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# Into the Northern Light

– in memory of Steen Treumer

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petitive dialogue is being used for. One should not pin high hopes on its ever happening with this procedure.

# Digital Transformation for Effective e-Procurement

*Gabriella M. Racca*

## 1. E-Procurement and digital transformation

Digitalisation is an essential prerequisite for the efficiency, integrity, and innovation of public procurement.<sup>1</sup> Relaunch of the public procurement market is closely linked to qualification and technological innovation.<sup>2</sup> The analysis of data on the characteristics (and size) of target markets and the needs of contracting authorities will enable the definition of bidding strategies for the best pursuit of the public interest. Digital transformation allows the standardization of contract award and execution and requires the analysis of the existing data to understand the possible organisational and functional changes.<sup>3</sup> The gradual development of data analysis makes it possible to highlight inefficiencies that in the past were difficult to detect, such as price fluctuations, fragmen-

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1. Gabriella M. Racca, Christopher R. Yukins (eds), "Public procurement and digitalisation", *Droit Administratif/Administrative Law Collection* (Dir. by J.- B. Auby, Bruylant [forthcoming]).
  2. Gabriella M. Racca, Christopher R. Yukins (eds), "Joint Public Procurement and Innovation: Lessons Across Borders", *Droit Administratif/Administrative Law Collection* (Dir. by J.- B. Auby, no. 27, Bruylant 2019).
  3. See, recently, the book edited by Roberto Cavallo Perin, Marco Lipari, Gabriella M. Racca, *Contratti pubblici e innovazioni per l'attuazione della legge delega* (Jovene 2022).

ted purchases for the same object or repeated awards to the same suppliers. Obviously, the reasons often lie in a lack of planning, capacity, and knowledge of the market.<sup>4</sup>

Data analysis allows, through electronic systems, to predict and prevent illicit fragmentation of procurement. Innovative surveillance tools – through indicators or red flags – should be used by public administrations for specific assessment.<sup>5</sup>

The aim is to understand the reasons for maladministration in public procurement (or vice versa: to highlight best practices) thanks to specific alerts. Effective accessibility and usability of data (especially by research institutes and universities) can enable detecting anomalies and failures in the system.<sup>6</sup>

The most advanced predictive data analysis methodologies permit to determine in advance which procurement features are most likely to give rise to material amendments or litigations. It would be possible to train the algorithm to recognise and predict which new contracts entered into the database will have similar anomalies through machine learning, starting from a dataset of contracts identified as 'anomalous' (i.e. contracts that are expected to be subject to modifications, extensions, etc., or challenged in court), helping contracting authorities to avoid critical issues.

Valuable information can be gathered from the data which, however, are often incomplete or provided in an inconsistent and non-interoperable manner. It is therefore necessary to redefine data-acquisition systems and methods to achieve greater completeness and meaningfulness and to facilitate rapid analysis of related big data.

4. In Italy, the public procurement system includes 36,000 contracting authorities; 32 qualified CPBs (*Soggetti aggregatori*), some at national level and others at regional level, approximately two for each of the 20 Italian regions; and up to 600 minor aggregations at local level. See Gabriella M. Racca, “Central Purchasing Bodies in Italy: reluctance and challenges”, in Carina Risvig Hamer, Mario Comba (eds), *Centralising Public Procurement* (Edward Elgar Publishing 2021), pp. 220–238.

5. Gabriella M. Racca, Christopher R. Yukins (eds), “Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally”, *Droit Administratif/Administrative Law Collection* (Dir. by Jean-Bernard Auby, no. 18, Bruxelles, Bruylant, 2014).

6. As in the case of the Convention between the University of Turin and the National Anticorruption Authority for access to the National Public Contracts Database for research purposes.

Hence, the procurement function based on the data could be reorganized for more efficiency and innovation.<sup>7</sup>

Large-scale supply chains, some even originated by private organisations, through the use of digitalised platforms may lead to the risk of replacing the procurement function of public administrations, with all the associated implications for strategy and industrial policy,<sup>8</sup> as in the case with the private “Amazon-like” platforms that in the United States are entering the market for lower-value public contracts.<sup>9</sup>

Overcoming the emergency and implementing the *Next generation EU* program and its main component – the Recovery and Resilience Facility – a fully digital transformation in national and EU systems is required. Innovation must be understood as a complete and native digitalisation of the entire public procurement cycle, requiring the interconnection of databases and implementation of native digital platforms from the award to the contract execution

7. Gabriella M. Racca, “Derogations from standstill period, ineffectiveness and remedies in the new tendering procedures: efficiency gains vs. risks of increasing litigation”, in Steen Treumer, François Lichère (eds), *Enforcement of the EU Public Procurement Rules* (DJØF Publishing 2011), pp. 95 ff.; G.M. Racca, “Aggregate models of public procurements and secondary considerations”, in Roberto Caranta, Martin Trybus (eds), *The Law of Green and Social Procurement in Europe* (Djøf Publishing 2010), p. 165 ff.

8. See the case law brought by the ANAC before the Italian Administrative Courts against tender procedures carried out by a private entity (Asmel s.c.a.r.l.). The administrative courts have repeatedly stated that Asmel cannot act as a qualified CPB as it is not a body entitled to carry out public tender procedures (recently see the decision of the Regional Administrative Court of Campania Region, Salerno, no. 1/2021).

9. In 2019, a pilot initiative was launched by the U.S. General Services Administration (GSA) to authorize “micro-purchases” through electronic platforms by government agencies, up to \$10,000 (value increased to \$20,000 domestically in times of declared emergency and \$30,000 abroad). The initiative launched is informally referred to as “Amazon.gov”. See GSA, Awards Contracts to Commercial EMarketplace Platform Providers, 2020, available at: <<https://interact.gsa.gov/blog/gsa-awardscontracts-commercial-e-marketplace-platform-providers>>. Cf. Peter Mckeen, “The Pursuit of Streamlined Purchasing: Commercial Items, E-Portals, and Amazon”, in Gabriella M. Racca, Christopher R. Yukins (eds), “Joint Public Procurement and Innovation: Lessons Across Borders”, *Droit Administratif/Administrative Law Collection* (Dir. By Jean-Bernard Auby, no. 27, Bruxelles, Bruylant 2019), pp. 373–387; Christopher R. Yukins, “United States procurement and the COVID-19 pandemic”, *Public Procurement Law Review*, 2020, 4, pp. 220–231.

phase.<sup>10</sup> This will ensure the implementation of effective e-procurement systems enabling data integration among different interoperable platforms.<sup>11</sup>

The procurement function requires the organisational and professional adequacy of specialised entities such as digitalised purchasing authorities, based on the “Amazon-like” model, but as public entities in full compliance with national and European principles.<sup>12</sup> Native digital procurement procedures and tender documents (*e-Forms*<sup>13</sup>) need to be entered (OJCE, TED), directly acquired and published in national and European databases.

## 2. Native digital documentation (e-forms) and the Virtual Company Dossier

The European Union requires “digitally native” adoption of tender documents by 2023 with new, automatically generated standard digital forms and the publication of notices in the Official Journal of the European Union.<sup>14</sup> These are templates to be filled out automatically, using software systems, with information drawn from previous notices, technical specifications, bids, contracts, national administrative records, and other data sources.

Digitalisation requires “disruptive” innovations with an increased knowledge of the reality that has never been possible in the past.<sup>15</sup> Such knowledge is necessary to rebuild the relationship of trust and mutual cooperation between economic operators and contracting authorities, according to the *once-only* and good faith principles.

The *once-only* principle implies that documents and data are requested once, or rather, acquired directly once, through the interoperability of databases and platforms (*interoperability by default*) which can also favour the development of national and transnational cooperation among European public administrations.<sup>16</sup> Publication can thus be facilitated and automated, overcoming the current burden on economic operators of repeatedly reloading the same data. Voluntary publication of contract notices below the EU thresholds and based on framework agreements is thus encouraged for greater transparency and efficiency.<sup>17</sup>

The Virtual Company Dossier avoids the heavy and repetitive work of verifying requirements and the subsequent litigation in public contracts, often related to formal errors. On this aspect, the interpretation and implementation

10. EU Commission, Making Public Procurement work in and for Europe, COM(2017) 572 final, October 2017. See Peter T. McKeen, “The importance of a professionally educated public procurement workforce: lessons learned from the U.S. experience”, in Gabriella M. Racca, Christopher R. Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, cit., pp. 319 ff. See also Gabriella M. Racca, “The role of third parties in the execution of public contracts”, in Laurence Folliot-Lalliot, Simone Torricelli (eds), *Contrôle et contentieux des contrats publics – Oversight and remedies in public contracts* (Bruylant 2017), p. 41 ff.; also in Martin Burgi, Martin Trybus, Steen Treumer (eds), *Qualification, Selection and Exclusion in EU Procurement* (DJØF Publishing, Copenhagen, 2016).

11. EU Commission, Expert Group on eProcurement (EXEP), Interoperability in end-to-end eProcurement (Publications Office 2020).

12. Stéphane De la Rosa, Patricia Valcárcel Fernández (eds), “Principles of public contracts in Europe”, in *Droit Administratif/Administrative Law Collection* (Dir. by Jean-Bernard Auby, no. 18, Bruylant 2022).

13. eForms are an EU legislative open standard for publishing public procurement data. They are standard forms used by public buyers to publish notices on Tenders Electronic Daily to facilitate the voluntary publication of notices by introducing standard digital forms that can be automatically generated by software systems.

14. Imposed by the EU through Commission Implementing Regulation (EU) 2019/1780 of September 23, 2019.

15. In Italy, the Finance Police of the Veneto Region, in collaboration with Ca’ Foscari University of Venice, is developing complex algorithms for cross-referencing data from more than 160 databases with an application system, “Price,” that can decrease the risk of economic operators and administrators.

16. Francesco Gorgerino, “Legal Basis and Regulatory Applications of the Once-Only Principle: The Italian Case”, in Robert Krimmer, Andriana Prentza, Szymon Mamrot (eds), *The Once-Only Principle* (The TOOP Project, Lecture Notes in Computer Science”, no. 12621, Springer Nature, Cham), 2021, pp. 104 ff. See EU Commission, Interoperability in end-to-end eProcurement, cit., 2020.

17. Recital 8 of Commission Implementing Regulation (EU) 2019/1780 of 23 September 2019 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) 2015/1986 (“eForms”): “As established in Article 33(2) of Directives 2014/23/EU, Article 51(2) of Directive 2014/24/EU, Article 71(2) of Directive 2014/25/EU, notices are electronic files rather than paper documents. In order to comply with the ‘once only’ principle in e-government, and thus reduce administrative burden and increase data reliability, and to facilitate voluntary publication of notices whose value is below the EU threshold or which are based on framework agreements, such standard forms should be established that can be automatically filled-in with information from previous notices, technical specifications, tenders, contracts, national administrative registries and other sources of data. Ultimately, such forms should no longer need to be filled-in manually, but should be automatically generated by software systems.”

of European Directives should be clarified in an innovative and digital perspective, also overcoming the case law of the Court of Justice.<sup>18</sup>

Trust and good faith between the contracting authority and the economic operator must remain throughout the entire procurement cycle, from the selection to the execution, and can only be based on facts assessed by digital means. The economic operator will be able to include every useful element into the Virtual Company Dossier. The digital accessibility of the economic operator's qualification and the information that there are no grounds for its exclusion will thus guarantee fairness and reliability.

Artificial intelligence enables market analyses that can be based on exact knowledge of the economic operators: what they have achieved over the years, which administrations they have been involved with, and the related results. This makes it possible to rethink a rapid and objective qualification system through direct access to information that go beyond the documentary step. The contracting authority may however justify and act differently if it considers that the integrity of the economic operator is in doubt.

As it is well known, the European Directives introduced the European Single Procurement Document (ESPD) as a single self-certification to replace, in all Member States, the various self-certifications or certificates (which were still required in many countries).<sup>19</sup>

In Italy, the National Anti-corruption Authority (ANAC) will ensure the reuse (i.e. *reusability* principle<sup>20</sup>) of the European Single Procurement Document (ESPD) and related verifications. The contracting authority would no longer need to request what has already been ascertained by another contracting authority through ANAC, which should obtain and provide "the lists of economic operators already ascertained and the modalities for using the ascertainment for different tenders".<sup>21</sup> The Virtual Company Dossier will then have to al-

18. ECJ, 19 June 2019, *Meca Srl v. Comune di Napoli*, Case C-41/18.

19. Art. 59(1), Directive 2014/24/EU.

20. "Reuse means that public administrations confronted with a specific problem seek to benefit from the work of others by looking at what is available, assessing its usefulness or relevance to the problem at hand, and where appropriate, adopting solutions that have proven their value elsewhere. This requires the public administration to be open to sharing its interoperability solutions, concepts, frameworks, specifications, tools and components with others": EU Commission, *New European Interoperability Framework, Promoting seamless services and data flows for European public administrations*, European Union, 2017.

21. Art. 81, para. 4-bis, Legislative Decree No. 50/2016 (Italian Public Contract Code), paragraph introduced Law No. 108/2021.

low full interoperability between the databases containing the information needed to verify qualification and the absence of grounds for exclusion.

The Directives also lay down the "winner only" principle, which implies that the contracting authority may only request documents as proof of the requirements subject to self-declaration from the successful tenderer – or rather, the potential – and not from all participants.<sup>22</sup>

The *once-only* principle<sup>23</sup> will allow contracting authorities to acquire the necessary information directly by accessing interoperable databases,<sup>24</sup> available free of charge in each Member State, or a Virtual Company Dossier, according to the requirements and documentary evidence indicated by the Member States in the European *e-Certis* register.<sup>25</sup> Member States are required to set up databases containing relevant information on economic operators accessible to national administrations and the contracting authorities in other Member States (*cross-border by default* principle).<sup>26</sup> Economic operators would not be required to submit additional documents if public administrations have such data accessible and updated in real time.

The ultimate goal indicated by the European Commission is to integrate a digitally native European Single Procurement Document (ESPD) with the databases and/or pre-qualification systems of economic operators,<sup>27</sup> including

22. Art. 59(4), Directive 2014/24/EU: "Before awarding the contract, the contracting authority shall, except in respect of contracts based on framework agreements where such contracts are concluded in accordance with Article 33(3) or point (a) of Article 33(4), require the tenderer to which it has decided to award the contract to submit up-to-date supporting documents in accordance with Article 60 and, where appropriate, Article 62. The contracting authority may invite economic operators to supplement or clarify the certificates received pursuant to Articles 60 and 62". Cf. Ivo Locatelli, "Process Innovation Under the New Public Procurement Directives", in Gabriella M. Racca, Christopher R. Yukins (eds), *Joint Public Procurement and Innovation: Lessons Across Borders*, cit., pp. 56 ff.; Ivo Locatelli, "Do European Public Buyers Purchase Together? An Assessment of Joint Cross-Border Procurement Contracts Published in Ted in 2017 And Beyond", *Ius Publicum Network review*, fasc. 1/2019.

23. Ivo Locatelli, "Process Innovation Under the New Public Procurement Directives", cit., p. 58 ff.

24. Francesco Gorgerino, "Legal Basis and Regulatory Applications of the Once-Only Principle: The Italian Case", cit., p. 110 ff.

25. The *e-Certis* system is recalled by the Italian State Council in Decision No. 623 of Jan. 20, 2021.

26. Art. 59(5), Directive 2014/24/EU. See: EU Commission, "Interoperability in end-to-end eProcurement", cit., 2020.

27. EU Commission, Report on the ESPD survey, 2019.

the e-Certis system.<sup>28</sup> This integration will make it possible to enable automatic verification of companies' compliance with moral requirements and special selection criteria,<sup>29</sup> including in a cross-border context (through the Single Digital Gateway).<sup>30</sup>

The Virtual Company Dossier will be constantly updated according to a "green light" model (or "green pass" of the economic operator, as provided with the experience of the EU "Covid-19 pass"), in relation to different types of contracts, with evident simplification and compliance with the *once-only* principle.<sup>31</sup>

Digitalisation in public procurement can ensure fair competition aimed at the timely and proper execution of the contract and not at winning the tender due to a mistake in enclosing a document by another tenderer or in verifying it

28. To date, the e-Certis system represents a list of requirements for economic operators, documentary evidence and certifying bodies related to them that is updated and verified on a voluntary basis by national authorities (Article 59(6) and Article 61 of Directive 2014/24/EU). However, recital 87 of the Directive states that "The aim of e-Certis is to facilitate the exchange of certificates and other documentary evidence frequently required by contracting authorities".

29. Ivo Locatelli, "Process Innovation Under the New Public Procurement Directives", cit., 58 ff.

30. Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, procedures, assistance, and problem-solving services and amending Regulation (EU) No 1024/2012. The Regulation allows access to information, procedures, and support and problem-solving services, and provides for the establishment of a technical system for the automated cross-border exchange of evidence in application of the once-only principle (Art. 14), including evidence pertaining to the qualification of firms participating in public contract procedures (see Hans Graux, "The Single Digital Gateway Regulation as an Enabler and Constraint of Once-Only in Europe", in Robert Krimmer, Andriana Prentza, Szymon Mamrot (eds), *The Once-Only Principle*, cit, pp. 83 ff.). An implementing regulation was scheduled to be issued by June 12, 2021, to define its technical and operational specifications. The Commission itself expressed the hope that this technical system would be integrated with e-Certis and ESPD: EU Commission, Interoperability in end-to-end eProcurement, cit., 2020, 16. Moreover, it should be recalled how Directive 2014/24/EU entrusted the Commission with the power to adopt delegated acts under Article 87, to ensure the interoperability of technical formats as well as data processing and messaging standards, particularly in a cross-border context, and to establish the mandatory use of such specific technical standards, in particular with regard to the use of electronic submission, electronic catalogues and electronic authentication arrangements (Art. 22(7)).

31. Art. 81, para. 4 of the Italian Public Contract Code.

by the contracting authority.<sup>32</sup> Possible litigation could be foreseen and avoided by data analysis, allowing economic operators to know their qualification in real time, while respecting the principle of cooperation and good faith with the contracting authority.

### 3. Qualification and specialisation of contracting authorities

In Italy, the upcoming reform of public contracts (Law no 78, approved on June 21, 2022) calls for the qualification of contracting authorities to be achieved through the specialization of central purchasing bodies according to the most advanced French<sup>33</sup> and British<sup>34</sup> models and some pilot projects already tested in healthcare.<sup>35</sup> Aggregation of public contracts makes it pos-

32. Roberto Cavallo Perin, Gabriella M. Racca, Gian Luigi Albano, "The safeguard of competition in the execution phase of public procurement", *Quaderni Consip*, VI, 2010.

33. In France, aggregation of public demand in healthcare is carried out by purchasing groups (groupements de commandes) or through the activity of central purchasing units. Among the main experiences of aggregation: the Union des Groupements d'Achats Publics – UGAP (a nationwide generalist purchasing central that operates both as an intermediary, through framework agreements, and as a wholesaler to contracting authorities); the Union des Hôpitaux pour les Achats – UniHA (groupement de coopération sanitaire), which brings together large French hospitals specializing in specific categories); and the Réseau des acheteurs Hospitaliers – Resah-IDF (groupement de commande), founded in 2007 and specializing in the mutualisation and professionalization of procurement in the health sector, which was a partner in the HAPPI project and today in EHPPA. See Antony Taillefait, "Groupements de commandes et centrales d'achats publics en France après la transposition des directives européennes de 2014", *Ius Publicum Network Review*, no. 1/2017; Gabriella M. Racca, Silvia Ponzio, "La mutualisation des achats dans le secteur de la santé publique: les centrales d'achat et les accords-cadres dans une perspective comparative", *Droit Administratif*, no. 7/2011, pp. 7–12.

34. In the United Kingdom, procurement is managed by the Crown Commercial Service (CCS) at the Cabinet Office. The report produced by Lord Carter of Coles for the Department of Health (Operational productivity and performance in English NHS acute hospitals: Unwarranted variations: An independent report for the Department of Health by Lord Carter of Coles, February 2016) highlighted the main obstacles in pursuing savings in healthcare sector procurement. The new operational program "Future Operating Model" (FOM) will require a transformation and re-procurement of the current NHS Supply Chain through eleven Category Tower Service Providers.

35. As in the case of the Healthy Aging in Public Procurement of Innovation project – HAPPI <www.mastersei.it/happi/>. See Silvia Ponzio, "Joint Procurement and Innovation in the new EU Directive and in some EU-funded projects", *Ius Publicum Network Review*, No. 2/2014.

sible to award framework agreements for works, supplies or services made available to clearly identified administrations with a predetermined maximum value, but without a commitment to buy.<sup>36</sup>

Contracting authorities may either join tenders already awarded by central purchasing bodies (i.e. “intermediary” function) or by qualified aggregating entities, or purchase from central purchasing bodies (i.e. “wholesaler” function), also across borders, alternatively to conducting independent tenders for the acquisition of necessary goods, services or works.<sup>37</sup>

Electronic tenders make available to contracting authorities the goods and services they need, which can be chosen “off the shelf”, as they have already been selected in a Framework Agreements or in a subsequent mini-competition as a competitive relaunch. The choice is based on the most appropriate quantity and quality with respect to the need, simplifying the mode of joining and purchasing (the “Amazon-like” model) without circumventing the principles and guarantees of holding a (public) tender procedure. Capable administrations will always be able to carry out an autonomous procedure on a platform albeit assuming the related costs and risks which must be monitored during contract execution phase.

“Native digital” tenders can be conducted through platforms by CPBs, mainly through dynamic purchasing systems, Framework Agreements (FAs) and electronic auctions. Little municipalities might delegate the award of procurement to a CPB or might adhere to DPS or Framework Agreements already in place.<sup>38</sup>

36. C-216/17, *Autorità Garante della Concorrenza e del Mercato, Coopservice Soc coop arl v Azienda Socio-Sanitaria Territoriale della Valcamonica – Sebino (ASST)*, concerning a request for a preliminary ruling under Article 267 TFEU by the Italian Council of State for the interpretation of Articles 1(5) and 32 of Directive 2004/18/EC and Article 33 of Directive 2014/24/EU. The case concerned a regional health authority's decision to join a framework agreement concluded by another health authority, without using a new public tender procedure. See Gabriella M. Racca, “Central Purchasing Bodies in Italy: reluctance and challenges”, cit., pp. 220–238.

37. Art. 39, Directive 24/2014/EU.

38. Gabriella M. Racca, “Joint Procurement Challenges in the Future Implementation of the New Directives”, in François Lichère, Roberto Caranta, Steen Treumer (eds), *Modernising Public Procurement: the New Directive* (DJØF Publishing, Copenhagen, 2014), pp. 225 ff.; Gian Luigi Albano, Marco Sparro, “Flexible Strategies for Centralized Public Procurement”, in *Review of Economics and Institutions*, 2010, available at: <<http://www.rei.unipg.it/rei/article/view/17>>.

Joint procurement ensures that national and regional purchasing bodies specialise in specific sectors (e.g. health, works, etc.) to award contracts in an efficient, integrated and innovative way.<sup>39</sup> The possibility of choosing among different Framework Agreements allows to avoid the burdens and risks of selective procedures.

The analysis of data concerning the needs of municipalities and the characteristics of the market allow the definition of tender strategies for the best pursuit of the public interest. Data analysis, especially for lower-value contracts, can enable better identification of needs and organisation of coordinated procurement in favour of smaller administrations (local authorities), to ensure efficiency and transparency with the development of framework agreements with appropriate territorial lots. Digitalisation of public procurement should be conducted in full compliance with European and national principles To open the participation to qualified and innovative suppliers, especially SMEs.<sup>40</sup>

#### 4. Building Information Modeling for a better quality of public works

Digital technologies are changing the way public demand can be defined and designed, as well as the execution and management of public works that are increasingly integrated with collaborative agreements. The European Directives introduced the concept of digital transition through information modelling which requires specific electronic methods such as the *Building Information Modeling* or BIM tools.<sup>41</sup> These tools use interoperable platforms by means of

39. Gabriella M. Racca, “Central Purchasing Bodies in Italy: recruitment and challenges”, cit., p. 220 ff. See Gabriella M. Racca, “Collaborative and Strategic Procurement for supporting industrial innovation”, in Étienne Muller (ed.) *La commande publique, un levier pour l'action publique?*, 2018, pp. 121–138. Cf.: Gabriella M. Racca, Silvia Ponzio, “La mutualisation des achats dans le secteur de la santé publique: les centrales d'achat et les accords-cadres dans une perspective comparative”, cit., pp. 7–12.

40. EU Commission, Communication COM(2017) 572 final, October 3, 2017, cit. recalling the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions, and the European Investment Bank, “Investing in Smart, Innovative and Sustainable Industry. A new EU industrial policy strategy,” 479 final.

41. Giuseppe M. Di Giuda, Gabriella M. Racca, “From Works Contracts to Collaborative Contracts: The Challenges of Building Information Modeling (Bim) in public procurement”, in Gabriella M. Racca, Christopher R. Yukins (eds), *Joint Public Procurement and Innovation:*

non-proprietary open formats, so as not to limit competition among technology providers and the involvement of specific designs.

The application of BIM in public procurement, requires to define a new synergy founded on transparency and knowledge of data based on Smart Contracts.

Success in the use of these new methodologies requires the capacity of the contracting authorities – which may not coincide with the recipient of the work, especially in the case of small municipalities – and the economic operators, which can also gather SMEs according to innovative collaborative models (collaborative agreements).

Digital tools make it possible to collect more accurate information and to process it better, to raise the level of effectiveness and rationality of public administrations' response to the collective needs of their communities. They also could reduce the amount of information that generates uncertainties and interpretive problems, issues that often affect the completion of buildings designed with traditional techniques. There is also a reduction in the number of errors or regulatory gaps that could emerge in the execution phase, with attendant extra cost variants, delays, and claims.<sup>42</sup>

The ability to exchange information is the key to ensuring transparency, efficiency, and integrity in the procurement process, from the definition of public demand to the awarding and management phases of the contract, thus ensuring control and rationalization of public spending.

The digital transition for the construction industry represents an opportunity to boost efficiency and development with significant time and cost savings and positive environmental effects.

The integration of the BIM methodology with smart and collaborative contracts ensures greater efficiency and collaboration between public authorities and innovative suppliers and overcomes the risk of abnormally low tenders due to inaccuracies of the project published with the tender notice. Once selected, the economic operator will know exactly how to proceed because all the choices related to the successful tender are digitalised and shared with the

*Lessons Across Borders*, cit, 2019, pp. 223–271; Roberto Cavallo Perin, Gabriella M. Racca, “Smart Cities for an Intelligent Way of Meeting Social Needs”, in Jean-Bernard Auby (ed.), *Le Future du Droit Administratif/The Future of Administrative Law* (Lexis Nexis 2019), pp. 431 ff.

42. Giuseppe M. Di Giuda, Gabriella M. Racca, “From Works Contracts to Collaborative Contracts: The Challenges of Building Information Modeling (BIM) in public procurement”, cit., pp. 223–271.

other economic operators and the contracting authority. In the performance phase, the integration of information modeling with a Document Management System (DMS) ensures the traceability of documents and data among parties, facilitating their acquisition, sharing and consultation. Moreover, digitalisation can integrate the BIM approach with the use of Blockchain technology, which could further develop certified automation of the process and contract cycle through the application of Smart Contracts. Thus, these technologies require specific guidelines based on process and procedure analysis for modeling new or existing buildings.

Digital modeling makes it possible to structure procedures for semi-automated verification of compliant current regulations. Compliance with technical and regulatory requirements can be detected from the model data, which will be integrated and verifiable. The definition of an information model makes it possible to combine geometric data and information, facilitating structured simulations by combining the BIM approach with data collected from sensors of various types. The Information Modeling provides a constantly updated basis for building management through a dynamic and data-based approach. It is possible to develop a “digital twin” of the real building, capable of simulating any phase of its life cycle (construction, logistics, flow optimization, operations, emergency management), including real-time data from sensors and tracking the life of the building.

These spatial representation tools could be integrated with smart planning systems increasingly applied on urban areas, providing efficient view of the different planning within which public and private works are located.

Only qualified contracting authorities can manage these innovations, and from this perspective only qualified central purchasing bodies will be able to develop efficient tools to be made available for public administrations.

## 5. Digitalisation for a renewed cooperation and trust between administrations and economic operators

As recalled, a renewed relationship of trust between administrations and economic operators is required.<sup>43</sup> Reciprocal cooperation and good faith are necessary from the beginning of the procedure and throughout the entire pro-

43. Gabriella M. Racca, “La responsabilità precontrattuale della pubblica amministrazione tra autonomia e correttezza”, *Jovene, Naples*, 2000, 180 ff.



curement cycle, pursuing the common interest in the proper selection and timely execution of public contracts by using digital tools.<sup>44</sup>

The infringement of public awarding rules can be assessed to verify the violation of the principles of fairness and good faith required from the contracting authority. Recent case law of the Italian courts on pre-contractual liability broadened the duty of fairness from the publication of the contract notice until the end of the execution phase.<sup>45</sup>

The digital, technical, economic, moral, financial, and reputational qualification of economic operators, ascertained objectively through public and private databases, could establish an alliance between public administrations and economic operators. Digitalisation in public procurement may allow economic operators to submit their bids very quickly if the evaluation process is structured on measurable quality criteria, therefore ensuring largely automated evaluations and requiring further evaluation, only whenever samples need to be tested.<sup>46</sup>

Digitalisation, in connecting and showing facts more clearly through artificial intelligence tools, requires an evolution of responsibilities, particularly of public administrations.

It seems necessary to define standards of action (efficiency, effectiveness, and economy), with a rebalancing of positions and the consequent allocation of risks, with identification of costs/benefits and the impact of claims.

Digitalisation might thus become a tool to make both the economic operator and the administration accountable.<sup>47</sup>

## PART III: MODIFICATIONS OF PROCUREMENT PROCEDURES AND CONTRACTS

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44. As stated by the Italian State Council in Decision. no. 5, May 4, 2018, and recently in Decision nos. 19, 20, and 21 of 2021.

45. Italian State Council, Decision No 10 of April 2, 2020, no. 10. See also: Roberto Cavallo Perin, Gabriella M. Racca e Gian Luigi Albano, “The safeguard of competition in the execution phase of public procurement”, cit. See Gabriella M. Racca, Christopher R. Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts*, cit., pp. 845–878.

46. Daniel I. Gordon, Gabriella M. Racca, “Integrity Challenges in the EU and U.S. Procurement systems”, in Gabriella M. Racca, Christopher R. Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts*, cit., pp. 117–145.

47. EU Parliament, Resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)), recital L). See, most recently: EU Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Establishing a European Declaration on Digital rights and principles for the Digital Decade, 26.1.2022 COM(2022) 27 final.