

**PUBLIC CONTRACTS**  
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## 1. THE ITALIAN IMPLEMENTATION OF EUROPEAN DIRECTIVES NO. 2004/18/EC AND 2004/17/EC

The EU Directives of March 31, 2004, N. 2004/17 and N. 2004/18<sup>1</sup> regulating public contracts, works, services and supplies have been implemented in Italy by means of Legislative Decree n. 163, of April 13, 2006 of the Public Contracts Code (hereafter PCC). In June 2011, the government regulation implementing the code entered into force<sup>2</sup> (D.P.R. 5 October 2010. Cfr. Cons. Stato, 24 February 2010, n. 313, opinion on *Schema di regolamento di attuazione ed esecuzione del codice dei contratti pubblici relativi a lavori, servizi e forniture, di cui all'articolo 5, D.Lgs. 12 aprile 2006, n. 163*) The new regulation abrogate the previous one (D.P.R. 21 December 1999, n. 554) on the public works sector (L. 11 February 1994, n. 109). This regulation governs the award and execution of public contracts and public works (classic sector arts. 9-251; utilities sector arts. 339-359), also

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<sup>1</sup> **TREATIES:** A. Carullo, G. Iudica, *Commentario breve alla legislazione sugli appalti pubblici e privati*, Padova 2012; R. Caranta, *I contratti pubblici*, Torino 2012; A. Massera, *Lo Stato che contratta e che si accorda. Vicende della negoziazione con le PP.AA., tra concorrenza per il mercato e collaborazione con il potere*, Pisa, 2011; G. D. Comporti, *Le Gare pubbliche: il futuro di un modello*, Napoli, 2011; R. Garofoli, G. Ferrari, *Codice degli appalti pubblici*, Lecce 2011; V. Cerulli Irelli, *Amministrazione pubblica e diritto privato*, Torino, 2011; L. Fiorentino, *Gli acquisti delle amministrazioni pubbliche nella Repubblica multilivello*, Bologna, 2011; C. Franchini (eds.), *I contratti di appalto pubblico*, Torino, 2010; M. Clarich (eds.), *Commentario al Codice dei contratti pubblici*, Torino, 2010; C. Franchini (eds.), *I contratti con la Pubblica Amministrazione*, Torino, 2007, I e II, in P. Rescigno, E. Gabrielli (eds.), *Trattato dei contratti*, Torino, 2007; A. Grazzini, *Appalti e contratti - Percorsi giurisprudenziali*, Milano, 2009; M. A. Sandulli, R. De Nictolis, R. Garofoli (eds.), *Trattato sui contratti pubblici*, Milano, 2008; M. Baldi, R. Tomei, *La disciplina dei contratti pubblici - Commentario al codice appalti*, Milano, 2009.

<sup>2</sup> **GOVERNMENT REGULATION ON PUBLIC CONTRACTS CODE:** R. De Nictolis, R. Garofoli, M. A. Sandulli (a cura di), *Trattato sui contratti pubblici*, vol. VIII - *Il regolamento di attuazione*, Milano, 2011; R. Giovagnoli (a cura di), *Il nuovo regolamento sui contratti pubblici*, Milano, 2011; R. Garofoli, G. Ferrari, *Il nuovo regolamento appalti pubblici*, Lecce, 2011; R. De Nictolis, *Il nuovo regolamento dei contratti pubblici*, in questa *Rivista*, 2011, 136.

with reference to services and supplies (classic sector arts. 271-338; services for architecture and engineering arts. 252-270; utilities sector art. 339-359). The provisions on public works have been extended, where compatible, to these sectors. In order to modernize, improve Italian infrastructures and enhance market competition the regulation aims to simplify administrative procedures by using IT solutions, fight organized crime prevent criminal infiltration of the public contract sector.

The EU Commission's data indicate that in 2010 the Italian market value for public procurements (concerning the total expenditure for the purchase of works, services and supplies) exceeded 252 billion euros (European Commission, *Internal Market, Public procurement indicators 2010*, November 4, 2011) which corresponds to 16,3% of National GDP.

The Italian Authority for the Supervision of Public Contracts calculated that in 2010 the amount of resources involved in public procurements exceeding 150,000 euros was 87 billion euros, equivalent to 6.6% of GDP, while in 2009 it had been 79.4 billion euros (the Italian Authority for the Supervision of Public Contracts, *Relazione annuale 2010*, June 15, 2011). The value of the contracts covered by the EU Directive n. 2004/18 was 64 billion euro (about 35.7% for works, approximately 27.3% for supplies and approximately 37% for services), and 23 billion concerned the special sectors (about 33.9% for works, about 27.3% for supplies and about 38.8% for services). The higher value of public contracts in 2010 compared to 2009 can largely be explained by the entry into force of the law on traceability of financial flows (L. 13 August 2010, n. 136 special plan against the Mafia and the delegation to the Government on anti-mafia legislation, Art. 3) which provides a Procedure ID Code (CIG). The CIG Code is an alphanumeric code generated by the Information System on Monitoring awarding procedure (SIMOG) of the Italian Authority for the Supervision of Public Contracts.

### ***1.1 The allocation of Legislative power between State and Regions<sup>3</sup>***

The State has exclusive legislative competence on competition and consequently, on public contracts<sup>4</sup>. Regions have filed claims before the Constitutional Court so as to assert their competence on: public contracts design and planning (Corte Cost. No. 221/2010); contracts below threshold (Corte Cost. No. 401/2007); exclusion of abnormally low tenders (Corte Cost. No. 160/2009). The Constitutional Court left to Regions only a limited discretion in the choice of the composition and functions of the jury.

### ***1.2 The Italian Authority for the Supervision of Public Contracts for works, services and supplies***

The Italian PCC (art. 6) envisages the institution of the Italian Authority for the Supervision of Public Contracts (Autorità di vigilanza sui contratti pubblici), with the task of monitoring both the award and the execution of public contracts.

This authority expresses opinions on the correct interpretation and implementation of the PCC and it submits to the Government proposals for legislative amendments to the PCC. It also prepares an annual report on public contracts award and execution for the Parliament (for further reference visit [www.avcp.it](http://www.avcp.it)).

The Authority's Monitoring Board on public contracts was created to collect and process data on public contracts worth over 150 thousand euros awarded and executed in

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<sup>3</sup> **STATE-REGION COMPETENCE:** A. Massera, *La disciplina dei contratti pubblici: la relativa continuità in una materia instabile*, in *Giornale Dir. Amm.*, 2009, 1252; D. Casalini, *Il recepimento nazionale del diritto europeo dei contratti pubblici tra autonomia regionale ed esigenze nazionali di «tutela dell'unità giuridica ed economica» dell'ordinamento*, in *Foro Amm. – C.d.S.*, 2009, 1215-1237.

<sup>4</sup> Art. 117, co. 2, lett. e, l, m, s, Cost.

Italy, so as to define standardized costs according to territory and sector. The Monitoring Board has also recently been entrusted with the management of the database of non-compliant tenderers that were excluded from public tender due to violations or false declarations, either in the selection or in the execution phase (see the Public Contract National Database below in § 5). The Authority's activities are funded by the State, by the awarding authorities and, partly, by bidders, since the latter have to pay a set contribution for participating in award procedures.

## **2. THE IMPLEMENTATION OF THE DIRECTIVE ON: PUBLIC CONTRACTS FOR WORKS, SUPPLIES AND SERVICES IN THE AREAS OF DEFENCE AND SECURITY**

In 2011 Directive 2009/81/EC regarding **public contracts for works, supplies and services in the areas of defence and security** was implemented. This provision applies to public contracts for the supply of military or sensitive equipment, as well as for works, supplies and services directly related to them and services specifically for military purposes. In this field contracting authorities during the awarding procedure, May use the restricted procedure, negotiated procedure (with the prior publication of a contract notice, or without) or competitive dialogue (D.Lgs. n. 208 of 2011, art. 16, comma 1). The possibility of using framework agreements is also proved. In this case the term of a framework agreement May not exceed seven years, except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause (Law n. 208 of 2011, art. 16, comma 4).

### **3. SUBJECTIVE AND OBJECTIVE COVERAGE, IN HOUSE PROVIDING**

The subjective coverage of public procurement legislation is often litigated in Italy. Some interpretative uncertainties still undermine the non-industrial and commercial character of **the body governed by public law**<sup>5</sup>. The qualification of body governed by public law was denied for a consortium company whose shares were partially held by public authorities and whose task was to run a public market area since it bears the economic risk of its activities (Cass., SS.UU., No. 8225/2010). On the other hand, three companies entrusted respectively with the tasks of building and operating airport facilities (Cass., SS.UU., ord. No. 23322/2009), highway facilities (T.a.r. Lazio, Roma, III, No. 2369/2009 and T.a.r. Puglia, Bari, I, No. 399/2009) and organizing a Public Fair, the *aziende speciali delle Camere di commercio* (Cons. Stato, VI, 24 November 2011, No. 6211), as well as *RAI* (Cass., SS.UU.: 22 December 2011, No. 28329) were considered bodies governed by public law.

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<sup>5</sup> **BODY GOVERNED BY PUBLIC LAW:** S. Girella (a cura di), *Organismi di diritto pubblico e imprese pubbliche : l'ambito soggettivo nel sistema degli appalti europeo e nazionale*, Milano, Angeli, 2010; D. Casalini, *Concessionario, organismo di diritto pubblico o gestore in house: chi sopporta il rischio economico della gestione delle autostrade?*, in *Urb. e app.*, 2009, 882-889.

The constant specification of **in house providing**<sup>6</sup> requirements through ECJ case-law (ECJ, C-324/07, *Coditel Brabant SA*; ECJ, C-573/07, *Sea s.r.l. v Comune di Ponte Nossa*) shed light on the interpretative issues at stake at the national level, mainly underlining the distinction between property of and control over the in house provider as for the assessment of the similar control requirement (ECJ, C-371/05, *EU Commission v Italy*; ECJ, C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo) c. Transformación Agraria SA (Tragsa), Administración del Estado*). The requirement is met whenever several public authorities, holding even a minimal share in the in house provider's capital, exercise the actual power of defining the industrial strategies and the core decisions of the in house provider (Cons. Stato, V, 3 February 2009, No. 591, Cons. Stato, V, 9 March 2009, No. 1365 e Cons. Stato, v, 26 August 2009, No. 5082; Cons. Stato, V, 11 August 2010, No. 5620; Cons. Stato, V, 24 September 2010, No. 7092; Cons. Stato, V, 8 March 2011, No. 1447; Cons. Stato, I, parere, 23 March 2011, No. 5653). The essential destination requirement shall be assessed both from a qualitative and quantitative point of view (ECJ, C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia c. Administración del Estado*; Corte Cost. No. 439/2008). However the Italian legislation limited the in house provider's activities outside its relevant territories, forbidding even the power of tendering in awarding procedures issued by public

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<sup>6</sup> **IN-HOUSE PROVIDING**: for the similar control requirement see C. Volpe, *In house Providing*, *Corte di giustizia, Consiglio di Stato e legislatore nazionale. Un caso di convergenze parallele?*, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it); R. Cavallo Perin, D. Casalini, *The control over in-house providing organizations*, in *Public Procurement Law Review*, No. 5/2009, 227-240; for a wider perspective see R. Caranta, *The In-House Providing: The Law as It Stands in the EU*, in *The In House Providing in European Law*, M. Comba and S. Treumer (eds.), Copenhagen, 2010; M. Comba, *In-House Providing in Italy: the circulation of a model*, in *The In House Providing in European Law*, M. Comba and S. Treumer (eds.), Copenhagen, 2010; F. Cassella, *In-House providing - European regulations vs. national systems*, in *The In House Providing in European Law*, M. Comba and S. Treumer (eds.), Copenhagen, 2010; M. G. Pulvirenti, *Recenti orientamenti in tema di affidamenti in house*, in *Foro Amm. - C.d.S.*, 2009, pag. 108; G. Corso e G. Fares, *Crepuscolo dell'in house?*, in *Foro it.*, 2009, I, 1319; H. Simonetti, *Il modello delle società in house al vaglio della corte costituzionale*, in *Foro it.*, 2009, I, 1314; G. Piperata, *La corte costituzionale, il legislatore regionale ed il modello «a mosaico» della società in house*, in *Regioni*, 2009, 651.

authorities other than the controlling ones (l.d. No. 223/2006 converted by law No. 248/2006). The exception to public procurement rules set out by the ECJ in C-480/06 (*Commission v Germany*), concerning cooperation arrangements among public authorities aiming at carrying out public tasks jointly and without a financial consideration, has not yet found application in our national case-law. Nonetheless, several forms of cooperation and joint exercise of public tasks among local public authorities have long been known in the Italian legal system (art. 15, law n. 241/1990 and art. 31-33, D.L. n. 267/2000) and have recently been promoted or even imposed by the budgetary law (L. n. 244/2007, art. 2, § 28; D.L. n. 78/2010, art. 14, § 25-31). As for the definition of economic operator, any individual or legal person offering work, supply or service provision on the market, regardless of its legal qualification as non-profit organisation<sup>7</sup>, NGO, public or private body in the relevant national system, is considered an «economic operator» according to EU directives on public procurement (Cons. Stato, VI, 8 June 2010, No. 3638; Cons. Stato, V, 25 February 2009, No. 1128; Cons. Stato, V, 26 August 2010 No. 5956 Autorità per la Vigilanza sui Contratti Pubblici, determinazione 21 ottobre 2010, No. 7, *questioni interpretative concernenti la disciplina dell'articolo 34 del d.lgs. 163/2006 relativa ai soggetti a cui possono essere affidati i contratti pubblici*; CGCE, 23 December 2009, C-305/08).

The special legislation on organized crimes (L. 13 August 2010, No. 136, Art. 13) defines modalities to create at regional level one or more central purchasing bodies (specifically named **stazioni uniche appaltanti** – SUA,<sup>8</sup> for the implementation of the provision see: D.P.C.M. 30 June 2011, regarding the *Stazione Unica Appaltante, in attuazione dell'articolo 13 della legge 13 August 2010, No. 136 - Piano straordinario*

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<sup>7</sup> **NO PROFIT ORGANIZATION**: S. Mento, *La partecipazione delle fondazioni alle procedure per l'affidamento di contratti pubblici*, in *Giornale Dir. Amm.*, 2010, 151.

<sup>8</sup> **STAZIONE UNICA APPALTANTE**: M. Pignatti, *La Stazione Unica Appaltante: le modalità di finanziamento e la trasparenza dell'attività*, in *Foro Amm., C.d.S.*, 2011; R. De Nictolis, *La nuova disciplina antimafia in materia di pubblici appalti*, in *Urb. e app.*, 2010, 1129.



*contro le mafie*). This provision also establishes the awarding of public contracts and the checking of the execution phase at territorial level (regional, provincial, interprovincial, municipal and inter municipal level) with the other administrative bodies involved. Some limitations of this provision seem to concern the territory in which these authorities can operate. The risk is the duplication of the contractual activity with other central purchasing bodies on the same territory and difficulty in aggregating needs of local authorities. The provision may give rise to the opposite effect by maintaining many individual award procedures in the hands of the SUA rather than a real aggregation of needs and joint procurement through framework agreements.

P.C.C., Art. 33, c. 3 *bis*, (introduced by D.L. 6 December 2011, No. 201, Art. 23, c. 4, converted into L. 22 December 2011, No. 214) limits capacity to stipulate contracts of **municipalities with less than 5000 inhabitants**. These municipalities, organized in aggregations of municipalities (according to Art. 32, d.lgs. 18 August 2000, No. 267) or consortium, from 31 of March 2013 (on the introduction of this term see D.L. 29 December 2011, No. 216, Art. 29, c. 11 *ter*, converted with amendments into L. 24 February 2012, No. 14) will have to entrust their procurements of works, services and supplies to a central purchasing bodies (P.C.C., Art. 33, c. 3 *bis*, introduced by D.L. 6 December 2011, No. 201, Art. 23, c. 4, converted into L. 22 December 2011, No. 214). The same municipalities can also make their purchases through the electronic means managed by other central purchasing bodies (D.L. 6 July 2012, Art. 1, c. 4).

#### 4. STRATEGIC USE OF PUBLIC PROCUREMENT POLICIES

The new Government regulation enforcing the code introduced the **planning of the awarding procedures**<sup>9</sup> (Art. 271). The new regulation provides that the contracting

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<sup>9</sup> **PLANNING OF THE AWARDING PROCEDURES:** C. Contessa – P. De Bernardis, *Organi del procedimento e programmazione nel nuovo regolamento unico*, in *Urb. e app.*, 2011, 757 e ss.

authorities can annually approve the planning of purchases for the following financial year by extending to the contracts of services and supplies the same provisions that are mandatory for public works (Art. 128, c. 2 last commas, 9, 10 e 11), apart from the possibility to purchase goods and services not provided for in such planning in cases of necessity and urgency. Concerning public works, the government regulation enforcing the code specifies also provisions about work planning (it establishes a term for the adoption of the three-year program, cf. Artt. 13 and ff.) and it expressly provides the content of the feasibility study (Art. 14).

In 2011, a new provision was introduced whereby contracting authorities are obliged to split contracts into functional lots (P.C.C., Art. 2 , c. 1 *bis*, introduced by D.L. 6 December 2011, No. 201, Art. 44, c. 7, converted in law 22 December 2011, No. 214). Such a provision can be interpreted as a social clause to facilitate the participation of small and medium enterprises (SMEs) in the public procurement market, thus promoting open competition.. With specific reference to public works sector in the field of large infrastructure the law provide the involvement of SMEs (P.C.C., Art. 2 c. 1 *bis*, introduced by D.L. 6 December 2011, No. 201, Art. 44, c. 7, converted in law 22 December 2011, No. 214). These provisions, in line with policies set by the EU Commission (see *Green Paper on the modernization of EU public procurement. For a more efficient European market for procurement*, COM (2011) 15 final; *Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation*, SEC (2011) 853 final) allow the inclusion in tender documents of social clauses, in favor of SMEs, that take into account, the EU rules and principles. However Italian law does not specify how to achieve those results.

The urgency of a **spending review** required the establishment of an interministerial committee (D.L. 7 May 2012, No. 52, Art. 1, converted in law 6 July 2012, No. 94) and the appointment of a “commissario straordinario” (special commissioner) to which is attributed the definition of the spending level on public purchases of goods and services and the tasks of supervision, monitoring and coordination of the public procurement of goods and services. For the same purposes was encouraged the use of electronic means, through the availment of a IT system (ASP - Application Service Provider) of the Ministry of Economy and Finance (D.L. May 7, 2012, No. 52, Art. 9,

converted in law 6 July 2012, No. 94). To simplify the public procurement of goods and services related to IT systems was excluded both the obligatory nature of the technical opinion (previously mandatory and non-binding) that would be required to the National Centre for Computing in Public Administration (D.L. May 7, 2012, No. 52, Art. 10, converted in law 6 July 2012, No. 94) and the administrative fees applied by local governments for the purchases of goods and services made by using IT tools (D.L. 7 May 2012, No. 52, Art. 13, converted in law 6 July 2012, No. 94).

**Public procurement aggregation**<sup>10</sup> has been one of the main focus of the recent Italian legislation who established central purchasing bodies at the local level<sup>11</sup> able to network with the national central purchasing body (Consip)<sup>12</sup> which, since 2000<sup>13</sup>, is entrusted with the task of awarding framework agreements which the government

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<sup>10</sup> **PUBLIC PROCUREMENT AGGREGATION:** G. M. Racca, *Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement*, in *Public Procurement Law Review*, 2010, 119; G. M. Racca, *La professionalità nei contratti pubblici della sanità: centrali di committenza e accordi quadro*, in *Foro Amm. – C.d.S.*, 2010, 1475; G. M. Racca, R. Cavallo Perin e G. L. Albano, *The safeguard of competition in the execution phase of public procurement: framework agreements as flexible competitive tools*, in *Quaderni Consip*, VI (2010); G.L. Albano e F. Antellini Russo, *Problemi e prospettive del Public procurement in Italia tra esigenze della pubblica amministrazione obiettivi di politica economica*, 2009, in *Economia Italiana*, 809; D. Broggi, *Consip: il significato di un'esperienza, Teoria e pratica tra e-Procurement ed e-Government*, Roma, 2008, 9.

<sup>11</sup> L. 27 december 2006, No. 296, *Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2007)*, Art. 1, c. 455. See also: Autorità per la Vigilanza sui Contratti Pubblici di Lavori, Servizi e Forniture, *Censimento ed analisi dell'attività contrattuale svolta nel biennio 2007-2008 dalle Centrali di Committenza Regionali e verifica dello stato di attuazione del sistema a rete*, 27 e 28 January 2010, in <http://www.avcp.it/portal/public/classic/>.

<sup>12</sup> See agreement of 21 december 2009 between SCR-Piemonte S.p.A. and Consip S.p.A., in <http://www.consip.it>.

<sup>13</sup> L. 23 december 1999, No. 488, *legge finanziaria per l'anno 2000*, Art. 26.

administrations are compelled to take part<sup>14</sup>. However, it is worth noticing that the framework agreements awarded by Consip concern a very few category of products and services, set out annually by a Ministerial decree. Local authorities shall refer to Consip's framework contracts as price and quality **benchmarks**<sup>15</sup> for their own purchasing<sup>16</sup> (Cons. St., V, 2 February 2009, No. 557) and local civil servants who fail in enforcing these benchmarks are **liable** (C. conti, giur. Reg. Valle d'Aosta, 23 November 2005, No. 14; D.L. 6 July 2012, n. 95, Art. 1).

The provisions on spending review (D.L. 6 July 2012, Art. 1, c. 7) provide an obligation for public entities and companies entirely public (included in the consolidated statement of public administration - Law 31 December 2009, No. 196, Art. 1) to purchase through contractual instruments provided by Consip SpA or other regional central purchasing bodies some goods and services (electricity, gas, fuel, fixed and mobile telephony).

In drafting the competitive tender documents and in the awarding procedures the contracting authority has to use improved value for money parameters compared to those contained in similar tenders and goods and services contracts made by the central

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<sup>14</sup> legge 23 december 1999, No. 488, *Budgetary law for 2000*, e Art. 26, providing the mandatory participation in Consip agreement for any public authority, apart from the municipalities with less than 1000 or 5000 (if mountain) citizens. See also the *Budgetary law for 2001*, Art. 58; L. 24 december 2003, No. 350, *Budgetary law for 2004*, Art. 3, § 166; D.L. 12 july 2004, No. 168, Art. 1, conv. in L. 30 july 2004, No. 191; L. 24 december 2007, No. 244, Art. 2, § 574, *Budgetary law for 2008*.

<sup>15</sup> **BENCHMARKS: ART. 1, c. 4, lett. c, D.L. 12 july 2004, No. 168; S. Ponzio, *La verifica di congruità delle offerte rispetto alle convenzioni Consip s.p.a. negli appalti pubblici di forniture e servizi* in *Foro Amm. - CdS*, 2009, 2352; I. Pagani, *Appalti di fornitura ed "anomalia esterna" rispetto alle previsioni del codice dei contratti pubblici*, in *Urb. e app.*, 2009, 592.**

<sup>16</sup> L. 23 december 1999, No. 488, Art. 26, c. 3, providing Consip framework contracts' price and quality as mandatory benchmarks for any contracting authority, apart from the municipalities with less than 1000 or 5000 (if mountain).

purchasing body – congruence assessment - (D.L. 7 May 2012, No. 52, Art. 7, converted in law 6 July 2012, No. 94; see also D.L. 6 July 2012, n. 95, Art. 1). This is not required when the contracting authority verifies fulfilment of the value for money benchmarks contained in the framework agreements made by the central purchasing body (D.L. 7 May 2012, No. 52, Art. 7, converted in law 6 July 2012, No. 94). For the in-progress awarding procedures, where the tender has already been published, Consip S.p.A. can publish the applicable parameters on its website.

The regulation has specified the tasks of the person in charge of the procedure also in relation to the services and supplies sector (Artt. 272-274). It provides that if purchasing is carried out through central purchasing bodies, the individual contracting authority (the contractor) shall appoint another person to be in charge of the procedure besides the first one who was appointed by the central purchasing body. In this case the director of the procedure (in coordination with the director of the execution phase if one has been appointed) are entrusted with the tasks of overseeing, controlling and surveillance in the execution phase of the contract in order to assure that the contract performance will be correct.

## **5. RULES ON PUBLIC CONTRACTS**

### ***5.1 Award procedures and new contractual tools***

The **negotiated procedure** is frequently used in Italy: as for the public contracts (including those below threshold) awarded in 2010, more than 30% (with peaks of more than 60% in the sectors covered by EU Directive No. 17/2004) of the overall tendering procedures are negotiated procedure, accounting for a 28% of the total public contracting expenditure (Autorità per la Vigilanza sui contratti pubblici, *Relazione annuale 2010*, 15 June 2011). Therefore our PPC did not implement two of the cases justifying use of the negotiated procedure with prior publication of a contract notice, according to EU Directive No. 18/2004, Art. 30, § 1, lett. b) and c): the exceptional cases, when the nature of the

works, supplies, or services or the risks attaching thereto do not permit prior overall pricing as well as the case of services, *inter alia* services within category 6 of Annex II A, and intellectual services insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision.

The negotiated procedure without prior publication of a contract notice entails the simultaneous dispatch of invitations to submit a tender to, at least, three economic operators meeting the qualitative selection criteria for the provision of the subject-matter of the contract, thus reducing considerably the competition for the award of the contract.

The implementation of **competitive dialogue**<sup>17</sup> in Italy has been postponed until the entry into force of the Government regulation enforcing the code (Art. 253, § 1-*quarter* PCC). Since the implementation of PCC, a kind of competitive dialogue in Italy has been used solely as a possible instrument to award the few public contracts that do not fall within the scope of the Directives, such as concession of works or services and other forms of PFI and PPP. Nonetheless, Italian PCC limits the use of competitive dialogue which is not available for the most complex work procurements such as strategic infrastructure works and production plants (Art. 161-205 PCC), far beyond the purpose of EC law (whereas 31 of EU Directive No. 18/2004). The government regulation enforcing the code define the elements that must be contained in the contract notice, the procedure for submitting tender (including the presentation of innovative solutions) and final offers by economic operators and the possibility of introducing a provision for the purchase of the project submitted.

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<sup>17</sup> **COMPETITIVE DIALOGUE**., G. M. Racca - D. Casalini, *Competitive dialogue in Italy*, in S. Arrowsmith - S. Treumer, *Competitive dialogue*, forthcoming, Cambridge, 2012; G. M. Racca - D. Casalini, *Implementation and application of competitive dialogue: experience in Italy*, *Public Procurement: Global Revolution V*, University of Copenhagen, 9-10 september 2010; on the comparison between competitive dialogue and French *marchés de définition*: S. Ponzio, *Gli "appalti di definizione" nell'ordinamento francese. La violazione dei principi di trasparenza e concorrenza nell'aggiudicazione degli appalti pubblici*. in *Foro Amm. - C.d.S.*, 2010, 22.

The *Ministero dell'economia e delle finanze* (through Consip S.p.A.) now has to create the instruments for the management of a **dynamic purchasing system** for public procurement (Art. 287) also included IT tools and an advisory system for contracting authority.

In case of **framework agreements** concluded with several economic operators has been clarified that where all the terms are laid down in the framework agreement (*framework contract*) and is required the use of the “rotation” criterion, the order of priority should be done taking into account not only of results of the tender, but also the content of individual bids in relation to the needs of individual contracting authorities wishing to use the framework agreement to meet their needs (Art. 287). This provision could allow a derogations from a strict application of the rotation criteria, especially when the framework agreement has been awarded with the most economically advantageous tender. In this case, goods and services offered by successful tenderers may have different characteristics. Now the regulation enforcing the code provides rules on the selection procedures of the contractor which are done digitally and it has also abrogated the previous regulation (d.P.R. 4 April 2002, No. 101).

The rule provide the means for the use of **electronic auction**, the IT system, the participation, the design of tender documents and improvements to an electronic auction conclusion, identifying the tasks of the manager IT system.

As for **project financing initiative**<sup>18</sup>, following a EU Commission infringement procedure against Italy, (Cons. Stato, IV, 13 January 2010, No. 75), Italian legislation was

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<sup>18</sup> **PFI:** M. Mariani, *Il Project financing. Analisi giuridica, economico-finanziaria, tecnica, tributaria, bancaria, assicurativa*, Giappichelli, Torino 2012; M. Baldi, *Il nuovo modello di project financing introdotto dal D.L. 70/2011*, in *Urb. e app.*, 2011, 1040 e ss.; G. F. Cartei, M. Ricchi (a cura di), *Finanza di Progetto. Temi e Prospettive*, Napoli 2010; G. Manfredi, *La finanza di progetto dopo il d.lgs. No. 152/2008*, in *Dir. amm.*, 2009, 429; V. Cesaroni, *La finanza di progetto*, in *Riv. amm.*, 2009, 119; M. Mattalia, *Il Project financing come strumento di partenariato pubblico privato in Foro Amm. – CDS*, 2010, 23; Id, *Project financing, un istituto in continua evoluzione*, in *Giur. It.*, 2011, 5 e ss. M. Baldi, *Le novità del D.L. 70/2011*, in *Urb. e app.*, 2011, 1012;

amended, restoring equality of treatment between the promoter and any other participant (Art. 153, § 1-14 modified by l.d. No. 152/2008). PFI in Italy is designed as a two-fold procedure where the first phase (to choose the promoter) is not an awarding procedure subject to the relevant EU rules, whilst the second phase is subject to EU directives on public procurement as far as it aims to choose the final concessionaire (Cons. Stato, Ad. pl.No., 15 April 2010, No. 1; Cons. Stato, V, 28 May 2010, No. 3399). The possibility of issuing *project bond* by the project company is provided (P.C.C., Artt. 157 and 158, as amended January 24, 2012 by D.L., No. 1, Art. 41, converted into Law March 24, 2012, No. 27).

Regarding the possibility of activating interventions not covered in the three-year program provided in the Code of public contracts, was amended in 2011 (P.C.C., Art. 153, c. 19, amended by D.L. 13 May 2011, No. 70, Art. 4, c. 2, lett. q) and completely rewritten in 2012 (D.L. 24 January 2012, No. 1, Art. 59 *bis*, converted in L. 24 March 2012, No. 27). Recent Italian case law stated that the position of advantage of the “promoter” immediately affect the legal position of other tenderers which can not take part in the subsequent procedure for the award of the concession on the basis of their project and allows the proposition of a claim (Cons. St., Ad. Plen. 28 January 2012, n. 1)<sup>19</sup>.

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M. Mattalia, Project financing, un istituto in continua evoluzione, in *Giur. It.*, 2011; S. Luce, *La progettazione dei contratti pubblici di lavori, servizi e forniture. I profili problematici*, Lecce, 2011

<sup>19</sup> M. Mattalia, *La nomofilachia dell'Adunanza plenaria in materia di project financing*, 2012, in corso di pubblicazione; M. Pignatti, *La legittimazione e l'interesse al ricorso in materia di finanza di progetto*, *Foro Amm.* – *CDS*, 2012.



Concerning **public-private partnership**<sup>20</sup> has been introduced the availability of the “**contratto di disponibilità**”. In this kind of contract the economic operator shall assume the costs and risks related to the construction and provision of the work. Contracting authority shall use this work for a period of time established in the contract during which pay a fee (P.C.C., Art. 3, c. 15bis.1 and 160 ter, introduced by D.L. 24 January 2012, No. 1 Art. 44, c. 1, letter. a), converted into Law 24 March 2012, No. 27).

The EU Treaty principles and provisions on the qualification requirements for planners and executors are applied to **sponsorship contracts**<sup>21</sup> of over forty thousand euro (P.C.C., Art. 26, as amended by 20, c. 1, lett. b), D.L., 9 February 2012, No. 5, converted in L. 4 April 2012, No. 35). A specific discipline on the procedures for choosing sponsors has also been introduced in the cultural heritage sector (P.C.C., Art. 199 *bis*, introduced by Art. 20, c. 1, lett. h), D.L., 9 February 2012, No. 5, converted in L. 4 April 2012, No. 35).

The P.C.C. provides that in a restricted procedure, negotiated through the publication of a call for tenders or competitive dialogue, the contract awarding bodies – if the work is complex – may limit the number of suitable candidates on the basis of objective and not discriminatory criteria on the basis of the principle of proportionality identified in the call for tenders together with the minimum number of candidates and if required also the maximum number (PCC, Art. 199 *bis*, introduced by Art. 20, c. 1, lett. h), D.L., 9 February 2012, No. 5, converted into L. 4 April 2012, No. 35). This possibility is also known as “*forcella*”. Resort to this provision, which had originally been conceived for public works, was extended in 2011 also to cover supplies and services of any price (P.C.C.

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<sup>20</sup> **PUBLIC-PRIVATE PARTNERSHIP:** M. A. Sandulli, *Il partenariato pubblico privato istituzionalizzato nell'evoluzione normativa*, in [www.federalismi.it](http://www.federalismi.it), 2012; F. Mastragostino (a cura di), *La collaborazione pubblico-privato e l'ordinamento amministrativo*, Torino, 2011; G. F. Cartei, *Le varie forme di partenariato pubblico-privato. Il quadro generale*, in *Urb. e app.*, 2011, 893 e ss.

<sup>21</sup> **SPONSORSHIP CONTRACTS:** M. Mattalia, *Le sponsorizzazioni delle amministrazioni pubbliche: dalla libertà alla concorrenza*, Nel Diritto, Lecce, 2012.

Art. 199 *bis*, introduced by Art. 20, c. 1, lett. h), D.L., 9 February 2012, No. 5, converted in L. 4 April 2012, No. 35).

The awarding of **public services concessions**<sup>22</sup> (CGCE 10 March 2011, in C-274/09, *Privater Rettungsdienst und Krankentransport Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau*; Cons. Stato, V, 9 September 2011, No. 5068; Cons. Stato, V, 6 June 2011, No. 3377) falls outside the scope of EU Directive on public procurement and is subject to the European principles of competition in the internal market (CGCE, 9 September 2010, C-64/08, *Ernst Engelmann*; CGCE, 3 June 2010, in C-203/08, *Sporting Exchange Ltd v Minister van Justitie*). Recently the Italian Consiglio di Stato stated that **public services concessions** shall be awarded by means of an open or restricted procedure, whereas the use of a negotiated procedure comply with the EU principles only in case of extreme urgency or disproportionate costs in choosing alternative solutions due to their different technical characteristics (Cons. Stato, V, 21 September 2010 No. 7024). With regard to public services concessions, the Law of August 6, 2008, No 133 was recently abrogated by art 1(1), d.P.R. 18 July 2011, No. 113, as from 21 July 2011. The D.L. of June 25, 2008, No 112 (*Disposizioni urgenti per lo sviluppo economico, la semplificazione, la competitività, la stabilizzazione della finanza pubblica e la perequazione tributaria*) had been converted by the Law 6 August 2008. Art. 23 of the

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<sup>22</sup> **PUBLIC SERVICES CONCESSIONS:** G. Rizzo, *La concessione di servizi*, Giappichelli, Torino, 2012; G. Caia, *Finalità e problemi dell'affidamento del servizio idrico integrato ad aziende speciali*, in *Foro Amm. – TAR*, 2012, 663 – 677; G. F. Cartei, *Il principio di equilibrio economico-finanziario e la disciplina del contratto di concessione*, in *Urb. e app.*, 2012; F. Goisis, *Concessioni di costruzione e gestione di lavori e concessioni di servizi*, in *Ius Publicum Network Review*, [http://www.ius-publicum.com/repository/uploads/14\\_06\\_2011\\_17\\_33\\_Goisis\\_IT.pdf](http://www.ius-publicum.com/repository/uploads/14_06_2011_17_33_Goisis_IT.pdf) 2011; C. Volpe, *Appalti pubblici e servizi pubblici. Dall'Art. 23-bis al decreto legge manovra di agosto 2011 attraverso il referendum: l'attuale quadro normativo*, 17 ottobre 2011, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it); L. Perfetti, *La disciplina dei servizi pubblici locali ad esito del referendum ed il piacere dell'autonomia locale*, in *Urb. e app.*, 2011, 906 e ss; R. Villata (a cura di), *La riforma dei servizi pubblici locali*, Torino, 2011; C. Viviani, *La disciplina dei servizi pubblici locali di rilevanza economica: si definisce il quadro della Riforma del Governo Monti*, in *Urb. e app.*, 2012, 511; A. Arena, *La nozione di servizio pubblico nel diritto dell'integrazione economica. La specificità del modello sovranazionale europeo*, Napoli, 2011.

latter D.L. regulates procedures for management of local public services of economic importance, in compliance with EU regulations (Cons. St., V, April 11, 2011, No 2222). The D.L. 13 August 2011, No 138 *Ulteriori misure urgenti per la stabilizzazione finanziaria e per lo sviluppo* was converted with amendments by Art. 1, L. 14 September 2011, No. 148, Art. 4, *Adeguamento della disciplina dei servizi pubblici locali al referendum popolare e alla normativa dall'Unione europea*, substituting the previous regulations. This law does not apply to the water service and does not provide the competitive award procedure to "in house" companies which are entirely public owned when the economic value of the service is equal to or less than the total sum of 900,000 Euros per year (§ 13).

The new Government regulation enforcing the code specified some aspects of the public procurement procedure for alternative catering services (Art. 285 which defines the activity covered by the service, identifies as preferential criterion for the awarding of the contract that of the economically most advantageous bid providing for the obligation of motivation in the case of the application of the criterion of the lowest price, a list of examples of the assessment criteria of the bids) and of cleaning of buildings (Art. 286 identifies evaluation criteria which have to be considered for the awarding, their relative weighting, the content of the technical report, the modalities for awarding points).

## ***5.2 Qualitative selection of tenderers and technical specifications***

In Italy, there's a specific system for **work suppliers' suitability requirements' verification**<sup>23</sup>, according to which licensed private companies (SOAs see: Autorità per la

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<sup>23</sup> **WORK SUPPLIERS QUALIFICATION SCHEME:** C. Contessa, *Giunge alla consulta la questione dell'obbligo per le SOA di svolgere attività in via esclusiva*, in *Urb. e app.*, 2012; L. Perfetti, *Sulla necessità di distinguere fra*

Vigilanza sui contratti pubblici, Determinazione, 15 March 2011, No. 1, concerning *chiarimenti in ordine all'applicazione delle sanzioni alle SOA previste dall'articolo 73 del D.P.R. 5 ottobre 2010, No. 20*) have the task of certifying and assessing the qualification requirements of undertakings which provide works (Artt. 34 and 40, PCC). The suitability requirements of suppliers and service providers can be self-declared by the latter and their assessment is done by each single contracting authority within each single awarding procedure, thus entailing a considerable amount of time and resources. The verification concerns the winning tenderer and at least 10 % of the other participants chosen by lot (Art. 48 PCC see: Autorità per la Vigilanza sui contratti pubblici, Determinazione 21 Maggio 2009, No. 5, *Linee guida per l'applicazione dell'Art. 48 del D.lgs. No. 163/2006*)).

The extreme detailed Italian discipline on suitability requirements (including personal situation, economic and financial standing and technical and professional ability) often leads to interpretative issues which courts try to settle through the application of principles such as *favor participationis*, **equality of treatment** and **non-discrimination**<sup>24</sup>, in order to allow for the widest possible participation (Cons. St., V, 2 February 2012, No. 546).

The Italian PCC was amended in order to comply with an ECJ decision (ECJ, IV, 19 May 2009, C-538/2007) stating that any national provision defining cases of exclusion from an awarding procedure has to be proportional and reasonable and the exclusion shall

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pincipes sans texte e sans fundament. *Considerazioni in merito a requisiti di qualificazione, quote di partecipazione in associazioni o raggruppamenti e di esecuzione di lavori pubblici*, in *Foro amm., C.d.S.*, 2011, 2142 – 2149; L. Giampaolino, *Il codice degli appalti e il sistema di qualificazione*, in *Riv. trim. appalti*, 2009, 301.

<sup>24</sup> **FAVOR PARTECIPATIONIS AND EQUALITY OF TREATMENT:** S. Usai, *L'interpretazione delle clausole ambigue inserite nella lex specialis della gara*, in *Urb. e app.*, 2010, 1319; S. Monzani, *L'integrazione documentale nell'ambito di un appalto pubblico tra esigenze di buon andamento e di tutela della par condicio dei concorrenti*, in *Foro Amm. – C.d.S.*, 2009, 2346; I. Filippetti, *Par condicio e favor participationis nell'interpretazione degli atti di gara*, in *Urb. e app.*, 2009, 821.

follow a specific procedure which the participants are allowed to take part in. The Italian PCC presently (Art. 38) provides for the exclusion of participants who are substantially and mutually linked only insofar as it is proved that the relevant offers of the linked participants come from the same decisional structure (Cons. Stato, VI, 25 January 2010, No. 247; Cons. Stato, VI, 26 February 2010, No. 1120; C.G.A., 21 April 2010, No. 546; Cons. Stato, VI, 7 April 2010, No. 1967; Cons. St., V, 6 April 2009, No. 2139; Cons. St., V, 8 September 2008, No. 4267). This is the case of firms using the same venues, having the same telephone number, whose chief executives are relatives (Cons. Stato V, 10 February 2010, No. 690). Italian case-law requires a specific procedure to assess the **substantial links**<sup>25</sup> among tenderers in order to allow their exclusion Cons. St., IV, 12 March 2009 No. 1459; C. Stato, V, 20 August 2008, No. 3982; Cons. Stato, IV, 28 January 2011, No. 673; Cons. Stato, V, 30 November 2011, No. 6329) and rules for the recording of the exclusion by the Authority for the Supervision of Public Contracts (Cons. Stato, VI, 15 June 2010, No. 3754; Cons. Stato, VI, 5 February 2010, No. 530).

A widespread ground of exclusion is the false or defective self-declaration of the **personal situation requirements**<sup>26</sup> by the tenderers (T.a.r. Piemonte, II, 16 March 2009,

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<sup>25</sup> **SUBSTANTIAL RELATIONSHIP AMONG TENDERERS:** S. Monzani, *L'estensione del divieto di partecipazione ad una medesima gara di imprese controllate o collegate in nome della tutela effettiva della concorrenza*, in *Foro Amm. – C.d.S.*, 2009, 666; M. Briccarello, *Collegamento sostanziale: il superamento del divieto assoluto di partecipazione alla gara*, in *Urb. e app.*, 2010, 731; S. Ponzio, *Il procedimento per l'accertamento del "collegamento sostanziale" tra imprese negli appalti pubblici*, in *Foro Amm. – C.d.S.*, 2010, 1795.

<sup>26</sup> **PERSONAL SITUATION:** G. Ferrari, *Dichiarazione personale del possesso del requisito di moralità da parte dei singoli rappresentanti dell'impresa*, in *Giornale Dir. Amm.*, 2010, 537; G. Manfredi, *Moralità professionale nelle procedure di affidamento e certezza del diritto*, in *Urb. e app.*, 2010, 508; A. Azzariti, *Requisiti di capacità tecnico-professionale e cause di esclusione negli appalti di forniture delle asl*, in *Sanità pubbl. e privata*, 2009, 5, 77; G. Ferrari - L. Tarantino, *Revoca di aggiudicazione provvisoria per condanna penale dell'amministratore e direttore tecnico*, in *Urb. e app.*, 2009, 1518; P. Patrito, *L'Art. 38 del codice dei contratti pubblici nuovamente al vaglio della giurisprudenza*, in *Urb. e app.*, 2009, 858; D. De Carolis, *Vicende soggettive delle imprese, obblighi del partecipante e poteri della stazione appaltante*, in *Urb. e app.*, 2009, 327; F. Bertini, *Durc e gare di appalto, tra dubbi e certezze*, in *Urb. e app.*, 2009, 10, 1214; G. Ferrari, *Verifica dei requisiti di ammissione in caso di*

No. 772; Cons. Stato, V, 2 February 2010, No. 428; Cons. Stato, VI, 6 April 2010, No. 1909; Cons. Stato, V, 11 May 2010, No. 2822; Cons. Stato, VI, 22 February 2010, No. 1017; Cons. Stato, V, 13 July 2010, No. 4520; Cons. Stato, V, 26 May 2010, No. 3364; Cons. Stato, V, 23 February 2010, No. 1040 Cons. Stato VI, 12 April 2011, No. 2257; Cons. Stato, V, 21 October 2011, No. 5674; Cons. Stato, IV, 22 November 2011, No. 6153; Cons. Stato, VI, 18 January 2012, No. 178; Cons. Stato, V, 2 February 2012, No. 527) that are required even with regard to the economic operator whose qualitative requirements the tenderer relies upon (Cons. Stato, VI, 6 April 2010, No. 1930; Cons. Stato, V, 23 February 2010, No. 1054; Cons. Stato, VI, 15 June 2010, No. 3759; Cons. Stato, V, 23 May 2011, No. 3077; Cons. Stato, III, 15 November 2011, No. 6040). Italian PCC provides also for the exclusion of tenderers who has incurred in previous breaches of public contract even if agreed upon with other contracting authorities (Art. 38, § 1, lett. f, PCC; Cons. Stato, V, 15 march 2010, No. 1550; Cons. Stato, VI, 28 July 2010, No. 5029; Cons. Stato, V, 5 July 2011, No. 4025; Cons. Stato, III, 4 November 2011, No. 5866; Cons. Stato, V, 28 December 2011, No. 6951).

From 2013 the contracting authorities will acquire the data demonstrating possession of the technical, organizational, economic, financial and general requirements needed to participate in the procedures regulated by the P.C.C. through the **Public Contract National Database** at the Italian Authority for the Supervision of Public Contracts (P.C.C., Art. 6 *bis*, introduced by Art. 20, c. 1, lett. a), D.L., 9 February 2012, No. 5, converted into L. 4 April 2012, No. 35). This Authority will define the data which should be included in Database and the updating procedures.

In 2011 the regulation of the general requirements of tenderers (P.C.C., Art. 38) was amended. For example, the requirement for professionals working in enterprises to

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*scissione societaria*, in *Giornale dir. amm.*, 2009, 539; M. Napoli, *Imprese vittime della criminalità organizzata ed esclusione dalle pubbliche gare*, in *Urb. e app.*, 2009, 1413; F. A. Giordanengo, *Sulle caratteristiche essenziali dei consorzi stabili*, in *Foro Amm. - T.a.r.*, 2010, 1567.

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have a clean criminal record has been further tightened (Art. 38, lett. b) and c) of the P.C.C.). However, their exclusion would no longer be valid in the case of depenalisation, rehabilitation, extinguishment of the offence or reversal of judgment. Tax evasion (D.L. 2 March 2012, No. 16, converted with amendments into L. 26 April 2012, No. 44) is considered serious criminal conduct entailing exclusion from the tender if the amount exceeds ten thousand Euros (D.L. 13 May 2011, No. 70, Art. 4, converted into L. 12 July 2011, No. 106)<sup>27</sup>.

A **mandatory exclusion of tenderers clause**<sup>28</sup> has been introduced in the awarding procedure (D.L. 13 May 2011, No. 70, Art. 4, converted into L. 12 July 2011, No. 106). The contracting entities will thus exclude the tenderers only on grounds of non fulfillment provided by P.C.C. by its regulation of implementation and execution and of the other law provisions, and “in cases of absolute uncertainty of the contents and origins of the tender; lack of signature or any other essential elements or if the package containing the tender or applications has been tampered with or any other irregularities regarding the packaging leading to the suspicions that the confidentiality principle of the tender has been violated in the specific case”. Any other exclusion clauses are considered unenforceable.

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<sup>27</sup> I. Pagani, *La valutazione della stazione appaltante sulla gravità degli inadempimenti contributivi*, in *Urb. e app.*, 2012; F. A. Giordanengo, *Sulla dichiarazione sostitutiva ex art. 38 D.Lgs. 163/2006 resa con riferimento ai soggetti cessati*, in *Urb. e app.*, 2011, 1440.

<sup>28</sup> **MANDATORY EXCLUSION OF TENDERERS CLAUSE**: C. E. Gallo, *Le prescrizioni a pena di esclusione alla luce dell'Art. 46, comma 1 bis, del codice dei contratti pubblici*, in *Foro amm. - Cd.S.*, 2011, 3733; R. Giani, *Le cause di esclusione dalle gare tra tipizzazione legislativa, bandi standard e dequotazione del ruolo della singola stazione appaltante*, in *Urb. e App.*, 2012, 95 e ss.; A. Massera, *Il "decreto sviluppo"*, in *Giornale Dir. Amm.*, 2011, 1049; R. De Nictolis, *Le novità del D.L. 70/2011*, in *Urb. e app.*, 2011, 1012; S. Ponzio, *I limiti all'esclusione dalle gare pubbliche e la regolarizzazione documentale*, in *Foro Amm. - C.d.S.*, 2011, 2464 e ss.

### 5.3 Award criteria

The **distinction between qualitative requirements and selection criteria**<sup>29</sup> (ECJ, I, 24 January 2008, in C-532/06, *Emm. G. Lianakis AE v Dimos Alexandroupolis*; Circolare del Dipartimento per le Politiche Europee della Presidenza del Consiglio, March 1 2007; Cons. St., V, No. 2716/2009) is still debated in Italy since Italian administrative courts allow or the evaluation of subjective elements whenever they seems decisive in granting the fair performance of the contract, mainly in case of services contract (Cons. St., V, 21 May 2010, No. 3208; Cons. St., V, 12 June 2009, No. 3716; Cons. St., V, 2 October 2009, No. 6002; Cons. Stato, V, 22 June 2010, No. 3887).

In case of awarding on the ground of the **most economically advantageous tender criterion**<sup>30</sup> (Autorità per la Vigilanza sui contratti pubblici, *Il criterio di aggiudicazione dell'offerta economicamente più vantaggiosa*, December 2011; Id, Determinazione 24 November 2011, No. 7, Linee guida per l'applicazione dell'offerta economicamente più vantaggiosa nell'ambito dei contratti di servizi e forniture), the

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<sup>29</sup> **DISTINCTION BETWEEN QUALITATIVE REQUIREMENTS AND SELECTION CRITERIA:** M. Pignatti, *Selezione dell'offerta e selezione dell'offerente: la distinzione fra la fvalutazione dei requisiti dell'offerente e la qualità dell'offerta*, in *Foro Amm.*, C.d.S., 2010, 2414 e ss.; A. Annibali, *Requisiti di idoneità e criteri di aggiudicazione dell'offerta*, in *Urb. e app.*, 2010, 201; M. E. Comba, *Selection and Award Criteria in Italian Public Procurement Law*, in *Public Procurement Law Review*, 2009, 122; A. Annibali, *Requisiti di idoneità e criteri di aggiudicazione dell'offerta*, in *Urb. e app.*, 2010, 201.

<sup>30</sup> **MOST ECONOMICALLY ADVANTAGEOUS TENDER:** I. Franco, *Trasparenza e pubblicità nelle gare di appalto con il criterio dell'offerta economicamente più vantaggiosa*, in *Urb. e app.*, 2009, 137; C. Contessa, *L'offerta economicamente più vantaggiosa: brevi note su un istituto ancora in cerca di equilibri*, in [www.giustamm.it](http://www.giustamm.it); A. Mascaro, *Appalti: il prezzo non prevale automaticamente sulla qualità se la lex specialis rispetta i parametri di proporzionalità e ragionevolezza*, in [www.dirittoegiustizia.it](http://www.dirittoegiustizia.it).



contracting authority must appoint a **jury**<sup>31</sup> whose composition is defined by Italian PCC in details (Art. 84 PCC). The members of the jury must have adequate professional skills with regard to the subject-matter of the contract (Cons. Stato, IV, 10 January 2012, No. 27; Cons. Stato, III, 12 April 2011, No. 2265; Cons. Stato, V, 4 March 2011, No. 1386; Cons. Stato, IV, 31 March 2010, No. 1830; Cons. Stato, V, 14 June 2010, No. 3732; Cons. Stato, V, 30 April 2009, No. 2761) and they must be appointed before the opening of the envelopes that contain the offers (Cons. Stato, V, 6 July 10, No. 4311; Cons. Stato, V, 27 October 2011, No. 5740).

According to the principle of **transparency**<sup>32</sup>, every sessions of the awarding body must be open to the public, the only exception being the evaluation of the single element of the most economically advantageous tender criterion by the jury (Cons. Stato, VI, 8 June 2010, No. 3634).

As the *Adunanza Plenaria of the Consiglio di Stato* declared (Cons. St., Ad. Plen., 28 July 2011, No. 13), when the **most economically advantageous tender**<sup>33</sup> is applied the envelopes that contain the technical offer have to be opened in public in order to check that all the required documents have been produced by the tenderers (d.P.R. 5 October 2010,

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<sup>31</sup> **JURY**: M. Sichetti, *La commissione giudicatrice nella procedura di valutazione dell'offerta economicamente più vantaggiosa*, in *Corriere Merito*, 2010, 3; C. Silvestro, *Funzionari interni componenti delle commissioni giudicatrici e requisiti di professionalità*, in *Urb. e app.*, 2009, 1373.

<sup>32</sup> **PUBLICITY OF SESSIONS**: R. Ricci, *Concentrazione, continuità e pubblicità delle sedute di gara: presupposti imprescindibili dei lavori delle commissioni giudicatrici*, in *Foro Amm., C.d.S.*, 2011, 1241 e ss.; A. Valletti, *La pubblicità delle sedute di gara si estende all'offerta tecnica*, in *Urb. e app.*, 2011, 11, 1314; A. Gandino, *Sulla pubblicità delle sedute di gara: riflessioni a margine della trasparenza amministrativa nel codice dei contratti pubblici (e non solo)*, in *Foro Amm.-Tar.*, 2009, 1276.

<sup>33</sup> **MOST ECONOMICALLY ADVANTAGEOUS TENDER**: A. Valletti, *La pubblicità delle sedute di gara si estende all'offerta tecnica*, in *Urb. e app.*, 2011, 1299.

No. 207, Art. 120 as amended by D.L. 7 May 2012, No. 52, Art. 12, converted in law 6 July 2012, No. 94).

As for the most economically advantageous tender (Art. 83, § 4, PCC), Italian rules compel contracting authorities to define in advance, within the contract documents, the elements of tender subject to evaluation and their relative weighting (Cons. Stato, III, 29 November 2011, No. 6306; T.a.r. Piemonte, II, 19 March 2009, No. 785). The jury is allowed to specify the criteria used to mark each element used to determine the most economically advantageous tender, providing that this specification do not entail a modification of the relevant criteria (Authority, opinion No. 119 of 22 January 2007; No. 90 of 20 March 2008; No. 125 del 23 April 2008; No. 183 del 12 June 2008; Cons. Stato, V, 8 September 2008, No. 4271; Corte di Giustizia, decision of 24 November 2005, case C-331/04).

The most economically advantageous tender criterion is sometimes applied in Italy by means of **mathematical formulae**<sup>34</sup> which should provide an easier marking of the single element of the tender, and can seem to be an aid to the objective evaluation of the tender. Nonetheless, they can be thwarted by tenderers and may lead to further criticalities instead of smoothing the process. The proportionality and reasonableness of these formulae are often subject to judicial review in order to avoid that a single element of the tender alone could turn to be decisive for the final awarding (Cons. Stato VI, 15 November 2011, No. 6023; Cons. Stato, V, 16 July 2010, No. 4624; Cons. Stato V, 9 April 2010, No. 2004; Cons. St., V, 22 June 2010, No. 3890; Cons. St., VI, 17 December 2008, No. 6278). Some problems may arise when the price element of the tender is zero<sup>35</sup>, since the mathematical

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<sup>34</sup> **MATHEMATICAL FORMULA:** M. Mattalia, *L'offerta economicamente più vantaggiosa e l'applicazione della formula matematica prevista dal disciplinare di gara*, in *Foro Amm. C.d.S.*, 2010.

<sup>35</sup> G. Ferrari, L. Tarantino, *Sugli esiti dell'offerta economica pari a zero*, in *Urb. e app.*, 2010, 1115 e ss.

formula becomes inapplicable or has an unexpected outcome (leading to a zero mark), thus leading to the exclusion of the tender (Cons. Stato, V, 16 July 2010, No. 4624).

In case of **abnormally low tenders**<sup>36</sup>, the contracting authority shall verify their constituent elements by consulting the tenderer, taking account of the evidence supplied (Cons. Stato, III, 22 November 2011, No. 6144; Cons. Stato, VI, 24 August 2011, No. 4801; Cons. Stato, IV, 2 August 2011, No. 4593; Cons. Stato, VI, 15 July 2010, No. 4584; Cons. Stato, IV, 30 October 2009 No. 6708; Cons. St., V, 13 February 2009 No. 826; T.a.r. Puglia, Lecce, III, 24 September 2009 No. 2186) even when the contract documents require the tenderer to provide in **advance**<sup>37</sup> the justifications of some elements of the tender when the latter is submitted (Cons. Stato, V, 17 February 2010, No. 922; Cons. Stato, VI, 2 April 2010, No. 1893 Cons. Stato VI, 2 April 2010, No. 1893; Cons. Stato V, 19 September 2011, No. 5279). To that aim, among the details of the constituent elements of the tender which can be considered relevant are: the possible economic exploitation of the service provided in other markets or other contractual relationships (Cons. Stato, V, 2 February 2010 No. 443), the timetable of the contract performance (T.a.r. Calabria, Reggio Calabria, 4 June 2010 No. 532) and the reutilization of materials and ancillary services produced during the contract performance (T.a.r. Lazio, Roma, III *ter*, 20 May 2010 No. 12518).

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<sup>36</sup> **ABNORMALLY LOW OFFER:** M. Pignatti, *Il giudizio sulle offerte anomale tra effettività del contraddittorio ed oggettività nelle valutazioni*, in *Foro Amm. – C.d.S.*, 2009, 1302; T. Del Giudice, *La rilevanza della concorrenza «effettiva» nel giudizio di anomalia dell’offerta: riflessioni in ordine alla compressione dell’utile d’impresa*, in *Foro Amm. – Tar*, 2009; A. Manzi, *Le novità in materia di offerte anomale*, in *Urb. e app.*, 2010, 270; E. Santoro, *Offerte anomale e calcolo del costo del lavoro: favor per le imprese che assumono lavoratori dalle liste di mobilità*, in *Urb. e app.*, 2010, 208; L. Masi, *Offerte con ribassi identici nel procedimento di determinazione della soglia di anomalia*, in *Urb. e app.*, 2010, 186; L. Miconi, *Il problema dei ribassi elevati nell’affidamento dei servizi di architettura e ingegneria: breve commento al nuovo regolamento di attuazione del d.leg. 163/2006 e parere del consiglio di stato No. 313/2010*, in [www.giustamm.it](http://www.giustamm.it).

<sup>37</sup> G. Fares, *Sulle conseguenze dell’omessa presentazione delle giustificazioni preventive*, in *Foro Amm.-Tar*, 2009, 813.

## 6. CONTRACTS BELOW EU THRESHOLDS

In Italy, public **contracts below threshold**<sup>38</sup> are highly widespread, commonly as a result of a lack of supply chain planning or malpractices in procuring management that can sometimes be regarded as subdivisions to prevent their falling within the scope of EU Directive, thus in breach of the latter (Art. 9, § 3, Directive No. 18/2004; Cons. Stato, V, 9 June 2008 No. 2803).

In Italy, public contracts below threshold are subject to the same principles but to simplified rules with respect to those applicable to the contracts above EU threshold: the contract notices can be published in any local newspapers and journals as well as only on the contracting authority's website, thus strongly limiting its advertising effect and reducing possible competition; the economic, financial and technical qualitative selection requirements are simpler and lower and the deadlines for tenders submission are shortened (Art. 121-124 PCC). The compliance with EU principles applicable to public contracts that fall outside the scope of EU directives of the rule which allows contracting authorities procuring below threshold to exclude abnormally low offer without requesting the tenderer any details of the constituent elements of his tender is still debated in Italy (Cons. Stato, cons. atti normativi, 6 February 2006 No. 355/06; ECJ, IV, 23 December 2009, in C-376/2008, *Serrantoni Srl and Consorzio stabile edili Srl v Comune di Milano*; ECJ, IV 15 May 2008, C-147/06 *SECAP Spa v Comune di Torino* e C-148/06 *Santorso soc. coop. Arl v Comune di Torino*; Interpretative Communication on *relativa al diritto comunitario applicabile alle aggiudicazioni di appalti non o solo parzialmente disciplinate dalle direttive «appalti pubblici»*, in GUCE 1 June 2006, C-179/2).

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<sup>38</sup> **CONTRACT BELOW THRESHOLD:** D. Dragos (eds.), *Outside the Procurement Directives - inside the Treaty?*, Djøf Publishing: Copenhagen, forthcoming; E. D'Arpe, *Le acquisizioni in economia di beni e servizi mediante la procedura di cottimo fiduciario*, in *Corriere merito*, 2009, 95; M. Giovannelli e F. Bevilacqua, *Ammissibilità della procedura negoziata ai contratti fino a cinquecentomila euro*, in *Urb. e app.*, 2009, 401.

Besides the ordinary awarding procedures for public contracts below threshold, Italian PCC (Art. 125) allows contracting authorities to directly provide works, services and supply by means of using their own material and human resources (*amministrazione diretta*) or to enter into the public contract by means of a negotiated procedure (*cottimo fiduciario*: T.a.r. Campania, Napoli, I, 9 June 2010, No. 13722; T.a.r. Piemonte, II, 19 March 2009, No. 785; T.a.r. Toscana, II, 22 June 2010, No. 2025).

Contracting authorities often purchase below threshold through the e-marketplace established by Consip (*Mercato Elettronico della Pubblica Amministrazione*<sup>39</sup> - M.E.P.A.); through the MEPA, economic operators may offer supply and services to public authorities who can purchase directly without issuing any awarding procedure.

In the **procedures for works involving a contract value that is below the EU threshold**, if the value is worth less than one million euros (provided that at least ten subjects have been invited to tender) it is possible to award the contract using a negotiated procedure which does not require the prior publication of a call for tenders (D.L. 13 May 2011, No. 70, Art. 4, cit.). In the case of works whose value is less than 500,000 euros at least five subjects have to be called to tender. In this case subcontracting is limited to 20% of the value of the works of the main category. Also for the services and supplies contracts, the figure for directly awarding the contract by the person in charge of the procedure has been raised to forty thousand euros. For public contracts worth 1 million euros or less, or for services and supplies worth 100,000 euros or less if the lowest price criterion is applied, the contract awarding body can provide in the tender for the **automatic exclusion**<sup>40</sup> of any bids which present a percentage of reduction that is equal to or higher than the threshold of

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<sup>39</sup> **E-MARKETPLACE – MERCATO ELETTRONICO DELLA PUBBLICA AMMINISTRAZIONE:** d.P.R. 4 april 2002, No. 101, Art. 11, *Regolamento recante criteri e modalità per l'espletamento da parte delle amministrazioni pubbliche di procedure telematiche di acquisto per l'approvvigionamento di beni e servizi.*

<sup>40</sup> **AUTOMATIC EXCLUSION:** F. Decarolis, *Cronaca di un fallimento annunciato: l'impiego dell'esclusione automatica negli appalti di lavori pubblici*, in *Giornale Dir. Amm.*, 2011, 1246.

anomaly. This faculty can be applied where the number of bids allowed is less than ten and in any case until 31 December 2012. This term has been postponed to 31 December 2013 raising the value by which the automatic exclusion is permissible up to the EU thresholds (D.L. 13 May 2011, No. 70, Art. 4, cit., c. 2, lett. ll, which amends Art. 253, c. 20 *bis* of P.C.C.).

The Regulation of the P.C.C. has amended the discipline of the **electronic market**. This has been defined as the instrument which allows telematic purchasing based on a system that activates awarding procedures which are entirely managed electronically and telematically. Procuring entities can use these procedures to purchase goods and services below the threshold both by competitively comparing public supply on the electronic market or supply received on the basis of a request for supply addressed to qualified suppliers. Purchases made by public authorities via the electronic market are expressly excluded from the application of the standstill period before the conclusion of the contract (P.C.C., Art. 11, c. 10 *bis*, lett. b), as amended by D.L. 7 May 2012, No. 52, Art. 11, converted in law 6 July 2012, No. 94).

This provision aims to prevent an aggravation of the awarding procedure, especially considering the recent Italian case law on the application of standstill period in the “cottomo fiduciario” procedure (T.A.R. Toscana, Firenze, 10 November 2010 No. 6570; T.A.R. Lazio, Roma, *II ter*, 11 April 2011, No. 3169).

## 7. ENVIRONMENTAL AND SOCIAL CONSIDERATIONS<sup>41</sup>

The Italian PCC, according to ECJ case-law (ECJ 17 September 2002, cause C-513/99, *Concordia Bus*), allows for social and environmental considerations to be included as qualitative selection criteria, technical specifications or most economically advantageous tender criteria (Art. 2, § 2 and Art. 83, § 1, lett. E, PCC).

Some social clauses are expressly provided by Italian legislation which automatically integrates the contract documents even when the latter do not explicitly provide so: it is the case of the compulsory employment of disabled persons (law 12 March 1999, No. 68; Cons. Stato, V, 19 June 2009, No. 4028). A commonly widespread social clause is also the one providing for the compulsory employment of the incumbent provider's employees by the winning tenderer, if compatible with the latter's organization chart (Cons. St., V, 16 June 2009, No. 3900).

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<sup>41</sup> **SOCIAL AND ENVIRONMENTAL CONSIDERATIONS:** Commissione UE, *Buying Green! A Handbook on green public procurement*, 2011; Commissione UE, *Acquisti sociali. Guida alla considerazione degli aspetti sociali negli appalti pubblici*, 2011; R. Caranta – S. Ricetto, *Sustainable Procurements in Italy: Of Light and Some Shadows*, in *The Law of Green and Social Procurement in Europe*, R. Caranta – M. Trybus (Eds.), Djøf Publishing: Copenhagen, 143; G. M. Racca, *Aggregate Models of Public Procurement and Secondary Considerations: An Italian Perspective*, in *The Law of Green and Social Procurement in Europe*, R. Caranta – M. Trybus (Eds.), Djøf Publishing: Copenhagen, 165; D. Perotti, *La «clausola sociale», strumento di salvaguardia dei lavoratori nel conferimento o nel trasferimento di attività a carattere economico-imprenditoriale da parte delle pubbliche amministrazioni*, in *Nuova rass.*, 2009, 24; P. Cerbo, *La scelta del contraente negli appalti pubblici fra concorrenza e tutela della «dignità umana»*, in *Foro Amm. - T.a.r.*, 2010, 1875; A. M. Balestrieri, *Gli «appalti riservati» fra principio di economicità ed esigenze sociali*, in *Urb. e app.*, 2009, 789; G. Ferrari – L. Tarantino, *Gara pubblica e costo del lavoro*, in *Urb. e app.*, 2009, 248.

## 8. CONTRACT PERFORMANCE<sup>42</sup>

The Italian PCC regulates the **public contract performance phase** as well (Cons. giust. amm. sic., giurisprudiz., 21 July 2008, No. 600). Nevertheless, the quality standards promised with the tender submission is not always delivered and procuring entities often accept a different and less worse performance as far as the economic operators fail to fulfil the obligations undertaken<sup>43</sup>. Italian PCC compels the contracting authorities to appoint a supervisor of the contract performance (Art. 119, PCC) but breaches of contract still frequently happen because of lack of professional skills in managing the performance phase of the public contract.

The more detailed rules concern the execution of works contract (Art. 130 et seq. PCC): contracting authorities have the power of supervision of works which entails the power of issuing orders on the performance of works (Art. 1662 cod. civ.) (Cons. Stato, VI, 26 May 2010, No. 3347). A specific discipline concerns **subcontracting**<sup>44</sup> (Art. 118, PCC) which has to be authorized by the contracting authority (Cons. Stato, IV, 24 March 2010 No. 1713; T.a.r. Lazio, Roma, III, 4 January 2010 No. 34) and entails the disclosure of the

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<sup>42</sup> **CONTRACT EXECUTION:** G. M. RACCA – R. CAVALLO PERIN – G. L. ALBANO, *Competition in the execution phase of public procurement*, in *Public Contract Law Journal*, vol. 41, no. 1, 2011, 89; M. E. COMBA, *L'esecuzione delle opere pubbliche. Con cenni di diritto comparato*, Torino, 2011.

<sup>43</sup> **CONTRACT PERFORMANCE:** M. Racca, R. Cavallo Perin, G. L. Albano, *Competition in the execution phase of public procurement*, in *Public Contract Law Journal*, 2011; M. E. Comba, *L'esecuzione delle opere pubbliche con cenni di diritto comparato*, Giappichelli, Torino, 2011; G. M. Racca, R. Cavallo Perin e G. L. Albano, *The safeguard of competition in the execution phase of public procurement: framework agreements as flexible competitive tools*, in *Quaderni Consip*, VI(2010); R. Cavallo Perin – G. M. Racca, *La concorrenza nell'esecuzione dei contratti pubblici*, in *Dir. amm.*, 2010, 325; A. M. Balestreri, *L'applicabilità di meccanismi revisionali ai contratti di concessione di servizi*, in *Urb. e app.*, 2009, 393.

<sup>44</sup> **SUBCONTRACTING:** G. Balocco, *Mancaza od irregolarità della dichiarazione di subappalto ed esclusione dalla gara*, in *Urb. e app.*, 2009, 1132.



subcontractors at the tender submission (Cons. Stato, V, 14 May 2010 No. 3016; Cons. Stato, IV, 30 October 2009 No. 6708).

ECJ qualifies any amendments of the public procurement term and conditions during its performance as a new award in breach of EU rules on public contracts (ECJ, III, 19 June 2008, in C-454/06, *Pressetext Nachrichtenagentur GmbH v Republik Österreich*, see also: ECJ, III, 29 April 2010 C-160/08, *EU Commission v Germany*; ECJ, Grande, 13 April 2010, in C-91/08, *Stadt Frankfurt am Main*; ECJ, III, 25 March 10, in C- 451/08, *Helmut Müller GmbH*). In Italy any **extension of a public contract**<sup>45</sup>, if not provided for in the contract documents and conditions, is forbidden as it account for a new direct award without any prior publication of the contract notice (Cons. Stato, VI, 16 February 2010, No. 850).

The fair and correct performance of the public contract is achieved also through the provision of penalties in case of breach of contract which, in case of severe misconduct, can lead to the termination of the contract (T.a.r. Campania, Napoli, I, 20 April 2010 No. 2026).

The new Government regulation enforcing the code, for service and supply contracts, provides that a **director of works** (arts. 301-301) may be added to the above directors (director in charge of the procedure and director in charge of the execution phase) in case of particularly complex contracts or contracts worth over € 500.000. The director of works, originally, was provided only for in the context of public works (cf. director of works).

In case of purchase by a contract or framework agreement carried out through a central purchasing bodies, this entity shall monitor and acquire further information regarding the execution of the contract relationship through the **Public Contracts**

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<sup>45</sup> **EXTENSION OF PUBLIC CONTRACT:** S. Usai, *La proroga programmata del contratto d'appalto*, in *Urb. e app.*, 2010, 705; G. Ferrari - L. Tarantino, *Proroga contratti di trasporto*, in *Urb. e app.*, 2009, 1148.

**Observatory** (after the prior stipulation of agreement protocols for computer connection to the network).

In order to make transparent the public procurement market and implement forms monitoring activity of the individual contracting authority is imposed Observatory of public contracts to disclose data relating contracts awarded by contracting authorities using methods that allow the detection of aggregated information relating to the contracting authority, consultant and trader for the delivery item" (D.L. 7 May 2012, No. 52, Art. 8, converted in law 6 July 2012, No. 94) and to transmit the same to the Ministry of Economy and Finance and to the national central purchasing (Consip S.p.A.).

In the services and supplies sector the execution of the contract and its accounting (Art. 307) has been regulated with specific provisions (borrowed from sector of public works) on the subject of execution in advance (Art. 302), delayed starting of work (Art. 305) and suspension of execution (Art. 308), penalty clauses (Art. 298), testing and verification of conformity (arts. 312-325). With particular reference to the **penalty clauses** regarding delayed fulfilment of the contract obligations the regulation quantifies the pecuniary value that the director of the procedure can provide for when drawing up the project. A pecuniary penalty of between 0.3 per thousand and 1.0 per thousand of the net value of the contract for each day of delay can be inserted (Art. 145, c. 3). Moreover there is possibility of including in the contract an "acceleration reward" clause for the executor for each day before the contract deadline if the works are concluded in advance: this has been extended also to the services and supplies sector. In this case the reward is determined according to the same criteria established in the specifications or in the contract as for the calculation of the pecuniary penalty clause by means of utilizing the money for contingencies indicated in the economic framework of the work, provided that the contract has been executed in conformity with the obligations agreed. For public contracts for services and supplies whose execution may cause damage to the environment the contracting authorities are obliged to take into account criteria aimed at reducing use of natural resources, production of waste, energy saving, polluting emissions and environmental damage (Art. 281).

The Special Plan against organized crimes (L. 13 August 2010, No. 136, Art. 3) provides for the **traceability of financial flows**<sup>46</sup> regarding payments made to: contractors; subcontractors; subcontractors of the chain of production; public funding and European funding recipients/grantees of any kind interested in public works, services and supplies (Corte Cost., 23 February 2012, n. 35; T.A.R. Sicilia, Palermo, sez. I, 11 May 2012, n. 959; T.A.R. Sicilia Catania, sez. I, 15 February 2011, n. 389). The Plan also provides for the identification of a current account devoted to transactions with public administrations and it introduces the termination of the contract in the case of a conclusive conviction for the crimes of usury and money-laundering (P.C.C. Art. 135, amended by L. 27 January 2012, No. 3, Art. 3).

## **9. THE ITALIAN IMPLEMENTATION OF EUROPEAN REMEDIES DIRECTIVE 2007/66/EC**

EU Directive No. 2007/66 has been implemented in Italy by the d.leg. 20 March 2010, No. 53 now included in the new Code of administrative procedure (*Codice del processo amministrativo*, d.lgs. 2 July 2010, No. 104 – hereafter CAP)<sup>47</sup>. The new Code of

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<sup>46</sup> **TRACEABILITY OF FINANCIAL FLOWS:** B. M.Cavallo, *La tracciabilità dei flussi finanziari negli appalti pubblici. la recente normativa alla luce delle determinazioni dell'autorità per la vigilanza sui contratti pubblici*, in *Giur. merito*, 2011, 1500.

<sup>47</sup> **JUDICIAL REVIEW:** M. Comba, *Enforcement of EU Procurement Rules. The Italian System of Remedies*, in S. Treumer – F. Lichère (a cura di) *Enforcement of the EU Public Procurement rules*, Djof Publishing: Copenhagen, 2011; M. RAMAJOLI, *Il processo in materia di appalti pubblici da rito speciale a giudizio speciale*, in (a cura di) G. GRECO, *Il sistema della giustizia amministrativa negli appalti pubblici in Europa*, Milano 2010, 47 e ss.; R. POLITI, *Il contenzioso in materia di appalti: dal recepimento della Direttiva ricorsi al Codice del processo amministrativo*, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it); M. A. SANDULLI, *La fase cautelare*, in *Dir. proc. amm.*, 2010, 1130; E. FOLLIERI, *I poteri del giudice amministrativo nel decreto legislativo 20 March 2010 No. 53 e negli artt. 120-124 del codice del processo amministrativo*, in *Dir. proc. amm.*, 2010, 1067; M. Lipari, *La direttiva ricorsi nel codice del processo amministrativo: dal 16 september 2010 si cambia ancora?*, in *Foro Amm. - T.a.r.*, 2010,

administrative procedure (Art. 133) entrusts the administrative courts (Tribunali Amministrativi Regionali and Consiglio di Stato) with the power of declaring the ineffectiveness of the contract as a consequence of the award annulment and regulates the consequences of the failure to comply with the standstill period.

Before the implementation of EU Directive No. 2007/66, the **competence over public contracts litigation** was divided between the administrative court, as for the disputes concerning the awarding procedure, and the ordinary courts (tribunals, court of appeal, Cassazione), as for disputes regarding the contract performance which starts after the contract stipulation. After the implementation of EU Directive No. 2007/66, the administrative courts can declare the award void and the contract ineffective (Cass., SS.UU., ord. 5 March 2010, No. 5291; Cass., SS.U., ord. 10 February 2010, No. 2906; Cons. Stato, V, 15 June 2010, No. 3759), whereas the ordinary courts maintain the competence over the disputes raising during the performance phase (Cons. Stato, VI, 26 May 2010, No. 3347; Cons. Stato, V, 1 April 2010, No. 1885), save the application of

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(5) LXXIII; M. Lipari, *Il recepimento della «direttiva ricorsi»: il nuovo processo super-accelerato in materia di appalti e l'inefficienza «flessibile» del contratto*, [www.giustamm.it](http://www.giustamm.it); V. Lopilato, *Categorie contrattuali, contratti pubblici e i nuovi rimedi previsti dal d.leg. No. 53 del 2010 di attuazione della direttiva ricorsi*, [www.giustamm.it](http://www.giustamm.it); M. Lipari, *Annullamento dell'aggiudicazione ed effetti del contratto: la parola al diritto comunitario*, in [www.federalismi.it](http://www.federalismi.it); R. De Nictolis, *Il recepimento della direttiva ricorsi nel codice appalti e nel nuovo codice del processo amministrativo*, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it); F. Saitta, *Contratti pubblici e riparto di giurisdizione: prime riflessioni sul decreto di recepimento della direttiva No. 2007/66/CE*, [www.giustamm.it](http://www.giustamm.it); F. Cintioli, *In difesa del processo di parti (note a prima lettura del parere del consiglio di stato sul «nuovo» processo amministrativo sui contratti pubblici)*, in [www.giustamm.it](http://www.giustamm.it); A. Bartolini - S. Fantini - F. Figorilli, *Il decreto legislativo di recepimento della direttiva ricorsi*, in *Urb. e app.*, 2010, 638; S. Foà, *L'azione di annullamento nel Codice del processo amministrativo*, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it); V. Cerulli Irelli, *Osservazioni sulla bozza di decreto legislativo attuativo della delega di cui all'Art. 44 l. No. 88/09*, in [www.giustamm.it](http://www.giustamm.it); R. Caranta, *Il valzer delle giurisdizioni e gli effetti sul contratto dell'annullamento degli atti di gara*, in *Giur. It.*, 2009, 6; F. Goisis, *Ordinamento comunitario e sorte del contratto, una volta annullata l'aggiudicazione*, in *Dir. proc. amm.*, 2009, 116; R. Calvo, *La svolta delle sezioni unite sulla sorte del contratto pubblico*, in *Urb. e app.*, 2010, 421.

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special public law rules in this phase (e.g. subcontracting: Cons. Stato, IV, 24 March 2010, No. 1713).

The administrative courts shall grant the renewal of the illegal awarding phases and the following new award<sup>48</sup>, whenever it is possible (Cons. Stato, V, 9 March 2010, No. 1373). After the contract subscription, the administrative judge can declare its **ineffectiveness** whenever: a) the award was done without prior publication of the contract notice; b) the award followed a negotiated procedure or direct provision of works, services and supply outside the cases; c) the contract was subscribed not complying with the standstill period (Art.121-122, CAP). Whenever the declaration of ineffectiveness is not possible, the judge will rule for compensation of damages<sup>49</sup> (Cons. Stato, V, 15 June 2010, No. 3759 where few months were left before the conclusion of the contract performance).

Italian law implemented the EU rules on the **standstill period**, setting a period of 35 days before the signing of the contract (Art. 11, § 10-10bis PCC; T.A.R. Campania, Napoli, I, 14 July 2010, No. 16776), as well as the relevant derogations provided for in EU Directive No. 89/665/EEC, Art. 2b as amended by EU Directive No. 2007/66.

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<sup>48</sup> F. Tallaro, *L'esecuzione in forma specifica dell'obbligo di contrarre nei confronti della pubblica amministrazione*, in *Rivista NelDiritto*, 2009, 1195; G. Ferrari - L. Tarantino, *Obbligo della stazione appaltante di formulare una nuova graduatoria di gara*, in *Urb. e app.*, 2009, 1385; M. Sinisi, *Il potere di autotutela nell'ambito delle procedure di gara fra annullamento dell'intera procedura e annullamento dei singoli atti della medesima sequenza procedimentale*, in *Foro Amm.-Tar.*, 2009, 31; M. Didonna, *Il subentro nel contratto di appalto dopo l'annullamento dell'aggiudicazione*, in *Urb. e app.*, 2010, 588; V. De Gioia, *Autotutela demolitoria e risarcimento dell'aggiudicatario*, in *Urb. e app.*, 2009, 429.

<sup>49</sup> **COMPENSATION FOR DAMAGES:** E. Boscolo, *L'intervenuta esecuzione dell'opera pubblica: il limite all'annullamento e la sequenza accertamento-risarcimento*, in *Urb. e app.*, 2010, 89; A. Reggio d'Aci, *Il G.A. riduce le prospettive di risarcimento per mancata aggiudicazione*, in *Urb. e app.*, 2009, 557; B. Gagliardi, *Esecuzione di un contratto sine titulo, arricchimento senza causa e diritto all'utile di impresa*, in *Dir. proc. amm.*, 2009, 806.

**Alternative penalties** have been implemented in Art. 123 of the CAP for the cases in which the principle of ineffectiveness is deemed to be inappropriate, with the imposition of fines to the procuring entity of a penalty ranging from 0.5% to 5% of the total value of the award price. Such fines will be included in the State's budget. An alternative penalty provides the shortening of the duration of the contract, ranging from 10% to a maximum of 50% of the remaining duration of the contract.

**The quantification of damages**<sup>50</sup> for illegal awarding of a public contract amounts in any case to the expenses sustained in preparing and submitting the tender and, only if the economic operator is able to prove that he would have been the awarding firm, also to the profit the economic operator would have gained by performing the contract (max. 10% of the contract value profit provided for by Art. 345 Law 20 march 1865, No. 2248, all. F is only a guideline). The lost profit should amount to less than 10% reaching up to 5% of the contract value whenever the economic operator fails to prove the impossibility of using its own technical and human resources and machinery in performing other contracts (Cons. Stato, VI, 21 September 2010, No. 7004). The amount of compensation is further reduced when there is no evidence of the right to the award of the contract. Damages may also refer to the loss of qualitative selection requirements the economic

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<sup>50</sup> **QUANTIFICATION OF DAMAGES:** S. Osella, *La centralità del tempo nella valutazione della correttezza della Pubblica amministrazione*, in *Foro Amm. – CDS*, 2012, 649; G. Crepaldi, *La revoca dell'aggiudicazione provvisoria tra obbligo indennitario e risarcimento*, in *Foro Amm. – C.d.S.*, 2010, 868; G. M. Racca, *Contratti pubblici e comportamenti contraddittori delle pubbliche amministrazioni: la responsabilità precontrattuale*, in *Rivista NelDiritto*, No. 2/2009, 281; H. Simonetti, *Il giudice amministrativo e la liquidazione del danno: temi e tendenze*, in *Foro it.*, 2009, III, 313.

operator would have achieved with the contract performance (amounting to a 1-5% of the contract value) (Cons. Stato, VI, 27 April 2010, No. 2384).