

**BRIEF NOTES ON THE SETTING ASIDE OF AN AWARD AND
THE EFFECTS ON THE CONTRACT: COURTS' POWERS IN
LIGHT OF THE ADMINISTRATIVE PROCEDURE CODE**

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1. FOREWORD

The question of the relationship between the setting aside of an award and the effects on a contract entered into in the meantime is one that straddles the boundary between public and private law and is the product of a complex intertwining of national law with European law.

In this regard over the course of time legal writers¹ and the courts² have espoused a multiplicity of constantly evolving views in relation to the nature of the defect that

¹ For literature dealing with the effects on the contract following the setting aside of the award, see: G. FERRARI, *L'annullamento del provvedimento di aggiudicazione dell'appalto pubblico e la sorte del contratto già stipulato nella disciplina dettata dal nuovo c.p.a.*, in *Giur. merito*, 2011, 04, 919; DUNCAN FAIRGRIEVE - FRANÇOIS LICHÈRE (EDS), *Public Procurement Law: Damages as an Effective Remedy*, 2011; G. LEONE, L. MARUOTTI, C. SALTELLI, *Codice del processo amministrativo*, Padua, 2011, 916; D. FATA, M. SANINO, G. CHINÈ, *Le sorti del contratto stipulato a seguito di aggiudicazione illegittima*, in M. SANINO (ED), *Commentario al codice del processo amministrativo*, Turin, 2011; A. QUARANTA, V. LOPILATO. (EDS), *Il processo amministrativo*, Milan, 2011; P. CARPENTIERI, *Sorte del contratto (nel nuovo rito degli appalti)*, in *Dir. Proc. Amm.*, 2011, 664; Council of State (Section VI) judgment no. 780 of 3 February 2011, in *Resp. civ. e prev.*, 2011, 1088, with note by F. GASPARRINO, *Nessun risarcimento al contraente che «confida» nel contratto illecito*; R. CARANTA, *Le controversie risarcitorie*, in R. CARANTA (ED), *Il nuovo processo amministrativo*, Bologna, 2011, 659 *et seq.*; GAMBATO SPISANI, *I riti speciali*, in R. CARANTA (ED), *Il nuovo processo amministrativo*, Bologna, 2011, 732; P. PATRITO, *Annullamento dell'aggiudicazione e inefficacia del contratto d'appalto: strumenti di tutela dell'originario aggiudicatario-contraente, prima e dopo il recepimento della direttiva ricorsi* (note on Court of Turin (Section I) judgment no. 307 of 19 January 2011), in *Resp. civ. e prev.*, 2011, Vol. 7-8, 1616; G. GRECO (ED), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa*, 2010; A. ANGIULI, *Contratto pubblico e sindacato del giudice amministrativo*, in *Dir. amm.*, 2010, Vol. 4, 865; R. CAVALLO PERIN, G. M. RACCA, *La concorrenza nell'esecuzione dei contratti pubblici*, in *Dir. amm.*, 2010, 325; R. BOSCOLO, *In tema di natura*

dell'aggiudicazione provvisoria (comment on Regional Administrative Court of Lazio (Section II-ter) judgment no. 10991 of 9 November 2009), in *I contratti dello Stato e degli Enti pubblici*, 2010, Vol. 1, 59-67; R. CALVO, *Annullamento dei provvedimenti di aggiudicazione definitiva e inefficacia dei contratti a evidenza pubblica* (articles 243 bis and 245 bis - 245 quinquies of the Public Contracts Code relating to works, services and supplies introduced by Legislative Decree No. 53 of 20 March 2010, implementing Directive 2007/66/EC), in *Le nuove leggi civili commentate*, 2010, Vol. 3, 617-637; ID., *Appalti pubblici e «decodificazione» dei rimedi*, in *Urbanistica e appalti*, 2010, Vol. 7, pages 757-761; G. COSTANTINO, *Note a prima lettura sul codice del processo amministrativo. Appio Claudio e l'apprendista stregone*, in *Il foro italiano*, 2010, Vol. 9, part V, 237-243; G. CREPALDI, *La revoca dell'aggiudicazione provvisoria tra obbligo indennitario e risarcimento* (comment on Council of State (Section VI) judgment no. 1554 of 17 March 2010), in *Il foro amministrativo C.d.S.*, 2010, Vol. 4, 861-877; O. CRISTANTE, A. ZUCCOLO, *Sorte del contratto* (comment on Legislative Decree No. 53 of 20 March 2010), in *I contratti dello Stato e degli Enti pubblici*, 2010, Vol. 3, 301-308; G. D'ANGELO, *Direttiva n. 2007/66/CE e giurisdizione nelle controversie sui contratti pubblici* (comment on Supreme Court (Civil Section I) order no. 2906 of 10 February 2010), in *Il corriere giuridico*, 2010, Vol. 6, 741-755; P. DELLA PORTA, S. SACCHETTO, *La disciplina processuale del Codice dei contratti pubblici dopo il d.lgs. 20 marzo 2010, n. 53 (e poco prima del codice del processo amministrativo)* (comment on Legislative Decree No. 53 of 20 March 2010), in *I contratti dello Stato e degli Enti pubblici*, 2010, Vol. 3, 269-299; M. R. BUONCOMPAGNI, *Annullamento dell'aggiudicazione e sorte del contratto*, in *Riv. dir.*, 2010, 3, 402; G. E. FERRARI, *Il contenzioso degli appalti pubblici nel nuovo codice del processo amministrativo*, Rome, 2010, 311; E. SANTORO, *Guida alla giurisdizione in materia di contratti pubblici*, in *Riv. Corte dei Conti*, 2010 Vol. 3, 218; G. DE ROSA, *Quale giudice può decidere la sorte del contratto a seguito di aggiudicazione annullata? L'impatto della direttiva ricorsi* (note on Supreme Court *en banc* judgment no. 2906 of 10 February 2010), in *Riv. it. dir. pubbl. comunit.*, 2010, Vol. 3-4, 1035; E. SANTORO, *Una pietra miliare nel cammino verso l'effettività della tutela: le Sezioni Unite affermano la giurisdizione del giudice amministrativo sulla sorte del contratto, anticipando il recepimento della direttiva 2007/66/Ce* (note on Supreme Court *en banc* judgment no. 2906 of 10 February 2010), in *Riv. giur. Edilizia*, 2010, I Vol. 2, 399; F. ASTONE, *I contratti pubblici fra ordinamento europeo e diritto interno*, in *www.giustamm.it*, 1 June 2010.

² For recent caselaw trends see Council of State (Section V) judgment no. 2817 of 12 May 2011. See also Council of State (Section III) judgment no. 6638 of 19 December 2011, according to which it is necessary to settle the question of (a) whether the ineffectiveness of the contract, as a logical, necessary and indispensable condition to the specific damages that can lawfully (as mentioned before) be claimed at the time of enforcement, can be declared on the application of the claimant by the execution court when deciding what measures to enforce the judgment would be best suited to satisfying the claims of the claimant that made an application for specific relief or (b) whether, by contrast, as held by the Regional Administrative Court in the challenged judgment, that power must be considered as being vested solely in the review court. Depriving the contract of its effects is ordered on the basis of predetermined prerequisites at the outcome of an investigation that relates to specific conditions laid down by law and involves considerations of expediency alongside the grounds for setting aside the award, which certainly fall within the classic powers of cognizance of the execution court such as to be able to include the latter within the notion of review court. From that standpoint, the claim for specific reinstatement made by the claimant in the application for review at first instance and upheld here may be granted because the preconditions for the declaration of ineffectiveness of the contract pursuant to article 122 of the Administrative Procedure Code are fulfilled (the cases does not fall within the scope of the award being set aside for serious breach pursuant to article 121.1 of the Administrative Procedure Code) given that the defect in the award is not one that obliges the contracting authority to repeat the procurement process because it can go down the ranking.

According to the judgment in question it is permissible in enforcement proceedings pursuant to article 112.4 of the Administrative Procedure Code to submit an application to obtain the award and an order for the signing of the contract following the judicial setting aside of the award previously made by the contracting authority. In fact, that application is to be treated (as it is well established that the court may classify the action as it sees fit) as a request for specific damages (pursuant to article 124 of the Administrative Procedure Code) because intended to settle one of the possible ways of implementing the judgment, including when “no express application” to that effect had been made in the review proceedings. In turn, granting the application to be given the award and the contract made before the execution court presupposes, in accordance with article 124 of the Administrative Procedure Code, a declaration of ineffectiveness of the contract in the meantime entered into referred to in articles 121.1 and 122 of the Administrative Procedure Code. In the absence of that application, the contract must

invalidates the contract, which courts exactly have jurisdiction³ and how to protect the unlawfully excluded tenderer.

This work, following on from an in-depth consideration of the issue in the past⁴, proposes to focus on three fundamental areas of inquiry and associated key aspects.

be considered as valid and effective despite the setting aside of the award (see Council of State (Section III) judgment no. 1570 of 11 March 2011, in www.giustizia-amministrativa.it).

Applying the above principle, after having assessed the interests of the parties and balanced them against the public interest, the court declared that the contract signed between the contracting authority and original awardee was ineffective. According to the judgment, ineffectiveness must be declared running from the thirtieth day after receipt by the original awardee of the administrative notice (or, if earlier, service) of the execution judgment with an obligation for the contracting authority to proceed by that deadline to sign the procurement contract with the claimant who won the legal proceedings and with a term equal to that of the contract that has been declared ineffective, subject to first making the award in the claimant's favour and checking that the latter fulfils all of the requirements for concluding the contract.

³ For an analysis of the issue of what powers the courts enjoy, see M. LIPARI, *L'annullamento dell'aggiudicazione e gli effetti sul contratto: poteri del giudice*, in www.federalismi.it. The formula "powers of the administrative court" is important from at least three angles: division of jurisdiction, the nature and type of judicial power exercised, and the relationship between the parties and the court. This author points out that based on a civil law approach, the court's assessment as to whether a declaration of ineffectiveness should be issued is one informed by what is fair and just in the circumstances whereas other approaches would be informed by the general interest, which is a factor extraneous to those contemplated in the Civil Code. See also A. CARULLO, *La sorte del contratto dopo l'annullamento dell'aggiudicazione: poteri del giudice e domanda di parte*, in www.giustizia-amministrativa.it.

⁴ On this point it should be noted that this work continues the analysis conducted in E. STICCHI DAMIANI, *La caducazione del contratto per annullamento dell'aggiudicazione alla luce del Codice degli appalti*, *op. cit.*, pages 3719-3728.

Firstly, the substantive repercussions on a contract stemming from the cancellation *ex tunc* of the decision making the award will be examined.

Secondly, the analysis will dwell on aspects regarding which court exactly entertains jurisdiction to adjudicate on the repercussions on the contract as a result of the setting aside of the award.

Finally, the work will go on to examine procedural issues in connection with litigation to decide on the fate of the contract. In particular, the question will be posed as to whether the courts may rule on the fate of the contract only where a party actually brings suit or may do so of their own motion.

Furthermore, it will be important to consider whether the proceedings for the setting aside of the award can be separated from those on the ineffectiveness of the contract or whether the principle of *simultaneus processus* applies further to which all aspects of the relationship must be examined in the same lawsuit.

In light of recent caselaw, a final issue to be considered is the distinction between cases where the setting aside of the award occurs as a result of court intervention and cases where it is the contracting authority itself who sets aside the award on its own initiative.

Given the special nature of the proceedings on the fate of a contract following the setting aside of the underlying award, this article will seek to determine the powers of the courts and their central role having regard to the wide discretion that they enjoy in the exercise of their functions.

2. THE RULES ON THE INEFFECTIVENESS OF THE CONTRACT LAID DOWN IN THE ADMINISTRATIVE PROCEDURE CODE AND THE WORDING OF ARTICLE 121

Among the views expressed by legal writers and in caselaw regarding the legal nature of the defect invalidating the contract following the setting aside of the award⁵, the Administrative Procedure Code has opted for the most evanescent conceptual category.

The *genus* ineffectiveness is a wide-ranging category that is not at all homogeneous. In fact, all the aspects regarding what ineffectiveness actually means and the rules governing it need to be clarified. One must also establish whether that concept entails a form of penalty or is just mere termination.

Those aspects are examined in more depth in the detailed analysis of the rules on the matter introduced by the Administrative Procedure Code.

The rules laid down in articles 121 *et seq.* of the Administrative Procedure Code hinge on a declaration of ineffectiveness of the contract as a

⁵ Reference has been made to nullity, setting aside, ineffectiveness and automatic cancellation of the contract, with a plethora of the variants that each of those concepts incorporate, discussed in M. MONTEDURO, *Invaldità del contratto*, in L. R. PERFETTI (ED), *Repertorio degli appalti pubblici*, II, 2005, 829, and Id., *Illegittimità del procedimento ad evidenza pubblica e nullità del contratto d'appalto ex art. 1418, comma 1, c.c.: una radicale «svolta» della giurisprudenza tra luci e ombre*, in *Foro amm. T.A.R.*, 2002, 2591. The author outlines a series of theories and sub-theories already advanced regarding the matter addressed in this work.

result of the setting aside of the award and distinguish between two cases, one addressed in article 121 governing so-called ‘serious’ breaches and one addressed in article 122 governing other breaches, with the former being expressly listed and the latter so-called ‘ordinary’ ones not⁶.

In cases covered by article 121 the court must declare the contract to be ineffective and specify whether the ineffectiveness is to operate *ex tunc* or *ex nunc*. The factors that the court is called upon to consider in making its decision are the parties’ arguments, the gravity of the contracting authority’s conduct and the facts of the case⁷.

⁶ For an analysis of the repercussions on the application of the provisions of the Administrative Procedure Code and an overview of the consequences of the setting aside of the award on the fate of the contract, see F. BOTTEON, *I contratti non relativi a lavori, servizi e forniture pubbliche e l’annullamento dell’aggiudicazione: alcuni spunti sulla questione della sorte dei contratti alla luce del nuovo codice del processo amministrativo*, in www.lexitalia.it.

⁷ According to prevailing opinion among legal writers, that declaration is a must. See M. LIPARI, *Il recepimento della “direttiva ricorsi”: il nuovo processo superaccelerato in materia di appalti e l’inefficacia “flessibile” del contratto nel d. lgs. n. 53, op. cit.*; R. DE NICTOLIS, *Il recepimento della direttiva ricorsi*, in www.giustizia-amministrativa.it; S. FANTINI in A. BARTOLINI, S. FANTINI, F. FIGORILLI, *Il decreto legislativo di recepimento della direttiva ricorsi*, in *Urbanistica e appalti*, 6/2010, 661; C. LAMBERTI, *La caducazione del contratto tra cognizione ed esecuzione*, report presented at the conference on “*Riforme della giustizia e giudice amministrativo*” held in Certosa di Pontignano in Siena on 11-12 June 2010; V. LOPILATO, *Categorie contrattuali, contratti pubblici e nuovi rimedi previsti dal decreto legislativo n. 53 del 2010 di attuazione della direttiva ricorsi* in www.giustizia-amministrativa.it, 2010. For criticism of the rise in popularity of the view that the court can act on its own motion, see 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, who maintains that “to theorise a power-duty enjoyed by the court to

Subparagraphs *a)* and *b)* of article 121.1 provide that where the final award is made without first publishing the contract notice or call for competition, using the negotiated procedure without publication of a contract notice or through a single tender action without that being permissible in circumstances that lead to no notice or call for competition being published, then the court that sets aside the final award must declare the ineffectiveness of the contract.

This would seem to fully protect competition. However, article 121.2 states that overriding reasons relating to a general interest may require that the effects of the contract should be maintained. In fact, if there is a general interest of such importance as to warrant preserving the contract⁸, the apparently mandatory nature of the declaration of ineffectiveness (“The court declares”) seems to be tempered by an equally mandatory provision to the contrary (the contract “remains” effective).

declare a contract ineffective without the claimant so requesting or desiring would be equivalent to making it a veritable official administrative power concerning a sanction. Perhaps not even the jurisdiction designed to secure observance of the law, in the sense understood to date, would manage to classify it”.

⁸ Further exemptions to a declaration of ineffectiveness occur in the cases covered by articles 121.5 and 123.3, respectively where the contracting authority has declared that its failure to comply with the publication requirements was in good faith or has published a notice for voluntary ex ante transparency or where there were only formal infringements of the stand still and suspension periods and the infringement in question did not deprive the claimant of the possibility to pursue pre-contractual remedies or did not damage the claimant’s chances to obtain the contract.

Certainly, in this way courts are given a significant degree of discretion if the overriding reasons are connected to economic interests.

Indeed, the court must take into account a whole series of factors in its assessment and, in particular, will lean towards preserving effectiveness for technical reasons only when ineffectiveness will not satisfy the demands of the claimant. In fact, the outstanding contractual obligations cannot be transferred in as much as they can be performed only by the original awardee or when the claimant does not intend to perform them not having applied to take them over. Even greater discretion is afforded to the court when it can refrain from declaring the ineffectiveness of the contract, especially where that would give rise to disproportionate consequences.

These provisions highlight the need, on the one hand, to protect competition allied to the claimant's own interest and, on the other hand, the public interest underlying the contract, with the courts being entrusted the task of striking a balance between them.

In particular, in the face of a public interest in maintaining the effectiveness of the contract, protection of competition increasingly tends to coincide with the claimant's interest in taking over the contract.

Therefore, article 121 reflects the significant complexity of the notion of ineffectiveness when, in identifying the rules to apply to cases of serious breach, it provides that in cases of infringement of publication requirements (subparagraphs a-b), the contract remains effective if overriding reasons relating to a general interest so dictate, such to be decided on the basis of a series of factors to be considered by the court.

Accordingly, in that case the public interest underlying the contract may, in the court's judgment, having regard to the principle of proportionality, take precedence over the need to safeguard competition even though the latter has been seriously prejudiced by infringement of the publication requirements⁹.

Likewise the second of the serious breaches envisaged by article 121.1, i.e. infringement of the "stand still period" (subparagraphs c and d), does not necessarily lead to ineffectiveness – despite the gravity of the harm caused to the rules of competition – of the contract where that

⁹ Not all legal writers agree on the relevance of the good faith exhibited by the successful tenderer in whose favour the award was originally and unlawfully made. Reference should be made to the extreme view espoused by 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)*, *op. cit.*, according to whom the court should never declare ineffectiveness if such could damage the position of a contracting party who acted in good faith. Only in cases of bad faith on the part of the awardee could (and generally should) the court declare ineffectiveness taking into account the other factors laid down in article 122. Therefore, according to this approach good faith trumps all other factors listed in article 122. An advocate of a more moderate view is M. LIPARI, *Il recepimento della "direttiva ricorsi": il nuovo processo superaccelerato in materia di appalti e l'inefficacia "flessibile" del contratto nel d. lgs. n. 53 del 2010*, *op. cit.*, for whom good faith on the part of the awardee is relevant only in cases of "minor breaches" but does not automatically preclude a declaration of ineffectiveness of the contract. The author does not share the view that good faith is an insurmountable barrier to a declaration of ineffectiveness but sees it as a factor of equal weight with the others mentioned in article 122.

infringement¹⁰ did not affect the chances of the claimant to obtain the contract in the first place.

In that case it is clear that it is not so much the public interest underlying the contract but more the claimant's interest or lack of interest that militates in favour of maintaining the effectiveness of the contract itself. Thus, it is evident that the claimant's interest in obtaining the contract will be a significant factor in the court's decision as to whether it should issue a declaration of ineffectiveness.

2.1 'Ordinary' breaches under articles 122 and 123 of the Administrative Procedure Code

The rules governing so-called 'ordinary' breaches laid down in article 122, i.e. the infringements that most often occur, confirm how a

¹⁰ In particular, as regards the irrelevance of culpability in the infringement, reference should be made to European Court of Justice (Third Chamber) judgment of 30 September 2010 (case C-314/09) ruling as follows in relation to the matter: "Council Directive 89/665/EEC of 21 December 1989 must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable". That approach has been followed in domestic caselaw: see, amongst many, Regional Administrative Court of Lombardy, Brescia, judgment no. 4552 of 4 November 2010.

declaration of ineffectiveness is linked to the possibility that the claimant could take over the contract¹¹.

In fact, those rules provide that the claimant's interest in taking over the award and the contract is not a matter that the court must take into account because that factor is actually a prerequisite for enabling the court to decide between the effectiveness and ineffectiveness of the contract. Indeed, for the court to do so, an application to take over the contract must have been submitted or such an application must be impossible because the offending defect is one that entails an obligation to repeat the procurement process¹².

¹¹ Regarding the distinction between the various models of ineffectiveness, see F. LIGUORI, *Appunti sulla tutela processuale e sui poteri del giudice nel decreto legislativo n. 53 del 2010, op. cit.* The author stresses that the different functions of the models of ineffectiveness envisaged by the overall body of rules laid down in the Administrative Procedure Code clearly emerge from the very wording of the provisions in question. In the first case, “the court that sets aside the award declares ineffectiveness”. In the second case, “the court decides whether to declare ineffectiveness”. In other words, it is the author's view that “in cases of serious breach the court's decision-making power. i.e. the decision whether or not to declare the contract ineffective, is subject to fulfilment of conditions that in one sense are more rigid but in another sense are more closely linked to an assessment of what is in the public interest. In cases of minor breaches, the court's powers of review are wide, entailing an overall assessment of the facts of the case (hence the relationship) but appear to be more linked to the parties' interests and especially those of the claimant”.

¹² Article 122, with reference to so-called ‘ordinary’ breaches, provides that ineffectiveness is linked to a series of factors but tied to the precise assumption that there is an application to take over the contract. See E. FOLLIERI, *I poteri del giudice amministrativo nel decreto legislativo 20 marzo 2010 n. 53 e negli artt. 120 - 124 del Codice del processo amministrativo*, in www.giustamm.it, according

In the absence of those prerequisites the court may not declare the contract to be ineffective.

The factors that article 122 states that the court must take into account essentially relate to whether the application to take over the contract can be granted having regard also to the public interest underlying the contract¹³.

to whom “the declaration of ineffectiveness is not an end in itself but replaces the awardee with the competitor who should, at the time of the administrative procedure, have won the contract and who now becomes a party to a new and subsequent contract. If the setting aside of the award is caused not by defects that lead to another competitor (the claimant) being selected but by defects that require the procurement process to be repeated, the judgment declares the contract to be ineffective and orders the contracting authority to repeat the administrative procedure”.

¹³ There is however an alternative view. In particular, some argue that ineffectiveness is a form of nullity conceived as a penalty that as a rule can be raised by a court of its own motion but in the case of article 122 nullity cannot be declared by the court of its own motion in the absence of an application to take over the contract, meaning that a direct interest is protected and not merely one instrumental to the repetition of the competition. In that sense see LOPILATO, *Categorie contrattuali, contratti pubblici e nuovi rimedi previsti dal D.lgs. n. 53/2010 di attuazione della direttiva ricorsi*, in www.giustizia-amministrativa.it. According to another view “ineffectiveness in the cases covered by article 122 is not a penalty; it always requires that a party apply for it; that application can be implied in an application to take over the contract; however, article 122 may allow the judge to declare ineffectiveness even in the absence of a veritable application to take over the contract, in other words, also when the interest that the lawsuit concerns is not direct but instrumental to the repetition of the competition”. See, in that regard, M. LIPARI, *Il recepimento della “direttiva ricorsi”: il nuovo processo superaccelerato in materia di appalti e l’inefficacia “flessibile” del contratto nel d.lg. n. 53 del 2010, op. cit.; ID., La direttiva ricorsi nel Codice del processo amministrativo: dal 16 settembre 2010 si cambia ancora?*, in *Foro amm. TAR*, 5/2010, LXXIII. Another writer maintains that “ineffectiveness, both in cases under 121 and in cases under article 122 is a penalty designed to

Decisive in this regard is article 123.3 regarding infringements of the “stand still period” that did not affect the chances of the claimant to obtain the contract. It expressly provides in that case for the imposition of penalties¹⁴ as an alternative to ineffectiveness¹⁵, thereby unequivocally ruling out any declaration of ineffectiveness.

protect the superindividual public interest and the application to take over the contract is just one of the many elements to be assessed”. See, in that regard, M. FRACANZANI, *Annullamento dell’aggiudicazione e sorte del contratto nel nuovo processo amministrativo: dall’onere di impugnazione alla pronuncia di inefficacia*, in www.giustizia-amministrativa.it. According to other writers “the rule, rather general and with a broad scope of application, identifying as it does factors to substantiate the decision of the court on the fate of the contract – ranging from the type of defect in the procedural stage to the state of performance of the contract and to the possibility for the claimant to take over the contract – thus envisions a form of optional ineffectiveness of the contract”. See, in that sense, S. RUSCICA, *Il nuovo processo degli appalti pubblici. Commento organico al D.lgs. 20 marzo 2010 n. 53 di attuazione della direttiva ricorsi 2007/66/CE*, Rome; A. BARTOLINI in A. BARTOLINI, S. FANTINI, F. FRIGORILLI, *Il decreto legislativo di recepimento della direttiva ricorsi*, in *Urbanistica e appalti*, *op. cit.*, 653. In caselaw see the recent Council of State judgment no. 6039 of 15 November 2011 and Council of State (Section V) judgment no. 6916 of 28 December 2011 concerning the importance of the public interests involved. See also Council of State (Section VI) judgment no. 1554 of 17 March 2010, according to which in matters concerning government contracts the power to deny approval to an award can be based, in general, on specific reasons of public interest even where a provisional or final award has already been made.

¹⁴ Significant in this regard is the wording to be found in some of the recitals to Directive 2007/66/EC, according to which: “[i]n order to combat the illegal direct award of contracts ... there should be provision for effective, proportionate and dissuasive sanctions”, “[i]neffectiveness is the most effective way to restore competition and to create new business opportunities” and “[i]n order to prevent serious infringements of the standstill obligation and automatic suspension ... effective sanctions should apply”.

3. THE MEANING OF INEFFECTIVENESS IN LIGHT OF THE LEGISLATIVE PROVISIONS.

A striking feature of the meaning of ineffectiveness and the rules governing it, based on an examination of the relevant provisions of the Administrative Procedure Code, is how variable the concept of ineffectiveness actually is.

¹⁵ The cases in which alternative penalties apply are ineffectiveness that is limited in time in cases of typified serious infringements, effectiveness of the contract in cases of an exemption to a declaration of ineffectiveness due to overriding reasons, effectiveness of the contract in cases of infringement of publication obligations where the contracting authority has complied with the ex ante transparency procedure, effectiveness of the contract in cases of infringement of the stand still and suspension periods that have not however deprived the claimant of its chance to apply for review and obtain the contract. Those penalties take the form of fines on the contracting authority of between 0.5 and 5% of the contract price or the shortening of the duration of the contract by between 10% and 50% of the residual duration as at the date of publication of the judgment. The penalties, alternatives to ineffectiveness and cumulable with ineffectiveness only in cases of a declaration of ineffectiveness that is limited in time, can be imposed by the court either alone or in conjunction with each other (i.e. both a fine and shortening the duration of the contract). An award of damages is not an alternative penalty but would be additional. The penalties in question can be classed as administrative in nature. See P. CERBO, “*sanzioni amministrative*” entry in S. CASSESE (ED), *Dizionario di diritto pubblico*, Vol. VI, Milan, 2006, 5424 *et seq.*; C. E. PALIERO – A. TRAVI, *La sanzione amministrativa. Profili sistematici*, Milan, 1988; A. CARRATO, *L’opposizione alle sanzioni amministrative*, Milanofiori Assago, 2008, 195 *et seq.*

There has been talk¹⁶ of flexible ineffectiveness in view of the various degrees that it may or could take depending on the powers exercised by the court.

That ineffectiveness could be interpreted as serving a penalty-like purpose and in that sense would constitute the sanction that the legal system attaches to the contract in light of the nullity that affects it. That approach would be based on considering the infringed rules as mandatory ones, i.e. the Community rules on publication, and as such the approach would fall within the realm of classic nullity of a contract for breach of mandatory rules pursuant to the first paragraph of article 1418 of the Civil Code.

That view is confirmed by the terminology used by the law, which speaks in terms of a “declaration” of the ineffectiveness. However, the court judgment would not be a constituent one but a mere declaratory one, as is typical of nullity. From that standpoint, the mandatoriness of the rule and the declaratory nature of the judgment would be symptomatic of the fact that ineffectiveness falls within the scope of nullity conceived as a penalty.

It is clear that any such premise would have a number of corollaries. The first, is the absence of a time limit for bringing an action for nullity. It follows that the action could never be statute barred. Secondly, nullity can be raised irrespective of good faith on the basis of the specific rules laid down in the Civil Code. Thirdly, the principle, enshrined in articles 1421 *et seq.* of the Civil Code, that nullity can be raised by a court of its own motion would apply.

According to another approach the defining features of nullity are absent like, in particular, the automaticness of the judgment and the original nature of the contractual defect. Therefore, it would not be a case of ineffectiveness deriving from nullity but judicial

¹⁶ Among legal writers see M. LIPARI, *Il recepimento della “direttiva ricorsi”: il nuovo processo superaccelerato in materia di appalti e l’inefficacia flessibile del contratto nel d.lg. n. 53 del 2010*, *op. cit.*

termination¹⁷ since the court is given the power to terminate the contract in terms of its effects. The theory of termination is consistent with the discretionary power granted to the courts because it would then be a case of judicial termination that takes on the form of a constituent judgment.

Regarding the concept of ineffectiveness that one can deduce from the provisions of the Administrative Procedure Code, it appears that ineffectiveness differs in degree depending on whether article 121 or article 122 is involved.

Ineffectiveness under article 121 would be ineffectiveness in the form of a penalty falling within the *genus* of nullity, bearing in mind the gravity of the infringement and the extent of the court's discretionary power, whereas optional ineffectiveness under article 122 could be considered as falling within ineffectiveness deriving from termination¹⁸.

4. INEFFECTIVENESS OF THE CONTRACT FOLLOWING THE SETTING ASIDE OF THE AWARD BY A COURT OR BY THE CONTRACTING AUTHORITY ITSELF: WHICH COURT HAS JURISDICTION

Having examined the fate that befalls a contract after the setting aside of the award and considered the legal nature of ineffectiveness in light of the relevant legislative

¹⁷ So maintains AULETTA, *Le conseguenze dell'annullamento dell'aggiudicazione sul contratto medio tempore stipulato alla luce del d. lgs. 53 del 2010*, in *Rivista Nel Diritto*, 2010, 757 *et seq.*

¹⁸ Other approaches could be based not so much on the provisions of articles 121 and 122 but more on when the ineffectiveness runs from, such that ineffectiveness would constitute nullity conceived as a penalty when *ex tunc* and termination when *ex nunc*.

provisions, next one needs to analyse the critical issue of which court exactly has jurisdiction to assess the effects on the contract signed in the meantime.

In order to achieve its practical aim – taking over of the contract – the claimant needs both the award itself and the contract signed in the meantime with the successful tenderer to be eliminated.

A clear legislative choice has been made in this regard, which repudiates the view expressed by the Supreme Court in 2007¹⁹ that it was possible that one court could entertain the proceedings to review the legality of the award while another one could entertain those in relation to the repercussions on the contract.

Implementing Directive 2007/66/EC the legislator considered the disputed relationship to be a single indivisible one consisting of an award and a contract and granted exclusive jurisdiction in the matter to the administrative courts.

Moreover, it is necessary to ask oneself whether that jurisdiction concerns solely the ineffectiveness of the contract following the setting aside of the award by the court or also cancellation of the contract in cases where it is the contracting authority itself who sets aside the award.

Some caselaw²⁰ adopts a restrictive interpretation to the point that where a contracting authority sets aside an award on its own initiative, article 133 of the Administrative Procedure Code would not apply, it being necessary in that instance to bring specific action before the ordinary courts seeking ineffectiveness of the contract. According to that view the rule laid down in article 133 is one strictly connected with the provisions of articles 121 and 122 in accordance with which the administrative courts are granted power

¹⁹ Supreme Court (Civil Division) *en banc* judgment no. 27169 of 28 December 2007.

²⁰ See Regional Administrative Court of Tuscany judgment no. 154 of 27 January 2011.

to issue a declaration of ineffectiveness solely as a consequence of the setting aside of the award by the courts themselves. Accordingly, article 133 is to be read as an application of those provisions and cannot cover the setting aside of an award by other than a court.

By contrast recent caselaw of the Council of State²¹ has opted for a non-restrictive reading of article 133²² relying on logic and a literal approach to interpretation.

The Council of State held that the principle of concentration is an impediment to any separation of the legal proceedings given that the subject matter is one and the same. From that standpoint just one court alone can review the contracting authority's setting aside of the award on its own initiative, in other words, assess whether it is lawful or not and if it has repercussions on the effects of the ensuing contract. Holding otherwise would require the administrative courts to hear the case on the setting aside and the ordinary courts to hear the one on the effects of that setting aside.

It follows that this second view is to be preferred in which a single court decides the effects on a contract in all cases of setting aside, be the setting aside ordered by the court or the result of steps taken by the contracting authority itself on its own initiative.

That interpretation best fits the letter of the law, which would not appear to contain any limits. In addition, there is also the point that if one were to opt for an exclusionary interpretation one would end up treating totally identical situations differently and this would contradict the principle of concentration requiring that just one court should rule on

²¹ Council of State (Section V) judgment no. 5032 of 7 September 2011.

²² In interpreting the scope of application of this provision caselaw has recently analysed a further topical aspect, having to assess whether the provision in question applies solely to the contracts specified in article 1 of the Public Contracts Code (services, supplies, works: so-called 'Community' contracts) or also to other contracts, specifically if it applies to corporate contracts. In that regard see Supreme Court *en banc* judgment no. 30167 of 30 December 2011.

the dispute concerning the lawfulness of the contracting authority's own setting aside and the repercussions of that same setting aside on the contract.

The foregoing is further confirmed by the importance attributed nowadays to the principle of effectiveness of protection, specifically enshrined in article 1 of the Administrative Procedure Code and which informs the interpretation of the entire code including the provisions on jurisdiction²³.

As for the nature of the jurisdiction under article 133 of the Administrative Procedure Code, finally, it should be noted that some commentators had advanced the view that the jurisdiction of the administrative courts was not only exclusive but also extended to the merits²⁴. However, that view clearly conflicts with article 134 of the Administrative Procedure Code, which does not contemplate administrative courts' jurisdiction on the merits as including their review of a contract as a consequence of the setting aside of the award.

That said, the foregoing does not limit the power of the courts in light of the concept of flexible effectiveness and the possibility for the courts to graduate the effects of the declaration of ineffectiveness of the contract²⁵.

²³ See, in that regard, A. POLICE, *Le forme della giurisdizione*, in F. G. SCOCA, *Giustizia amministrativa*, III edition, Turin, 2009, 121 *et seq.*

²⁴ That approach, suggested by the content of Directive 2007/66/EC and what was envisioned in the first draft of the Legislative Decree drawn up to transpose it, found favour with CAPONIGRO, *La valutazione giurisdizionale del merito amministrativo*, in www.giustamm.it. Another writer maintained that there was an implied extension of jurisdiction to the merits: see LIPARI, *Il recepimento della "direttiva ricorsi"*, *op. cit.*

²⁵ See also E. FOLLIERI, *I poteri del giudice amministrativo nel decreto legislativo 20 marzo 2010, n.53 e negli artt. 120 e 124 del codice del processo amministrativo*, in www.giustamm.it, referring to

5. LITIGATION MATTERS. RECENT KEY ISSUES.

The third aspect that this work proposes to examine in a purely litigation context relates to assessing whether the claimant has to specifically seek a declaration of ineffectiveness and whether the court may declare ineffectiveness of its own motion.

The law is silent on the matter, so a number of different views are possible.

According to one interpretation, a specific request is not necessary and of its own motion the court may declare the ineffectiveness of the contract. In support of this view is a literal argument to the effect that the rule is constructed in a way as to admit a declaration of ineffectiveness by the court of its own motion as well as a further argument based on the assumption that as nullity is involved the declaration must necessarily come from the court of its own motion.

According to a second interpretation taking into account the provisions in the Administrative Procedure Code itself, one has to draw a distinction depending on whether article 121 or 122 is involved

In the former, as it is a case of nullity conceived as a penalty, the ineffectiveness should be declared by the court of its own motion. In the latter, if one accepts the view that it is actually a case of termination, then the party concerned would need to have specifically applied for a declaration of ineffectiveness.

“special exclusive jurisdiction, whereby although the administrative courts’ cognizance and decision-making powers might not cover the merits they are nonetheless on a special and different level compared to other matters, including exclusive jurisdiction”.

It would thus appear that administrative jurisdiction has developed in the direction of securing observance of the law, with the proceedings designed to safeguard an interest that to all intents and purposes transcends the claimant's individual one. On the other hand in article 122, informed by a model of jurisdiction in which there is no penalty aspect, it is the claimant who must seek the declaration of ineffectiveness.

Moreover, as for separating or unifying the proceedings on setting aside the award and those on the fate of the contract, in this author's view the latter is the correct interpretation. The law is clear in favouring *simultaneus processus* because the relevant provisions state that the court which sets aside is also the one which declares ineffectiveness in the same proceedings.

That approach is consistent with the choice made by the legislator in article 30 of the Administrative Procedure Code, in which it is provided that an active judgment can be issued in the same proceedings in which the setting aside of a decision is sought.

6. THE EFFECTIVENESS VS. INEFFECTIVENESS OF THE CONTRACT AND THE COURT'S ASSESSMENT

In light of what has been stated so far, one can conclude that the setting aside of the award may lead to the ineffectiveness of the contract or alternatively to the effects of the contract being maintained but accompanied by specific penalties.

Secondly, whether effectiveness or ineffectiveness is the outcome depends on precise legislative factors that in turn are informed by specific public interests protected by the law.

Finally, it is clear that the application of those factors and hence the assessment of the public interests that lead to the effectiveness or ineffectiveness of the contract are entrusted to the administrative courts having regard to the principle of proportionality.

It follows therefore that there is a dual standpoint from which a court must assess, on the one hand, a declaration of ineffectiveness of the contract when such is required to enable the contract to be taken over and, on the other hand, the continued effectiveness of the contract when there are important public interests in connection with performance of the contract.

It is also important to consider the breadth of the discretion that a court enjoys in deciding on ineffectiveness itself and when precisely that ineffectiveness runs from. In fact, the court is called upon to decide whether a contract is to be declared ineffective and if so whether to declare it *ex nunc*, *ex tunc* or partially *ex tunc*.

The choice that the court may make is thus conditioned by four variables and all of them may play a role given the wide discretion that the court enjoys.

Moreover, the types of ineffectiveness can also vary on a normative level given that articles 121 and 122 provide that the extent of a court's discretion differs according to how serious the breach is.

In cases under article 121, as mentioned before, ineffectiveness is the norm unless some very limited exceptions apply. Ineffectiveness is the rule, which can be derogated from solely in exceptional circumstances to do with overriding reasons of public interest. On the other hand, for more minor breaches, the law grants the courts wide powers of discretion without specifying a general rule nor particular conditions.

The rule is determined by the court depending on the facts of the case and not the wording of the legislation. In that case the court may – weighing the competing interests and evaluating partial performance or not of the contract and the other circumstances of the case, including the position of the opposing party – establish whether the contract should be declared ineffective and if so from what point in time.

In particular, ineffectiveness followed by the taking over of the contract has been defined as effective protection of competition while maintaining the effectiveness of the contract is more about protecting the public interest that the community may have in the

conclusion of the contract, understood as an objective exponential public interest not coinciding with the individual interest of the public administration, which is simultaneously fined.

The public interest underlying the contract does not necessarily prevail over the request to take over the contract but is an issue to be considered by the court, which in the actual case before it will have to assess – in light of various factors – which of the two interests must take precedence bearing in mind the principle of proportionality.

Moreover, the analysis conducted so far highlights the necessary interplay between the interests at stake, protecting competition, safeguarding the public interest and upholding the rights of the good faith awardee, whose overall mix is entrusted to the court for consideration.

In their actual weighing of opposing public interests²⁶, the courts²⁷ would seem to be able to rely on a discretion that is more characteristic of the exercise of administrative power²⁸.

²⁶ See in that sense Council of State judgment no. 7004 of 21 September 2010 according to which “When assessing damages for the loss deriving from failing to win a procurement award, full loss of profits is to be granted in the case of the setting aside of the award and certainty of the award for the claimant solely if the claimant proves that it was not otherwise able to use the labour and equipment kept on hand in view of the award. If that cannot be proved, it is to be held that the enterprise could reasonably have reused the labour and equipment for other works and services and thus in that instance the compensation must be reduced to take account of other actual earnings in the meantime and other sums that could have been earned in the meantime in an attempt to mitigate the loss. In that case, application of the above principle of *aliunde perceptum vel percipiendum* appears designed to avoid a situation whereby after obtaining the damages the injured party could well be better off”.

²⁷ See, recently, Council of State (Section III) judgment no. 6638 of 19 December 2011 according to which “the removal of the effects of the contract as a result of the setting aside of the award made in a

public competition is the object of a standard judicial decision. In fact, it is a matter for the administrative court to decide at its discretion (including in cases of serious infringements) whether to maintain the effects of the contract entered into in the meantime. This means that ineffectiveness is not an automatic consequence of the setting aside of the award, which merely triggers the power of the court to decide whether or not the contract must continue to be effective”. See also Regional Administrative Court of Sicily, Catania, judgment no. 839 of 26 March 2012 declaring inadmissible an appeal on the point that the economic interests invoked by the claimant cannot constitute the overriding reasons that make it imperative to maintain the effectiveness of the contract. The Court based its ruling on the current legislative framework, which provides that it is the court that has the power to decide on whether the contract is to be effective or ineffective.

²⁸ As for the aspects pertaining to jurisdiction, see Supreme Court (Civil Division) *en banc* judgment no. 27169 of 28 December 2007 and Council of State *en banc* judgments nos. 9 and 12 of 30 July 2008 ruling that the ordinary courts enjoy jurisdiction. See also Supreme Court (Civil Division) *en banc* judgment no. 2906 of 10 February 2010, which, going against the grain of well established caselaw, ruled that the administrative courts have exclusive jurisdiction in relation to the consequences of the setting aside of the award on the contract signed in the meantime. See also Regional Administrative Court of Lazio (Section III), Rome, judgment no. 2122 of 8 March 2011 according to which “in the matter of the awarding of public contracts, setting aside of the award and depriving the contract of its effects, in as much as deriving from a single situation, are matters for full and direct cognizance by the administrative courts because depriving the contract of its effects is ordered after an investigation that relates to specific conditions laid down by law and involves considerations of expediency that flank, in a totally autonomous manner, the reasons for the setting aside of the award”. This question, discussed in the literature, has been clarified in the Public Contracts Code and the Administrative Procedure Code. In particular, article 244.1 of the Public Contracts Code, now also point 1 of article 133.1(e) of the Administrative Procedure Code, provides that “exclusive jurisdiction extends to the declaration of ineffectiveness of the contract following the setting aside of the award”. Important among legal writers is the debate as to the nature of that jurisdiction. See 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. For a theory that what is involved is implied jurisdiction on the merits, see M. LIPARI, *Il recepimento della “direttiva ricorsi”*, *op. cit.*

In this sense the power of the courts envisioned by articles 34 and 114 of the Administrative Procedure Code is an expression of the growing breadth of the decisions that they can adopt.

From that perspective it is worth pointing out that the ordinary powers of the courts incorporate new powers of decision, cognizance and execution such that the assessment of the fate of the contract occurs within a single decision-making process with shades of both cognizance and execution to it.