

PUBLIC CONTRACTS

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1. THE ITALIAN IMPLEMENTATION OF EUROPEAN DIRECTIVES N. 2004/18/EC AND 2004/17/EC

The Italian market value for public procurements (concerning the total expenditure for the purchase of works, services and supplies) in 2008 exceeded the value of 221 billion

Euro (European Commission, Internal Market, *Public procurement indicators 2008*, april 27, 2010) equal to 14,08% of National GDP. The Italian Authority for the Control of public contracts, calculated the amount of resources involved contracts exceeding 150,000 euros was 79,4 billion euros in 2009, equivalent to 6.6% of GDP, while the previous year was 76 billion euro, representing 6% of GDP (Italian Authority for the Control of public contracts, *Relazione annuale 2009*, 22 giugno 2010). The amount of contracts covered by EU Directive n. 2004/18 was 58 billion euro (about 41.6% for work, approximately 24.8% for supplies and approximately 33.5% for services), and 21 billion concerned the special sectors (about 34.1% to work, about 33.2% to supplies and about 32.5% to services).

EU Directives of March 31, 2004, no. 2004/17 e n. 2004/18¹ regulating public contracts, works and supplies have been implemented in Italy by means of **Legislative Decree no. 163, of April 13, 2006 of the Public Contracts Code** (hereafter **PCC**).

1.1 The allocation of Legislative power between State and Region²

¹ **TREATIES:** C. Franchini (eds.), *I contratti di appalto pubblico*, Torino, UTET, 2010; M. Clarich (eds.), *Commentario al Codice dei contratti pubblici*, Torino, Giappichelli, 2010; C. Franchini (eds.), *I contratti con la Pubblica Amministrazione*, UTET, Torino, 2007, I e II, in P. Rescigno – E. Gabrielli (eds.), *Trattato dei contratti*, Torino, UTET, 2007; A. Carullo – G. Iudica, *Commentario breve alla legislazione sugli appalti pubblici e privati*, Cedam, Padova, 2009; A. Grazzini, *Appalti e contratti - Percorsi giurisprudenziali*, Giuffrè, Milano, 2009; M. A. Sandulli - R. De Nictolis - R. Garofoli (eds.), *Trattato sui contratti pubblici*, Giuffrè, Milano, 2008; M. Baldi – R. Tomei, *La disciplina dei contratti pubblici - Commentario al codice appalti*, Ipsoa, Milano, 2009.

² **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.

The State has exclusive legislative competence on competition and consequently, on public contracts³. In time Regions have filed claims before the Constitutional Court so as to assert their competence on: public contracts design and planning (Corte Cost. n. 221/2010); contracts below threshold (Corte Cost. n. 401/2007); exclusion of abnormally low tenders (Corte Cost. n. 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 Control of public contracts

Italian PCC (art. 6) envisages the institution of the Italian Authority for the Control 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 submits proposals of legislative amendments to PCC to the Government and opinions on the correct interpretation and implementation of the PCC. It also prepares for the Parliament an annual report on public contracts award and execution (for further reference visit www.avcp.it).

The Authority's Monitoring Board on public contracts was created to collect and process data on public contracts over 150 thousand euro awarded and executed in Italy, so as to define standard cost according to territory and sector.

The Monitoring board has also recently started to manage a database of non compliant bidders that were excluded from public bids due to violations or false declarations, either in the selection or in the execution phase.

³ Art. 117, co. 2, lett. e, l, m, s, Cost.

The Authority's activities are funded by the State, the awarding authorities and partly by bidders. Their set contribution, in fact, is mandatory for participation in the award procedures.

2. SUBJECTIVE AND OBJECTIVE COVERAGE, IN HOUSE PROVIDING, CONCESSIONS, PFI AND PPP

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**⁴. 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., n. 8225/2010). On the other hand, three companies entrusted respectively with the tasks of building and operating airport facilities (Cass., SS.UU., ord. n. 23322/2009), highway facilities (T.a.r. Lazio, Roma, sect. III, n. 2369/2009 e T.a.r. Puglia, Bari, sect. I, n. 399/2009) and organizing a Public Fair were considered bodies governed by public law.

⁴ **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**⁵ requirements through ECJ case-law (ECJ, C-324/07, *Coditel Brabant SA*; ECJ, C-573/07, *Sea s.r.l. v Comune di Ponte Nossia*) 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, sect. V, 3 February 2009, n. 591, Cons. Stato, sect. V, 9 March 2009, n. 1365 e Cons. Stato, sect. v, 26 August 2009, n. 5082). 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. n. 439/2008) but 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 authorities other than the controlling ones (l.d. n. 223/2006 converted by law n. 248/2006).

The most recent exception to public procurement rules set out by 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, did not yet

⁵ **IN-HOUSE PROVIDING**: for the similar control requirement see R. Cavallo Perin, D. Casalini, *The control over in-house providing organizations*, in *Public Procurement Law Review*, n. 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.

find application in our national case-law. Nonetheless, several forms of cooperation and joint exercise of public tasks among local public authorities are long known in the Italian legal system (art. 15, law n. 241/1990 and art. 31-33, l.d. n. 267/2000) and were recently favoured or even imposed by the budgetary law (l. n. 244/2007, art. 2, § 28; l.d. n. 78/2010, art. 14, § 25-31).

The awarding of **public services concessions** 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 State Council 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 n. 7024).

As for **project financing initiative**⁶, following a EU Commission infringement procedure against Italy, (Cons. Stato, IV, 13 January 2010, n. 75), Italian legislation was amended, restoring equality of treatment between the promoter and any other participant (art. 153, § 1-14 modified by l.d. n. 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. plen., 15 April 2010, n. 1; Cons. Stato, V, 28 May 2010, n. 3399).

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

⁶ **PFI**: G. Manfredi, *La finanza di progetto dopo il d.lgs. n. 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.

qualification as **non-profit organisation**⁷, 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, n. 3638; Cons. Stato, V, 25 February 2009, n. 1128; Cons. Stato, sect. V, 26 August 2010 n. 5956).

3. AWARDING PROCEDURES

3.1 Qualitative selection of tenderers and technical specifications

In Italy, there's a specific system for **work suppliers' suitability requirements' verification**⁸, according to which licensed private companies (SOAs) have the task of certifying and assessing the qualification requirements of undertakings which provide works (art. 34 e 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).

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

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

⁸ **WORK SUPPLIERS QUALIFICATION SCHEME:** L. Giampaolino, *Il codice degli appalti e il sistema di qualificazione*, in *Riv. trim. appalti*, 2009, 301.

principles such as *favor participationis*, **equality of treatment** and **non discrimination**⁹, in order to allow for the widest possible participation.

Italian PCC was amended in order to comply with an ECJ decision (ECJ, sect. 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 follow a specific procedure which the participants are allowed to take part in. 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, n. 247; Cons. Stato, VI, 26 February 2010, n. 1120; C.G.A., 21 April 2010, n. 546; Cons. Stato, VI, 7 April 2010, n. 1967; Cons. St., sect. V, 6 April 2009, n. 2139; Cons. St., sect. V, 8 September 2008, n. 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, n. 690). Italian case-law requires a specific procedure to assess the **substantial links**¹⁰ among tenderers in order to allow their exclusion (Cons. St., sect. IV, 12 March 2009 n. 1459; C. Stato, sect. V, 20 August 2008, n. 3982) and rules for the recording of the exclusion by the Authority for the control of public contracts (Cons. Stato, VI, 15 June 2010, n. 3754; Cons. Stato, VI, 5 February 2010, n. 530).

⁹ **FAVOR PARTECIPATIONIS AND EQUALITY OF TREATMENT:** 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.

¹⁰ **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.

A widespread ground of exclusion is the false or defective self-declaration of the **personal situation requirements**¹¹ by the tenderers (T.a.r. Piemonte, sect. II, 16 March 2009, n. 772; Cons. Stato, V, 2 February 2010, n. 428; Cons. Stato, VI, 6 April 2010, n. 1909; Cons. Stato, V, 11 May 2010, n. 2822; Cons. Stato, VI, 22 February 2010, n. 1017; Cons. Stato, V, 13 July 2010, n. 4520; Cons. Stato, V, 26 May 2010, n. 3364; Cons. Stato, V, 23 February 2010, n. 1040) that are required even with regard to the economic operator whose qualitative requirements the tenderer relies upon (Cons. Stato, VI, 6 April 2010, n. 1930; Cons. Stato, V, 23 February 2010, n. 1054; Cons. Stato, VI, 15 June 2010, n. 3759). 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, n. 1550; Cons. Stato, VI, 28 July 2010, n. 5029)

3.2 Negotiated procedure and competitive dialogue

The **negotiated procedure** is frequently used in Italy: as for the public contracts (including those below threshold) awarded in 2009, more than 30% (with peaks of more than 60% in the sectors covered by directive n. 17/2004) of the overall tendering procedures are negotiated procedure, accounting for a 20%-25% of the total public contracting

¹¹ **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 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.

expenditure. 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 n. 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**¹² in Italy has been postponed until the entry into force of the Government regulation enforcing the code (Art. 253, § 1-*quarter* PCC), foreseen in the near future. 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 n. 18/2004).

3.3 Evaluation criteria

¹² **COMPETITIVE DIALOGUE**., 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 **distinction between qualitative requirements and selection criteria**¹³ (ECJ, sect. 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., sect. V, n. 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., Sect. V, 21 May 2010, n. 3208; Cons. St., sect. V, 12 June 2009, n. 3716; Cons. St., sect. V, 2 October 2009, n. 6002; Cons. Stato, V, 22 June 2010, n. 3887).

In case of awarding on the ground of the **most economically advantageous tender criterion**¹⁴, the contracting authority must appoint a **jury**¹⁵ 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, 31 March 2010, n. 1830; Cons. Stato, V, 14 June 2010, n. 3732; Cons. Stato, V, 30 April 2009, n. 2761) and they must be appointed before the opening of the envelopes that contain the offers (Cons. Stato, V, 6 July 10, n. 4311).

¹³ **DISTINCTION BETWEEN QUALITATIVE REQUIREMENTS AND SELECTION CRITERIA:** M. E. Comba, *Selection and Award Criteria in Italian Public Procurement Law*, in *Public Procurement Law Review*, 2009, 122; A. Annibaldi, *Requisiti di idoneità e criteri di aggiudicazione dell'offerta*, in *Urb. e app.*, 2010, 201.

¹⁴ **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; 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.

¹⁵ **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.

According to the principle of **transparency**¹⁶, 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, n. 3634).

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 (T.a.r. Piemonte, sect. II, 19 March 2009, n. 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 n. 119 of 22 January 2007; n. 90 of 20 March 2008; n. 125 del 23 April 2008; n. 183 del 12 June 2008; Cons. Stato, V, 8 September 2008, n. 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**¹⁷ 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 bidders 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 V, 9 April 2010, n. 2004; Cons. St., V, 22 June 2010, n. 3890; Cons. St., VI, 17 December 2008, n. 6278). Some problems may arise when the price element of the tender is zero, since the mathematical 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, n. 4624).

¹⁶ **PUBLICITY OF SESSIONS:** 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.

¹⁷ **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.

In case of **abnormally low tenders**¹⁸, the contracting authority shall verify their constituent elements by consulting the tenderer, taking account of the evidence supplied (Cons. Stato, VI, 15 July 2010, n. 4584; Cons. Stato, sect. IV, 30 October 2009 n. 6708; Cons. St., sect. V, 13 February 2009 n. 826; T.a.r. Puglia, Lecce, III, 24 September 2009 n. 2186) even when the contract documents require the tenderer to provide in **advance**¹⁹ the justifications of some elements of the tender when the latter is submitted (Cons. Stato, V, 17 February 2010, n. 922; Cons. Stato, VI, 2 April 2010, n. 1893). 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 n. 443), the timetable of the contract performance (T.a.r. Calabria, Reggio Calabria, 4 June 2010 n. 532) and the reutilization of materials and ancillary services produced during the contract performance (T.a.r. Lazio, Roma, III *ter*, 20 May 2010 n. 12518).

¹⁸ **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 n. 313/2010*, in www.giustamm.it.

¹⁹ G. Fares, *Sulle conseguenze dell’omessa presentazione delle giustificazioni preventive*, in *Foro Amm.-Tar*, 2009, 813.

Public purchasing aggregation²⁰ has been one of the main focus of the recent Italian legislation who established central purchasing bodies at the local level²¹ able to network with the national central purchasing body (Consip)²² which, since 2000²³, is entrusted with the task of awarding framework contracts which the government administrations are compelled to take part in²⁴. However it is worth noticing that the framework contracts 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**²⁵ for their own purchasing²⁶ (Cons.

²⁰ **PURCHASING 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.

²¹ L. 27 december 2006, n. 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/>.

²² See agreement of 21 december 2009 between SCR-Piemonte S.p.A. and Consip S.p.A., in <http://www.consip.it>.

²³ L. 23 december 1999, n. 488, *legge finanziaria per l'anno 2000*, art. 26.

²⁴ legge 23 december 1999, n. 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, n. 350, *Budgetary law for 2004*, art. 3, § 166; d.l. 12 July 2004, n. 168, art. 1, conv. in L. 30 July 2004, n. 191; L. 24 december 2007, n. 244, art. 2, § 574, *Budgetary law for 2008*.

²⁵ **BENCHMARKS:** Art. 1, c. 4, lett. c, d.l. 12 July 2004, n. 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.

St., sect. V, 2 February 2009, n. 557) and local civil servants who fail in enforcing these benchmarks are **liable** (C. conti, sect. giur. Reg. Valle d'Aosta, 23 November 2005, n. 14).

3.4 Contracts below the EU thresholds

In Italy, public **contracts below threshold**²⁷ 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 n. 18/2004; Cons. Stato, sect. V, 9 June 2008 n. 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, sect. cons. atti normativi, 6 February 2006 n. 355/06; ECJ, sect. IV, 23 December 2009, in C-376/2008, *Serrantoni Srl and Consorzio stabile edili Scrl v Comune di Milano*; ECJ, sect. IV 15 May 2008, C-147/06 *SECAP Spa v Comune di Torino* e C-148/06 *Santorso soc.*

²⁶ L. 23 december 1999, n. 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).

²⁷ **CONTRACT BELOW THRESHOLD:** 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.

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).

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, sect. I, 9 June 2010, n. 13722; T.a.r. Piemonte, sect. II, 19 march 2009, n. 785; T.a.r. Toscana, sect. II, 22 June 2010, n. 2025).

Contracting authorities often purchase below threshold through the e-marketplace established by Consip (*Mercato Elettronico della Pubblica Amministrazione*²⁸ - 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.

3.5 Environmental and Social Considerations²⁹.

²⁸ **E-MARKETPLACE – MERCATO ELETTRONICO DELLA PUBBLICA AMMINISTRAZIONE**: d.P.R. 4 april 2002, n. 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*.

²⁹ **SOCIAL AND ENVIRONMENTAL CONSIDERATIONS**: R. Caranta – S. Richetto, *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.

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, n. 68; Cons. Stato, V, 19 June 2009, n. 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, n. 3900).

4. EXECUTION OF THE CONTRACT

The Italian PCC regulates the **public contract performance phase** as well (Cons. giust. amm. sic., sect. giurisdiz., 21 July 2008, n. 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 undertaken³⁰. 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.

³⁰ **CONTRACT PERFORMANCE:** 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.

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, n. 3347). A specific discipline concerns **subcontracting**³¹ (art. 118, PCC) which has to be authorized by the contracting authority (Cons. Stato, sect. IV, 24 March 2010 n. 1713; T.a.r. Lazio, Roma, sect. III, 4 January 2010 n. 34) and entails the disclosure of the subcontractors at the tender submission (Cons. Stato, sect. V, 14 May 2010 n. 3016; Cons. Stato, sect. IV, 30 October 2009 n. 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, sect. III, 19 June 2008, in C-454/06, *Pressetext Nachrichtenagentur GmbH v Republik Österreich*, see also: ECJ, sect. III, 29 April 2010 C-160/08, *EU Commission v Germany*; ECJ, sect. Grande, 13 April 2010, in C-91/08, *Stadt Frankfurt am Main*; ECJ, sect. III, 25 March 10, in C- 451/08, *Helmut Müller GmbH*). In Italy any **extension of a public contract**³², 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, n. 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 n. 2026).

³¹ **SUBCONTRACTING:** G. Balocco, *Mancanza od irregolarità della dichiarazione di subappalto ed esclusione dalla gara*, in *Urb. e app.*, 2009, 1132.

³² **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.

5. THE ITALIAN IMPLEMENTATION OF EUROPEAN REMEDIES DIRECTIVE 2007/66/EC

EU Directive n. 2007/66 has been implemented in Italy by the leg.d. 20 March 2010, n. 53 now included in the new Code of administrative procedure (*Codice del processo amministrativo*, d.lgs. 2 July 2010, n. 104 – hereafter CAP)³³. The new Code of 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 n. 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 n. 2007/66, the administrative courts can declare the award void and the contract ineffective (Cass.,

³³ **JUDICIAL REVIEW:** M. Lipari, *La direttiva ricorsi nel codice del processo amministrativo: dal 16 settembre 2010 si cambia ancora?*, in *Foro Amm. - T.a.r.*, 2010, (5) LXXIII; M. Lipari, *Il recepimento della «direttiva ricorsi»: il nuovo processo super-accelerato in materia di appalti e l'inefficacia «flessibile» del contratto*, www.giustamm.it; V. Lopilato, *Categorie contrattuali, contratti pubblici e i nuovi rimedi previsti dal d.leg. n. 53 del 2010 di attuazione della direttiva ricorsi*, www.giustamm.it; M. Lipari, *Annullamento dell'aggiudicazione ed effetti del contratto: la parola al diritto comunitario*, in 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; F. Saitta, *Contratti pubblici e riparto di giurisdizione: prime riflessioni sul decreto di recepimento della direttiva n. 2007/66/CE*, 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; 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; V. Cerulli Irelli, *Osservazioni sulla bozza di decreto legislativo attuativo della delega di cui all'art. 44 l. n. 88/09*, in 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.

SS.UU., ord. 5 march 2010, n. 5291; Cass., SS.U., ord. 10 february 2010, n. 2906; Cons. Stato, V, 15 June 2010, n. 3759), whereas the ordinary courts maintain the competence over the disputes raising during the performance phase (Cons. Stato, VI, 26 may 2010, n. 3347; Cons. Stato, V, 1 April 2010, n. 1885), save the application of special public law rules in this phase (e.g. subcontracting: Cons. Stato, IV, 24 march 2010, n. 1713).

The administrative courts shall grant the renewal of the illegal awarding phases and the following new award³⁴, whenever it is possible (Cons. Stato, V, 9 march 2010, n. 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 damages³⁵ (Cons. Stato, V, 15 June 2010, n. 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, Sect. I, 14 July 2010, n. 16776), as well as the relevant derogations provided for in EU Directive n. 89/665/EEC, art. 2b as amended by EU Directive n. 2007/66.

³⁴ 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.

³⁵ **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'Acì, *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 damages³⁶ 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, n. 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, sect. VI, 21 September 2010, n. 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 operator would have achieved with the contract performance (amounting to a 1-5% of the contract value) (Cons. Stato, sect. VI, 27 April 2010, n. 2384).

³⁶ **QUANTIFICATION OF DAMAGES:** 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*, n. 2/2009, 281; H. Simonetti, *Il giudice amministrativo e la liquidazione del danno: temi e tendenze*, in *Foro it.*, 2009, III, 313.

6. WEB SITES

www.gazzettaufficiale.it Gazzetta Ufficiale della Repubblica Italiana
www.cortecostituzionale.it Corte Costituzionale
www.quirinale.it Presidenza della Repubblica
www.parlamento.it Parlamento italiano
www.camera.it Camera dei deputati
www.senato.it Senato della Repubblica
www.governo.it Governo italiano Presidenza del Consiglio dei Ministri
www.sviluppoeconomico.gov.it Ministero dello Sviluppo economico
www.cnel.it Consiglio Nazionale dell'Economia e del Lavoro
www.cortedicassazione.it Corte Suprema di Cassazione
www.giustizia-amministrativa.it Consiglio di Stato – Tribunali Amministrativi Regionali
www.corteconti.it Corte dei Conti
www.agcm.it Autorità garante della concorrenza e del mercato
www.agcom.it Autorità per le garanzie nelle comunicazioni
www.bancaditalia.it Banca d'Italia
www.garanteprivacy.it Autorità garante per la protezione dei dati personali
www.avcp.it Autorità per la vigilanza sui Contratti pubblici
www.consip.it: Consip S.p.A.:
www.cnipa.gov.it Centro nazionale per l'informatica nella pubblica amministrazione
www.autorita.energia.it Autorità per l'energia elettrica e il gas
www.giustizia-amministrativa.it Consiglio di Stato
www.appaltiecontratti.it Appalti e contratti
www.giustamm.it Giustizia amministrativa
www.neldiritto.it Neldiritto:
<http://dejure.giuffre.it> DeJure
www.astrid-online.it Astrid
www.lexitalia.it Lexitalia
www.consip.it/on-line/Home/Pressroom/QuaderniConsip.html Quaderni Consip
www.diritto-amministrativo.org Associazione italiana professori di diritto amministrativo
www.progetto-oplab.org OPLAB Laboratorio sulle opere pubbliche
www.planpublicprocurement.org/main/ Procurement law academic network

www.contrats-publics.net/inhalte/home.asp Public contracts in legal globalization