

The New Italian Public Procurement Code

The Italian Council of Ministers approved a new Legislative Decree reforming the Italian Public Procurement regulation, implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU.

On April 18, 2016, the Italian Government definitively approved Legislative Decree no. 50, implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU of the European Parliament and European Council of 26 February 2014 “on public procurement and awarding concession contracts, procurement by entities operating in the water, energy, transport and postal services sectors and on the reorganization of the Public Procurement Regulation” (New Code). The New Code’s entry into force on April 19, 2016 is likely to produce uncertainties for economic operators, pending the competent authorities’ issuance of the relevant soft-law instruments (*i.e.* general guidelines which the Ministry of Infrastructure and Transport (*Ministero delle Infrastrutture e dei Trasporti*) will issue based on input from the National Anti-bribery and Corruption Authority (ANAC). Pending the issuance of such soft-law instruments, certain provisions implementing the previous Italian Public Procurement Code will continue to be valid. This *Client Alert* briefly summarizes the main changes following this reform.

Summary of the main regulatory changes:

1. Strengthens the ANAC role
2. Creates a qualification system of contracting authorities and other provisions to consolidate public tenders
3. Updates award criteria to include preference based on the “most economically advantageous tender”
4. Includes new regulation on subcontracting
5. Includes clauses ensuring compliance with collective bargaining agreements (*clausole sociali*)
6. Specifies the regulatory framework concerning awarding concessions
7. Introduces the European Single Procurement Document (ESPD)
8. Introduces a new financial guarantees system
9. Outlines three projects for public building construction planning
10. Introduces an autonomous public/private partnership regulation
11. Overturns the “Aim Law” (*Legge Obiettivo*) for infrastructure planning
12. Renews the general contractor regulation and creates a register of directors and inspectors
13. Outlines requirements to participate in public procurement procedures
14. Sets forth contracting authorities’ reward criteria
15. Contracts to be divided into sections
16. Updates dispute resolution mechanisms

Preliminary remarks on the main regulatory changes:

1. Strengthens the ANAC role

Certain measures of the New Code are aimed at strengthening ANAC's supervisory functions, its support and promotion of best practices and its role in simplifying the information sharing process among contracting authorities.

ANAC has been appointed to issue certain orientation guidelines, contracts, call to tender models and other soft-law instruments.

2. Creates a qualification system of contracting authorities and other provisions to consolidate public tenders

ANAC maintains a register of qualified contracting authorities, which includes the central contracting authorities (*Centrali di committenza*). The qualification system for determining qualified contracting authorities relates to authorities entering into a specific kind of contract, and depends on the complexity of the contract and the value of the underlying contract (value ranges are provided in the New Code). Authorities constituting qualified contracting authorities are selected based on certain criteria regarding technical and organizational abilities.

The contracting authorities will be able to conduct independent tenders (without using central contracting authorities) for supplies and services with a value below €40,000 and for works with a value below €150,000. If the value supersedes these thresholds, contracting authorities are required to use the information technology (IT) platform provided by the central contracting authorities if the contracting authorities are qualified contracting authorities. If not qualified, they will have to perform the execution of works and purchase of supplies or services by means of central contracting authorities or through a union with qualified contracting authorities.

3. Updates award criteria to include preference based on the “most economically advantageous tender”

The New Code provides that the “most economically advantageous tender” award criteria shall always apply for social services, hospital scholastic and welfare catering services, labor-intensive services and engineering and architecture services tender processes with a value over €40,000.

A technical commission composed of experts registered in a public register held by ANAC shall be appointed to supervise any tender process from a technical perspective.

4. Includes new regulation on subcontracting

Private contractors will be able to enter into subcontractor agreements with third parties for services, supplies or works included in their contracts, provided that: (i) the relevant subcontracted quota does not exceed 30% of the contractual value, (ii) the private contractor received prior authorization from the contracting authority and (iii) the ability to subcontract is expressly provided in the call to tender.

Any bidder shall explicitly indicate in its offer any share of the contract it intends to subcontract to third parties, the name of the proposed subcontractors and prove that there are no grounds to exclude such subcontractors.

5. Includes clauses ensuring compliance with collective bargaining agreements (*clausole sociali*)

Calls to tender and invitations to tender, in particular those referring to labor-intensive activities, can include clauses ensuring compliance with collective bargaining agreements, so that the stability of the workers employed in the performance of the contract is granted in compliance with European law. Under the New Code, the expression “labor-intensive services” refers to services characterized by a labor cost that is at least 50% of the global value of the contract.

6. Specifies the regulatory framework concerning awarding concessions

For the first time, a specific regulatory framework is dedicated to awarding concessions. The distinguishing feature of concessions compared to other public contracts is that they always involve the transfer of an economic risk related to the operation of the works or services to the concessionaire.

Such operating economic risk involves the possibility that the concessionaire will not recoup the investments made and the costs incurred in conducting the works or services awarded under normal operating conditions. This risk involves actual exposure to market fluctuations, such that any potential loss the concessionaire incurs shall not be merely nominal or negligible.

In the event that an economic operator has been awarded with a concession contract: (i) with a value exceeding €150,000, (ii) without having participated in public procurement procedures and (iii) still valid at the date of the entry into force of the New Code, such economic operator must allow third parties to conduct works, services and supplies under the contract — equalling 80% of the contractual value — by participating in a public tender.

7. Introduces the European Single Procurement Document (ESPD)

At the time of submission of tenders’ requests to participate, contracting authorities must accept the European Single Procurement Document (ESPD), which shall be provided exclusively in electronic form from April 18, 2018. The ESPD consists of an updated self-certification confirming that the relevant economic operator fulfils the contracting authority’s requirements and conditions in order to participate. This self-certification replaces — at a preliminary stage — all certificates issued by public authorities or third parties.

8. Introduces a new financial guarantees system

With reference to works of a specific value, the “global financial guarantee” provided under the previous legal regime has been repealed and substituted by two different guarantees required under the New Code: the “fair fulfilment guarantee” (*Garanzia di buon adempimento*), which exists until the work is completed without any possibility of release and the “termination guarantee” (*Garanzia per la risoluzione*) to cover costs (corresponding to the value of the damages suffered) incurred due to need to conduct another public procurement procedure in order to re-enter into the relevant contract with a third party, in case the relationship with the original contractor cannot continue, and to cover costs for the new contractor.

9. Outlines three projects for public building construction planning

The New Code furthers high quality standards for public works and attempts to limit excessive cost increases due to project variances in the execution of the works. Specifically, according to the New Code, the contracting authorities’ public building construction planning must be organized according to three projects: (i) the new “technical and economic feasibility” project; (ii) the definitive project and (iii) the executive project, which constitutes the planning standard for all bidders. The technical and economic

feasibility project is meant to increase the technical and economic quality of the project, since the technical and economic feasibility analysis will be drafted on the basis of geological and geotechnical surveys, and preventive archeological checks, with the cost-benefit analysis as the main objective.

A progressive introduction of open electronic modeling tools has also been provided, in order to enable a better definition of the projects starting from the first phase of planning.

10. Introduces an autonomous public/private partnership regulation

The New Code also introduces the first autonomous public/private partnership regulation. The private partner's operating income can derive from the fee paid by the contracting authority as well as from other forms of economic compensation (e.g. a direct revenue from the users of the service). Many different forms of public/private cooperation are provided, such as the involvement of citizens in the care of public areas or in the enhancement of unused public buildings, through cultural initiatives and urban quality actions (e.g. the "administrative exchange" (*baratto amministrativo*) which provides for the possibility for citizens to realize savings on taxes, in case they perform activities of public interest).

11. Overtakes the "Aim Law" (*Legge Obiettivo*) for infrastructure planning

The New Code overtakes the "Aim law." The planning of infrastructure and other interventions essential for the country's development have previously been led under the scope of application of the ordinary instruments such as the "General plan for transports and logistics" (*Piano generale dei trasporti e della logistica*) and the "Multiannual planning documents" (*Documenti pluriennali di pianificazione*) provided by Legislative Decree no. 228/2011.

In order to prepare the first Multiannual planning document, the Ministry of Infrastructure and Transport (*Ministero delle Infrastrutture e dei Trasporti*) together with an *ad hoc* agency (*Struttura tecnica di missione*), will review the measures already included in the planning instruments in force (project review). The Ministry of Infrastructure and Transport is to create *ad hoc* funds to improve the expenditure planning capacity for infrastructure of significant national interest. The first allocation of resources will ensure respect for all existing commitments and assignments which the Interministerial Committee for Economic Planning previously decided on. However, such existing commitments can be amended by following the relevant procedures provided by a decree to be issued by the Ministry of Infrastructure and Transport and the Minister for Economic and Financial Affairs.

12. Renews the general contractor regulation and creates a register of directors and inspectors

The general contractor regulation has also been revised.

A general contractor cannot be entrusted as the person responsible for public procurement procedures (*responsabile unico del procedimento*) or works' director. Moreover, awarding works to a general contractor must be approved by the contracting authority on the basis of the complexity, quality, safety and economic characteristics of the public building.

Contracting authorities are no longer entitled to set up public procurement procedures through prior invitation to certain potential bidders and the definitive project shall constitute the standard for all tenders.

The Ministry of Infrastructure and Transport (*Ministero delle Infrastrutture e dei Trasporti*) will create a national register to identify people who can be entrusted with the role of director and inspector of works for contracts awarded pursuant to the regulation on general contractors.

The New Code explicitly excludes certain persons from performing the role of inspector and of compliance supervisor, in particular those who performed or are still performing supervision activities with reference to the same contract.

13. Outlines requirements to participate in public procurement procedures

Under the New Code, the contracting authorities are entrusted with new powers. A contracting authority may exclude a bidder if the authority can prove that the bidder was guilty of serious misconduct that prejudices its integrity or reliability (e.g. breaches in the performance of a previous contract causing early termination or attempting to influence an award or to obtain confidential information for its own advantage).

14. Sets forth contracting authorities' reward criteria

The contracting authorities can select the reward criteria to be used in the evaluation of tenders in the call to tender and in the invitations to bidders. These criteria must take into account the "legality" rating of the bidder (expressing its inclination to law-abiding behaviors (*rating di legalit *), the low environmental impact of works, supplies or services, and low impact on the employees' health and safety. Also micro-, small- and medium-sized enterprises (SMEs), young professionals and new enterprises' participation must be supported using these criteria.

15. Contracts to be divided into sections

In order to facilitate SMEs' access to public procurement contracts, contracting authorities shall divide contracts into sections (*i.e.* shares of the contract) to reduce the size of contracts so as to be in line with the actual capacity of SMEs as economic operators.

If a contracting authority determines that dividing the contract into lots would be inappropriate, the call to tender and the invitations to bidders should contain an indication of the main reasons for the contracting authority's determination. Furthermore, contracting authorities are expressly prevented from aggregating the value of the lots in an artificial and misleading way.

16. Updates dispute resolution mechanisms

In order to streamline trials relating to public tenders, certain alternative methods of settling disputes are provided. Moreover, a specific hearing in closed session behind the TAR (*Tribunale Amministrativo Regionale*, *i.e.* the administrative court of first instance in the Italian judicial system) has been introduced. According to the regulation of such administrative proceeding, any breaches of the relevant legal provisions pertaining to grounds for exclusion are considered directly damaging thus allowing the injured party to take the matter to the TAR, within 30 days from the publication of the list of the excluded bidders. Once the 30-day term expires, the remedy for such breaches is no longer available.

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