



The impact of COVID-19 on public contracts from the perspective of the Italian legislation. Measures adopted and PPP contracts.

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[Good evening to all the participants and many thanks to UNCITRAL Secretariat for the invitation and for giving us the opportunity to bring our experience to this Panel. My brief contribute will focus on Italian experience, from the point of view of Italian Anti-Corruption Authority, which I belong to, as an official. The contribution has been draft with the coordination of Professor Nicoletta Parisi, member of the Board of ANAC, in charge of international activity, and the precious collaboration of my colleague Silvia Pomes. Laura Mascali.]

This presentation briefly describes: (1) the impact of the sanitary emergency due to Covid 19 on public procurement in Italy, (2) the most important measures adopted by Italian Government, and the guidelines provided by Italian Anticorruption Authority to support public procurement sector. (3) It also focuses on particular cases occurred, related to PPP contract, in order to outline the main criticalities that the emergency brought out.

1. IMPACT OF THE COVID_19 EMERGENCY

The Italian Anti-Corruption Authority Annual Report, submitted to the Government and the Parliament on 2 July 2020, points out how Covid_19 emergency deeply affected public procurement in Italy. Since 2017 the demand for public contracts in Italy has grown significantly and the positive trend continued in 2019 with an overall increase of about 8% in the number of procedures started, and of about 23% in the amount of public expenditure. On the opposite, the first quarter of 2020 shows a relevant decrease in the procurement procedure (taking into account new calls for tenders) which is hovering around 24% (as far as it concerns the number of procedures) and 33% (as far as it concerns the global economic amount).

Looking closer to the procurement strictly dealing with the necessity to face the ongoing sanitary emergency, the global amount stands around 3 billion euros, the 95% of which refers to health supplies of protective devices, medical fans and gowns. The majority of public contracts over 40.000 euro have been awarded through procedures with no publication of the tender (77%) or through direct assignment (20%), mainly by central purchasing bodies or central bodies (around 57%).

2. LEGISLATIVE PROVISIONS

In order to deal with the COVID-19 Emergency, the Italian Government introduced regulatory interventions and legislative amendments to the Italian Public Contracts Code (Legislative Decree no. 50 of 2016). This aimed at speeding up and streamlining public procurement processes, increasing the possibilities for Contracting Authorities to use simplified procurement procedures, extending deadlines for administrative procedures (at the request of a party or ex officio) pending on 23 February 2020, and ensuring the supply of personal protective equipment and medical devices related to the emergency. Most of the substantial law amendments has been introduced with [ANAC – Autorità Nazionale Anticorruzione](#)



Decree Law No. 18 of 17 March 2020, (the so-called "Cura Italia"), which provided the possibility, for the Contracting Authorities, to recourse to the negotiated procedure without a prior call for tenders and to sign the contract and execute it immediately after the end of the procedure without having to comply with the stand-still period of 35 days.

Moving from information given by the UE Commission with the Communication 2020/C 108 I/01 concerning options and flexibilities available under the EU public procurement framework for the purchase of the supplies, services, and works needed to address the emergency situation related to the Covid 19 crisis the Italian National Anti-Corruption Authority has issued a special HANDBOOK. It was published on 9 April 2020 with the aim of supporting Contracting Authorities with a systematic overview of the already existing law provisions which ordinarily allow accelerated and simplified tender procedures for the award of public works, services, and supplies even beyond the sanitary emergency and the Health sector.

This with a view to promoting and supporting a more general economic recovery, ensuring a speedy timeframe for tendering proceedings and reducing the risk of irregularities and disputes. The National Anti Corruption Authority is also providing technical support to the Government in the ongoing process of legislative reform in the field of public procurement, with an attempt of balancing instances of acceleration and simplification, form one side, and the compliance with the European general principles on public procurement, and, moreover, safeguards for legality and transparency, on the other side.

Among the available simplification measure, if legal requirement are met, it is possible to mention:

- **the assignment without prior publication of the notice** (Art. 63 of Legislative Decree no. 50/2016) **when specific conditions occurs;**
- **the reduction of the terms of the ordinary award procedures** (Art. 60, paragraph 3; Art. 61, paragraph 6, of Legislative Decree no. 50/2016) **with reference to both above-threshold and below-threshold tenders**, including tenders in special sectors, on duly justified grounds of urgency, the deadlines may be reduced;
- **the exclusion of the stand still period** (Art. 32, paragraph 10, of Legislative Decree no. 50/2016), in specific cases:
- **the early execution of the agreement** following the award, as a matter of urgency, (Art. 32, paragraph 8, of Legislative Decree no. 50/2016):
- **the extension of the possibility of recourse to negotiated proceeding without prior publication of the notice** (Art. 63 of Legislative Decree no. 50/2016). If strictly necessary, this procedure is permitted when there are reasons of extreme urgency deriving from unforeseeable events by the tendering authority, including civil protection emergencies (Art. 63, paragraph 2, letter c) of Legislative Decree no. 50/2016). **It is considered that the current emergency, if adequately indicated in the grounds, also in relation to the specific nature of the tender, may constitute a legitimate prerequisite for this procedure.** However, in such cases an adequate evidence of the causal link between the epidemiological emergency and the urgency of the tender must be provided;
- **the extension of the possibility of recourse to procedures in case of emergency or civil protection** (Art. 163 of Legislative Decree no. 50/2016). If the requirements and conditions laid down in the rule are met, the RUP or the competent administration's technician may order the immediate execution to begin. This procedure also applies to specific works in the cultural heritage sector for an amount of more than 300,000 Euros;



- **the immediate effectiveness of subcontracting, postponing the control on legal requirements during the execution ;**
- **Simplification in the procedure of verification of anomalous bidding** (Art. 97, paragraph 3-bis, 6 and 8, of Legislative Decree no. 50/2016);

It has also been brought to the attention of Contracting Authorities that the legal framework already allows amendments to contractual agreements during the period of execution due to unforeseeable and unexpected events (art. 106 of Legislative Decree no. 50/2016), and some clarifications were also given on the provision concerning the termination of the agreement (Art. 108, paragraph 4, of Legislative Decree no. 50/2016).

And finally, it has also been enhanced the Preventive Collaborative Surveillance on public procurement, an instrument by which the Anti Corruption Authority supports the Contracting Authorities in the management of the public procurement procedure, helping them in the proper implementation and enforcement of the law.

3. PPP CONTRACTS

On the basis of the experience the Italian National Anti Corruption Authority gained during the most critical phase of the pandemic emergency it is possible to highlight some criticalities concerning PPP contracts.

It is necessary to premise that many of the simplification and accelerated measures listed above find correspondence in some provisions of the UNCITRAL MODEL. Just think at Model Provision 23 that allows direct negotiation in case of urgent need due to unforeseeable circumstances, or at Model Provision 14 (2.c) that indirectly introduces the possibility to negotiate terms, and others, as afterwards outlined. Therefore these are provisions that should particularly be enhanced in this period, when needed.

It is also necessary to premise that in the last few years, before 2020, PPP contracts benefited from the positive trend of the marked of public procurement, as it has been observed an improvement in the number of PPP, even if not always corresponding to a proper use of the contractual instrument by the contracting authorities. So the emergency due to Covid_19 has occurred in an expanding sector, even if not always assisted by a proper use of the legal framework. It is too early to measure the impact of the emergency in terms of numbers of contracts or procedures affected by criticalities or in terms of lost opportunities, but is definitely possible to point out some first outcomes.

For example it has been observed a significant impact, on the tender procedures, of the changes in economic conditions related to the sanitary emergency, which made it necessary to explore the possibility to change part of the procurement document – and subsequently the bid - (especially as it concerns financial terms of the proposal) after the starting of the selection procedure.

Just think at a PPP concerning construction and management of new University buildings within an already existing Campus, with original financial terms partly related to the pre – covid_19 foreseeable trend of the incomes related to university taxes, and the impact on this provision of the collapse of university enrollments due to the consequences of the sanitary emergency.



Both national and international law provisions currently consider only three instances for the adjustment of the financial equilibrium of the contract.

At first it is considered the possibility for the national contracting authorities to ask the proponent to make changes to the proposal, before initiating the selection procedure (under UNCITRAL Model Provision 16 and Italian Public contract code art. 183).

A second instance concerns the start-up phase of the selection procedure, as it can be included in the procurement documents the possibility for the bidders to include in their tender proposals of amendments (under UNCITRAL Model Provision 22 and Italian Public contract code art. 183).

The third instance is related to amendment and modification of the contract, after conclusion. It is disciplined under UNCITRAL Model Provision 45 (Amendment of the PPP contract).

But what if the need for relevant changes (such as a modification of economic terms) arise during the period of time between the submission of the tender and the award of the contract? Is it possible to negotiate, if the original procedural terms and conditions do not include negotiation with the bidders? And what if there is only one bidder? Is it efficient to impose the renewal of the procedure in the name of competition? Is it consistent with an emergency period?

As far as national law is concerned, the Italian National Anti-Corruption Authority outlines that according to administrative case law substantial changes to procurement documents (such can be a modification of financial equilibrium) must be published in the same way as the original documents were, and it is also necessary to assign new terms for the submission of the tenders. Whereas to start a negotiation with the bidder, when not originally provided from procurement documents, may affect competition unless in case of urgent need or other circumstances strictly indicated by the law (disciplined under UNCITRAL Model Provision 23 and Italian Public contract code art. 163).

Other cases occurred in which on the basis of an assumption of urgent need related to the sanitary emergency, current or possible PPP contracts have been set aside in favour of other forms of direct negotiation with different economic operators. This happened, for example, in the field of medical supplies, with specific reference to the development, testing and commercialization of diagnostic kit for covid_19, as some contracting authorities put in place agreements for scientific research with substantial commercial aspects that lead those agreements outside the scope permitted by law. These practices have been condemned by the administrative case law in Italy (TAR Lombardia Sent. 8.6.2020, n. 1006). It has been outlined that resorting to the form of a scientific agreement instead of public procurement procedure may favour one specific economic operator that obtains a competitive advantage in the achievement of a new product by using a public structure (research structure of a public hospital) while maintaining exclusive commercial availability of the product itself. On the contrary, the administrative judge has made it clear that the contractual relationship between the contracting authority (that provides scientific support and laboratories) and the economic operator (that provides prototype with the intent of testing them and subsequently put them on the market) has to be considered a concession of public property in view of achieving a result of public interest, and therefore requires a public tender procedure for the selection of the economic operator. It appears to be clear, on the basis of this recent statement of the administrative judge, that in this filed there is room for a strategic use of PPP with good results in terms of efficiency of public action.