STEFANELLI & STEFANELLI STUDIO LEGALE

FOCUS ON THE NEW ITALIAN CODE OF PUBLIC CONTRACTS

PREFACE

For operators in the procurement sector, 2023 represents a turning point due to a reform that, we hope, will have a significant impact on the entire sector. In fact, the value of the public procurement market in Italy in 2021 was almost Euro 200 billion (about 10.7% of national GDP), with a significant increase in the number of tendering procedures, clearly demonstrating the importance of public procurement for the economy of our country.

The drafting of the new Code of Public Contracts (Legislative Decree no. 36/2023) represents the end point of a process that started with Delegated Law No. 78/22 and had the precise aim of achieving one of the most important objectives of the National Recovery and Resilience Plan (*Piano Nazionale di Ripresa e Resilienza*, - PNRR).

The new draft is the result of the work of a Commission of experts (magistrates, university professors, lawyers) who, for the first time, did not have to deal with the transposition and implementation of EU Directives on the subject, thus being able to venture into drafting a Code that would be synthesis of all the numerous requests for systematisation and simplification coming from both economic operators and administrations, all involved in the increasingly complex procedures for awarding public contracts.

The result is an apparently leaner (roughly the same number of articles, but with a significant reduction in the number of paragraphs) and 'self-executing' Consolidated Act, whereby there are no longer any references to further implementing measures and it is thus possible to have full knowledge of the entire discipline to be implemented from the outset.

The intention of this Focus is therefore to provide some targeted insights into the provisions that, in our opinion, have undergone the most significant changes.

Among the many novelties, we should first mention the section specifically dedicated

to **General Principles**, among which the 'Result', 'Trust' and 'Market Access' principles stand out in particular, serving as interpretative and applicative criteria with respect to all other subsequent codified provisions.

Alongside these is the complete and definitive **digitalisation** of all public procedures (and not only), whose actual entry into force, however, will take until the beginning of next year, as it is first necessary to fully implement a series of instruments, including

- The National Public Contracts Database (Banca dati nazionale dei contratti pubblici - BDNCP);
- • The Economic Operator's Virtual File (FVOE - Fascicolo virtuale dell'operatore economico);
- The Digital Procurement Platforms;
- The Automated Public Contract Life Cycle Procedures;
- Digitised Civic Access and facilitation of requests for documentation.

These are the provisions of Title I, Part II, specifically dedicated to the digitalisation of contracts, which represents an absolute novelty compared to the previous Code, since the Legislator decided to regulate the entire 'digital life cycle' of public contracts in an autonomous and entirely organic manner (Arts. 19-34), dividing it into planning, design, publication, awarding and execution.

The fact, however, that the entire digital system is based on the National Public Contracts Database, on which a considerable amount of data will be loaded, has already highlighted considerable organisational and interoperability problems between the databases of the various Public Administrations, with the risk of a further delay in the full implementation of these innovations.

Thus, at the time of writing, we have learned of a possible partial backtrack by the government. Indeed, Minister Fitto's report reads that: "The complexity of the new architecture for interoperability and the broadening of the actors involved requires a resetting of the deadline to December 2023 that accurately reflects the process of progressive implementation of the provisions of the new Code, to ensure the full interoperability of all systems and the fluidity of processes in the new ecosystem of

public procurement".

Other relevant innovations of the Code concerned the provisions on **pooling** (for which the so-called 'reward pooling' was introduced) and **subcontracting** (for which the maximum percentage was eliminated as well as the prohibition of 'cascade' subcontracting).

Considerable systematisation has also been carried out with regard to **Morality Requirements** as well as the consequent **exclusion grounds** (in the event of their absence), as the Legislator has created a more articulated discipline compared to the previous Code (Article 80) that takes into account the differentiations between various cases.

Nor can we omit to mention the special attention paid to the regulation of events pertaining to the execution phase, with the inclusion of provisions on **price revision** and **renegotiation**, both aimed at preserving the contractual relationship.

We then see in Legislative Decree no. 36/2023 the strengthening of the **Public-Private Partnership**, which, in the intent of the legislator, is increasingly to be an instrument of cooperation that can be used to carry out complex economic operations of public interest.

Finally, an entire book is dedicated to the Special Sectors, further outlining the substantive aspects of the sector with more precise and accurate regulations.

Last but not least, one may consider the in-depth examination of the Sub-threshold procedures and the related principle of rotation, with the assumption of important changes having a profound impact in the simplification of the awarding of contracts under the EU thresholds (for which the same amounts are essentially confirmed as in Decree 31 May 2021 no. 77 (so-called *Semplificazioni bis*).

This whitepaper collects a series of insights that our legal firm has published following the issue of the new Code of Public Contracts (31 March 2023) and until its full entry into force (1 July 2023).

Enjoy the read

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The Entry into Force and General Principles of the New Code

Entry into force and effectiveness of the new Articles

On 31 March 2023, the new Code of Public Contracts (Legislative Decree No. 36/2023) was published in the Official Gazette, which entered into force on 1 April 2023. Article 229, however, stipulates that this Legislative Decree will only become applicable - and thus its provisions will take full effect - as of 1 July 2023.

In addition, to allow for the actual implementation of the new code, many provisions will not actually enter into force until 1 January 2024, which means that we will have to wait until the beginning of next year for the entire Code to become operational.

Tenders called after 1 April 2023 and until 30 June 2023 will therefore follow the rules of the 'old' code (Legislative Decree no. 50/2016), while those published afterwards will see the adoption of the new one (Legislative Decree no. 36/2023).

Beware, however, as the rule of *tempus regit actum* always applies, according to which **the procedure is governed by the legislation in force at the time of its publication** (even if, in the course of the tender, that legislation is repealed), which is why Legislative Decree 50/2016 will continue to apply, even after 1 July 2023, to tenders called before that date.

However, one of the most significant innovations of the new Code will only be effective as of next year, when the National Digital Procurement Ecosystem should become fully operational, with the definitive elimination of paper-based tenders (as we have been accustomed to so far). **Digitalisation will thus become the absolute protagonist of the life cycle of public contracts**, from planning to execution, to guaranteeing transparency, traceability, participation and control of all the tender procedures.

A final consideration is that for the first time we finally have a Code of Public Contracts that is 'self-executing', i.e. already complete in all its Annexes and therefore without the need for further references to external sources.

General Principles

One of the most important innovations of Legislative Decree 36/2023 is also (and above all) the inclusion of the so-called 'General Principles' in the first 12 articles, which were previously set out in Arts. 29 and 30 of Legislative Decree 50/2016. In the new Code they are placed at the beginning of the legislative draft as the foundation of any future tendering procedure as well as the yardstick of judgement and evaluation of the work of public officials.

This reassigns, albeit indirectly, a wide discretionary power to the Public Administration in the definition of the entire tender design, which the ANAC Guidelines, as provided for in the previous Code (and here definitively repealed), had drastically reduced.

Let us now briefly analyse the most interesting principles introduced by the legislator.

Art. 1. The Code starts with the **principle of Result**, from which emerges the primary interest that contracting authorities and awarding bodies must pursue, i.e. the awarding of the contract and its execution with the utmost timeliness and the best value for money, in compliance with the principles of legality, transparency and competition and in the interest of the community, for the achievement of EU objectives.

Its position with respect to the other principles testifies to its importance, elevating the result of the awarding of the contract as the founding purpose of the procedural action of the Public Administration, with respect to which the other principles are thus placed in a logic of 'means' to 'end'.

Thus, the principle of the result fully implements, in the field of public procurement, the principles of good performance, effectiveness, efficiency and cost-effectiveness laid down in Article 97 of the Italian Constitution, also becoming the criterion for assessing the proper exercise of public power as well as for determining the responsibility of the officials involved in each phase of the public procurement cycle.

In a nutshell, the introduction of the result principle shows how legitimacy is no longer sufficient to deem a tender effective.

Art. 2. The **principle of Trust** stands in close correlation with the previous one, being connected to the concept expressed in paragraph 4 Article 1, according to which trust "*favours and enhances the initiative and decision-making autonomy of public officials, with particular reference to evaluations and choices for the acquisition and execution of services based on the principle of result*".

Trust must therefore underlie the relationship between public officials and private operators, since both must rely on the one hand, on the exercise of legitimate, transparent and correct action by the Public Administration and, on the other, in the equally impeccable conduct of competitors. Trust, moreover, aims to increase the initiative and decision-making autonomy of public employees, acting as a remedy to defensive bureaucracy (so-called 'fear of signing').

Mistrust in the correctness of administrative action and the fear of making mistakes has in fact contributed to the slowdown - if not paralysis - of many administrative procedures, so a renewed trust in all participants should favour the relaunch of public initiative and administrative activity, which is all the more necessary given the massive investments possible with the PNRR funds.

Paragraph 3, moreover, reintroduces the concept of 'gross negligence' in the case of violation of the law, the tender specifications, as well as the rules of prudence, expertise and diligence. However, it also provides that gross negligence does not apply to violations of case law (even if prevailing) and of the opinions of competent Authorities.

Art. 3. The third fundamental principle is the **principle of market access**, which plays a complementary function to the previous ones and stipulates that contracting authorities should favour the access of economic operators to the market as much as possible, in compliance with the principles of competition, impartiality, non-discrimination, publicity, transparency and proportionality (Art. 97 of the Constitution).

Therefore, the legislator's aim is not only to foster competition, which, it should be noted, does not mean that all operators have the right to participate in all tenders. Rather, it means that everyone must be able to compete under the same conditions,

under the broader aim of allowing as many subjects as possible to participate in tendering procedures, thus aiming to reduce those access barriers that often deliberately limit participation.

The principle of market access is therefore destined to represent a powerful keystone in the interpretation of, for example, the technical specifications describing the subject matter of the tender, or the subdivision of the procedures into lots. This is because, as can be well understood, if the aim that the drafter of the tender specifications must pursue is obtaining the freest possible access to the market by all economic operators in the sector, any barrier or limitation to it would constitute a violation of the law.

Art. 5. A corollary of the **principle of trust is the principle of good faith and reliance**, which differs from the prior principle by being more objective, as opposed to a more subjective connotation held by the principle of trust.

In other words, Article 5 represents a warning from the legislator to the subjects (public officials and economic operators) involved in tender procedures, so that they both behave in the name of mutual (and renewed) trust, with the public officials trusting in the good faith of the participants and the latter in the legitimacy of the former's conduct.

Paragraphs 3 and 4 are extremely interesting since they provide, in accordance to the above-mentioned principles, for the possibility of annulment of an award which, if caused by the misconduct of the participant/awardee, may then be subject to the action for indemnity of the administration ordered to pay damages by the successful plaintiff (hypothesis later taken up by Art. 209).

Art. 8. Another completely new article is the one that introduces into the Italian legal system the principle of contractual autonomy understood as the absolute freedom (finally granted to public authorities) to enter into any type of agreement (including atypical contracts), without necessarily relying on typical forms, as already possible for private individuals.

The scope of this article therefore goes far beyond the 'simple' matter of procurement,

as it recognises the aforementioned autonomy in absolutely generic terms and free from sector or subject matter constraints, provided of course that the institutional purposes are pursued and the prohibitions imposed by the Code and other legal provisions are not violated.

Therefore, if the public authority comes to be completely equated with the private individual in terms of contractual autonomy, we must consequently assume that it must also comply with the provisions of Article 1325 of the Italian Civil Code. This states that the requirements of a contract are the agreement of the parties, its cause, object and form (which, as is well known, in the public sector can only be in writing).

A logical consequence of this autonomy is also that Public Administrations may receive donations or other services free of charge, provided that they are in the public interest and (equally important) - no tender procedure is necessary in this case.

Art. 9. In conjunction with the preceding article, Article 9 introduces the **principle of the preservation of contractual balance**, which is an extraordinary innovation in the context of public contracts that has always been characterised by the unchangeability of the contract price, due to the obligation to comply with public accounting principles.

In fact, given the obligation to allocate a public expenditure to a budget chapter of the Public Administration before signing the contract, this has always resulted in the absolute prohibition of any modification of cost items by the administration (hence the long-standing issue of the inadmissibility of variations in public works).

However, the dramatic period of the Covid pandemic, followed by the still ongoing war events, led the legislator to introduce a series of corrective measures to the unchangeability of public contracts, in order to return them to their nature as bilateral contracts, so that the relationship between the contractually agreed obligations must remain, as far as possible, unchanged for the entire duration of the contract.

That is why it is necessary to introduce corrective measures, i.e., clauses for the renegotiation of relations in the event of substantial changes to the initial conditions of performance, aimed at preserving the contractual balance as established at the signing

of the contract.

Therefore, in the presence of extraordinary and unforeseeable events that cause a substantial alteration in the contractual balance, the disadvantaged party must have the right to renegotiate the contractual terms in good faith in order to restore the original balance without altering the economic substance. These modifications, however, are only applicable when such alteration is significant and caused by circumstances extraneous to the normal contractual risk, ordinary economic fluctuation and market risk.

Art. 9 also covers the scenario in which contingencies render the performance partially or temporarily useless or unusable for one of the parties, in which case the party having an interest may request a reduction of the consideration in accordance with the rules laid down in Art. 1464 of the Italian Civil Code.

Art. 10. Lastly, in the list of principles placed as a cornerstone of the correct action of the administrations in the field of public contracts, the **principles of the imperative nature of the grounds for exclusion and maximum participation** could not be ignored, since they are directly linked to Article 3 (market access) and of which they are the necessary bulwark.

Contracting authorities cannot therefore allow to participate in public tenders, those economic operators who do not have the so-called 'Morality requirements', thus providing for their exclusion even when the fulfilment of those requirements was not a condition for participation and thus characterising Articles 94 and 95 of the Code as having 'heterointegrative' nature.

The provision of the previous Legislative Decree no. 50/2016 (Art. 83, paragraph 8) is also confirmed, according to which the clauses of the technical specifications which introduce grounds for exclusion not provided for in the Code are automatically null and void, thus assigning to the Legislator alone (of the Code of Public Contracts and not of other legal provisions, pursuant to Art. 227) the power to decide what are the minimum general requirements that future public contractors must possess. Therefore, public authorities are only left the autonomy to decide what 'special' requirements

having economic-financial and technical-professional nature are to be required in the tender, both in terms of evaluation (in compliance with the principle of proportionality) and participation. In this case, however, they have to be compliant to the principle of market access (Article 3) and work in favour of SMEs.

Summary

With a few articles, the 2023 legislator has completely changed not only the subject matter of public procurement, but also, without a doubt, all public contracts.

In fact, the first three principles completely change the way in which public tenders are carried out (the main purpose of which had been, until now, to pursue mere legitimacy in compliance with the principles of the EU Treaty), placing at the centre the 'result' that the Public Administration has to pursue - and therefore to define in advance - and also with the obligation to allow maximum 'market access' by all economic operators (a condition that will certainly and increasingly imply the subdivision of tenders into lots).

Articles 8 and 9 then definitively complete the work of 'privatising' the contractual activity of the Administration by allowing the stipulation of atypical contracts and introducing the obligation of bilateral rebalancing (definitively archiving the unchangeability of public contracts).

Lastly, the very architecture of the Code, with the general principles set out as a beacon to illuminate every public activity, gives Administrations a wide margin of discretion in the drafting of tendering procedures. These no longer only have to comply with the law but serve, above all, to achieve the result of the Administration (best contract) and the legislator (market access).

The National Digital Procurement Ecosystem

The new Code of Public Contracts also aims to simplify and speed up procurement procedures through the digitalisation of the entire life cycle of public contracts.

If we go back slightly in time, an embryonic form of digitalisation of procedures can already be found in Leg. Decree 50/2016 (previous Code) to then, in October 2018, move to the introduction of the obligation of electronic means of communication and electronic procedures in tenders.

An increasingly digitised tendering process, characterised by electronic means of communication, telematic platforms and the MEPA as key issues both for the way procedures were to be carried out and for their use by economic operators, had already been envisaged.

Legislative Decree No. 36/2023 therefore represents the culmination of this digitalisation process, laying the foundations for a true National Digital Procurement Ecosystem (e-procurement). This will essentially consist of the digital platforms and services in use by the contracting authorities assisted, with a view to total interoperability, by the National Public Contracts Database (BDNCP) and the Economic Operator's Virtual File (FVOE), both tools operated by ANAC.

All this is intended to enable procuring public authorities to monitor the entire life cycle of public contracts, from the planning and design of the tender to the publication of the call for tenders, the awarding of the contract and finally its execution.

The new Code dedicates as many as **18 articles** (Arts. 19-36) to the subject of digitalisation, which will only become effectively **operational as of January 2024** (unlike other parts of the Code which will be operational as early as July 2023). Among the most significant regulations are:

Art. 19. headed 'Digital Principles and Rights', specifies that contracting authorities and awarding bodies are the entities responsible for ensuring the digitalisation of the

entire contract life cycle and for introducing the technical and organisational measures to safeguard IT security and the protection of personal data.

By virtue of the complete digitalisation, **the principle of single submission** is thus established, i.e. that each piece of data must be submitted only once by the economic operator to a single information system. This way, other Public Administrations that may need it will not be able to ask the economic operator for it again but will necessarily have to obtain it from their own database or, alternatively, from other information systems.

The definitive dismantling of paper-based tenders is instead established by Paragraph 3 of Art. 19, which states that all **administrative activities and procedures underlying tenders will henceforth be carried out only in digital form** through the use of platforms.

Art. 21. Instead, outlines the '**Digital Life Cycle of Public Contracts**' (Planning, Design, Publication, Awarding and Execution), in compliance with the provisions of the Code of Digital Administration (Legislative Decree No. 82/2005) and specifying how all the entities involved (public and private) will have to comply with the relevant rules of the new Code.

Art. 22. outlines the **National Digital Procurement Ecosystem**, the operational part of which will enable the management of the entire contract life cycle. The Ecosystem will consist of:

- **Platforms and digital infrastructure services**, which will allow the drafting or acquisition of documents in native digital format, the publication and transmission of data and documents to the National Public Contracts Database, electronic access to tender documents, the submission of the Single European Tender Document in digital format and interoperability with the Economic Operator's Virtual File, the submission of tenders, the opening, management and storage of the tender dossier in digital mode and, finally, technical control;
- **Digital procurement platforms used by contracting authorities** (see Art. 25) that will interact with the National Public Contracts Database. Note: Important is the

provision that contracting authorities must, in any case, guarantee the participation of economic operators in the event of (even temporary) malfunctioning of the platforms. On this point, the rule also provides for the possibility of suspending the deadline for the submission of tenders.

Art. 23. The **National Public Contracts Database (BDNCP)** has a fundamental importance within the National Digital Procurement Ecosystem, it must contain all the data relating to public works, services and supply contracts as well as all the information concerning the acts of the contracting authorities relating to planning, choice of contractor and awarding of contracts.

This information must be transmitted in a timely manner via the IT platforms interconnected to it.

Art. 24. The picture is completed by the **Economic Operator's Virtual File (FVOE),** which operates in the BDNCP. The rule specifies the need for the use of the Virtual Fle for the purposes of participation in all the tendering procedures governed by the Code, and stipulates that the data and documents contained in the FVOE be updated automatically, through the aforementioned interoperability of information.

The FVOE had already been activated by the ANAC with its own resolution in July 2022 and, from that moment, the contracting authorities should already have acquired, through a web interface, all the documentation proving the possession of the participation requirements of economic operators, etc. The new Code on this point provides that the ANAC, by its own provision in agreement with the Ministry of Infrastructure and Transport and AGID, shall make provisions in this regard within 60 days of the entry into force of the new Code, indicating the types of data to be included in the FVOE, in relation to which verification with the BDNCP will then be mandatory.

Art. 27. The fundamental importance of the BDNCP in the context of the new Ecosystem, is also confirmed by being attributed the function of guaranteeing the **legal publication of deeds**, the legal effects of which will run from the date of publication of the deeds and documents in said Database.

The new Code then does not fail to dedicate a section to '**Transparency**', specifying how all data relating to the planning of works, services and supplies, as well as to the procedures of the life cycle of public contracts, will be promptly transmitted to the BDNCP and that the contracting authorities will ensure that they are linked to the respective sections on 'Transparent Administration'.

The BDNCP must also ensure maximum transparency through the publication of data in 'open format' (subject of the call for tender, list of invited operators, successful tenderer, award amount, works completion time, amount of sums paid, etc.).

Art. 30. Finally, an efficiency improvement is envisaged for contracting authorities through the use of automated procedures, including the use of **artificial intelligence**, subject to the obligation to introduce clauses in tender documents to ensure the correction of errors resulting from this automation process.

The economic operator must therefore always be informed in advance of the existence of algorithmic-based decision-making processes, it being understood that contracting authorities must always guarantee that there is human intervention in the decision-making process, which can validate or reject the automated decision.

Summary

With the actual entry into force of the section on the digitalisation of public contracts (1 January 2024), a fundamental transformation of the activities of the Public Administration is introduced, which will henceforth be able to rely on an advanced and highly integrated IT system to manage public procurement processes efficiently and transparently.

The definitive end of the paper-based tender is established, stipulating that all administrative activities and processes will be carried out solely in digital mode.

The 'National Digital Procurement Ecosystem' thus consists of digital infrastructure platforms (including the National Public Contracts Database - BDNCP) and digital procurement platforms, and the entire digital contract life cycle (planning, design, publication, award and execution) must be managed within this Ecosystem.

In order to enable all this, however, it is necessary to ensure full and effective interoperability between databases and platforms, with the application of the 'single-submission principle', whereby the public authorities will have to request data and information not from the economic operators but only from the BDNCP, as it contains all the information on public tenders and as the future instrument for the lawful publicity of tender documents.

Finally, Artificial Intelligence makes its entry into insolvency proceedings, albeit with limitations through the so-called human contribution, so as not to make the decision-making processes fully automated, including for the purposes of awarding tenders.

Expanding the scope of pooling and subcontracting

Pooling

A small revolution concerns the institution of pooling as it has been regulated by the new Article 104 of Legislative Decree No. 36/2023.

Unlike in the case of the grounds for exclusion, the legislator in this case intended to concentrate the discipline in a single provision (or rather, it 'would have wanted to', given that there are other provisions of the Code that have a considerable impact on the institution, such as that contained in Art. 132, which provides for the prohibition of the use of pooling for the cultural heritage sector, etc.).

The main innovation brought by Art. 104 consists in the '**formalisation' of the pure award pooling**, i.e. that which is not adopted exclusively for participation purposes but to allow the economic operator to obtain a higher score in the evaluation of its technical bid.

This overcomes the prohibition, identified in previous case law, of award pooling aimed exclusively at enhancing the value of one's own negotiation proposal (on this, see Council of State V° no. 2526/ 2021, consistent with TAR Palermo no. 2378/2022).

Then, the general prohibition of joint participation of auxiliary and competitor lapses, remaining expressly provided for, but only in cases of award pooling (para. 12).

This is a significant change if one considers that, **in the old Code (Legislative Decree No. 50/2016), the auxiliary company could NEVER participate in the same tender in which the lead company was listed as a competitor.**

With regard to the onerousness of the pooling contract, Art. 104 adopts the prevailing case-law, which also admits a general interest of the auxiliary (even if not patrimonial), which is why it is provided that "the pooling contract is normally onerous, unless it also

responds to an interest of the auxiliary company, and may be concluded irrespective of the legal nature of the relationship between the parties".

Therefore, the possibility of a gratuitous pooling contract must also be considered admissible, provided, however, that a different interest/opportunity for its conclusion can be inferred on the part of the auxiliary company.

Subcontracting

The current framework on subcontracting (Art. 119) is the result of legislation that had to be progressively adapted to the principles of European legislation and the rulings of the EU Court of Justice (primarily CJEU, V°, 27./11/2019, C-402/18), which found the provision of Legislative Decree No. 50/2016 that established the 30% quantitative limit for the use of subcontracting to be unlawful.

The new provision **eliminates any percentage limit** for the use of subcontracting, while at the same time allowing the contracting authority to exclude or limit the services that can be subcontracted.

Under paragraph 2, the contracting authorities may therefore, subject to adequate justification, indicate in the tender documents the services or works to be performed exclusively by the successful tenderer, thus **introducing an optional prohibition (both partial and total) on the use of subcontracting:**

- based on the specific characteristics of the contract;
- as may be necessary to strengthen control over worksite activities, working conditions and health or the prevention of risks of criminal infiltration;

The rationale therefore remains to ensure the protection of the health and safety of workers and to prevent the risk of criminal infiltration (no assessment if subcontractors are on the 'white list').

But the most relevant reform on the subject of subcontracting is the one contained in Paragraph 17, which, contrary to the provisions of Legislative Decree No. 50/2016,

allows the so-called 'cascade' subcontracting, which occurs when the performance of the services subcontracted is subject to further subcontracting.

This may occur unless the Public Administration prohibits it in the tender documents for certain services or certain categories of works or services which, although subcontractable, cannot be subject to further subcontracting (thus maintaining administrative discretion in limiting the excluded services).

A number of critical points should be noted, however, if we consider that the legislation in principle does not seem to be backed by an operational framework that specifies the procedures to be followed in order to authorise and to monitor the contracted services.

Summary

For the institutions of pooling and subcontracting, important new features are introduced such as:

- **the 'pure' award pooling**, which is definitively cleared and allowed for technical scores;
- the prohibition, only in the above-mentioned case, of the joint participation by a lead company/auxiliary, which entails the 'indirect' forfeiture of the previous prohibition of joint participation in all other cases; this means that, **from now on, one may lend the requirements to a competitor while participating in the same tender;**
- **the 'cascade' subcontracting**, which removes the prohibition on further subcontracting the provision of services;
- (above all) **the non-introduction of a minimum or maximum percentage for subcontracting**

‘New’ grounds for exclusion from tenders

As is well known, in order to perform a contract, the economic operator must satisfy both general requirements (once called ‘morality requirements’) and specific requirements, the former established by law and valid in every tender, the latter laid down by the technical specifications and valid for that single procedure.

The general requirements require the competitor to prove ‘worthy’ of entering in a contract with the Public Administration, i.e. that it has not engaged in certain behaviours, it has not incurred certain sanctions (criminal or administrative), etc.

This means that, irrespective of the nature and value of the tender, the determination of the existence of ‘morality requirements’ must always be verified subjectively against the tenderer.

In the previous regulatory set-up (Legislative Decree No. 50/2016), the entire discipline on morality requirements was encapsulated in a long and articulated provision (Art. 80), repeatedly subject to legislative amendments and revisions and, as a result, a harbinger of considerable interpretative doubts and the litigation that necessarily ensued.

The merit of the new Code (Leg. Decree 36/2023) is that of having split the previous articulation into five distinct provisions, with the aim of making the entire discipline more systematic. In particular, the institution of the ‘grounds for exclusion’ is subdivided into:

- Article 94 - ‘Automatic’ grounds for exclusion;
- Article 95 - ‘Non-automatic’ grounds for exclusion;
- Article 96 – Rules on exclusion;
- Article 97 - Grounds for exclusion of participants in groupings;
- Article 98 - Serious professional misconduct.

Let us analyse them in order.

'Automatic' grounds for exclusion

Article 94 identifies the **grounds for exclusion** defined as '**automatic**', i.e. those that are based on an assessment that leaves no margin of discretion to the contracting administration, which must therefore order the exclusion from the tender procedure upon the mere assessment of the fact.

Paragraphs 1 to 4 of said article confirm what was already provided for in the previous Article 80 of Legislative Decree No. 50/2016 concerning automatic exclusion in the event of criminal convictions that have become irrevocable for the offences provided for and listed in said article (except in the event of decriminalisation, revocation or extinction).

The first significant novelty is that, for the serious offences listed in the provision, the application of the penalty at the request of the parties (the so-called **plea bargain**) **is no longer relevant** for the purposes of exclusion.

As for the **Subjects** subject to the assessment of the possession of the general requirements, another important novelty is the **elimination of any reference to the so-called 'ceased from office**', whereas, **in the case of a competitor in which one of the shareholders** is **a legal person**, it should be noted that the **assessment** must be made with regard **to the directors of that company, if a holding company**.

Article 94 also includes, among the new subjects to be assessed, the so-called '**de facto director**', to be identified as the person who takes decisions and performs acts of management in the name of and on behalf of the company without having been vested with a deed of appointment validly made within the company itself (based on the law or the articles of association).

Finally, the inclusion of "*economic operators within the meaning of and in accordance with Legislative Decree No. 231 of 8 June 2001*" among the persons subject to certain measures is confirmed (paragraph 3, letter a). The relevance of sanctions for administrative offences under Legislative Decree No. 231/2001 for the purposes of exclusion is thus confirmed, as provided for in paragraph 5 of the same Article 94.

Again, paragraph 5 (together with paragraph 6) also provides for exclusion for anti-mafia measures, violation of regulations on the employment of disadvantaged persons, ANAC interdictions, submission to bankruptcy proceedings and for serious violations finally ascertained, referred to in Annex II.10 (i.e. those worth more than Euro 5,000.00, i.e. the threshold for issuing the DURC).

In this regard, a significant novelty is that **the exclusion due to disqualification does not apply if the company has been placed under judicial control** under art. 34-bis of Legislative Decree no. 159/2011 within the date of the award (art. 94, paragraph 2).

In any case, the economic operator is always permitted to prove that it has fulfilled its tax and fiscal obligations, provided that this took place before the deadline for submitting the tender.

'Non-automatic' grounds for exclusion

On the other hand, **Art. 95** provides for **'optional' exclusion grounds** (or 'non-automatic') and applies when the contracting Public Administration is recognised as having the discretion to assess the reliability of the economic operator or the circumstance that the condition fulfilled does not affect the fairness of the tender procedure.

The grounds envisaged in the subsequent paragraphs of Article 95 are serious infringements of **labour law, environmental law** and social law, irreconcilable **conflicts of interest**, irreconcilable **distortions of competition**, imputability of tenders to a single decision-making centre, **serious professional misconduct**, as well as **tax offences not finally ascertained** (as per Annex II.10, i.e. those worth € 5,000.00 or more)

In all cases, the seriousness of these grounds must be assessed in relation to the value of the contract.

Rules on exclusion

In **Art. 96** a '**self-cleaning**' provision is introduced for the first time, providing that competitors may always prove that they have adopted **measures suitable to ensure**

their reliability, also with regard to automatic grounds for exclusion, it being specified that, if such measures are suitable and timely, no exclusion shall take place.

The only exception to the application of such 'rehabilitative' measures relates to **finally ascertained violations in fiscal and tax matters**, for which any reparative hypothesis is expressly excluded.

On the other hand, any measures (such as, for example, compensation for damages, cooperation in reconstructing the facts, active remission in the case of tax offences, etc.) taken by economic operators pending a dispute are assessed in the light of the seriousness and particular circumstances of that dispute (also taking into account the timeliness of their adoption).

It is then expressly established that the economic operator is obliged to notify the contracting authority of the existence of facts and measures that may constitute grounds for exclusion under Articles 94 and 95, should they NOT be mentioned in its Virtual File (FVOE).

An interesting novelty is the reversal of the application perspective of the measure, which can also take place after the submission of the tender, thus overcoming the system proposed by the previous ANAC Guideline No. 6.

Grounds for exclusion of participants in groupings

Turning to **Art. 97**, the legislator intended to differentiate the grounds for exclusion for economic operators belonging to temporary groupings of companies from other grounds, creating a specific provision and admitting a generalised possibility of 'substitution' or 'exclusion' of the participant in the grouping.

In fact, the grouping is not excluded even if one of its members is affected by a cause for exclusion (automatic or not), if it notifies the Public Administration of the occurrence of such a situation and the member has been excluded from the temporary grouping or if it proves the adoption of all the necessary 'self-cleaning' measures (which will be assessed by the Administration).

It is also provided that a participant in an incompatible situation may be replaced, without prejudice to the substantial unchangeability of the tender submitted.

These provisions also apply to ordinary and stable consortia (limited to the members of the consortium carrying out the contract).

Serious professional misconduct

Finally, **Art. 98** contains a very extensive list of the conditions that may give rise to a 'serious professional misconduct' (such as, i.e, **measures from ANAC** or other authorities, **contractual terminations, convictions for damages** (even if not final) for offences not included in Art. 94, or **tax offences, urban planning offences, simple and fraudulent bankruptcy, offences under Legislative Decree no. 231/2001**). The list is only apparently exhaustive, since it also includes 'general' conduct that may significantly affect the tenderer's reliability.

Also noteworthy is the inclusion of a **general clause** useful for identifying acts or facts suitable **to prove a serious misconduct** and which contributes to complementing the list of standardised means of proof mentioned above.

Among the aforesaid adequate means of proof, paragraph 3: letter h) also mentions the 'alleged or ascertained commission' by the economic operator (or the obligated persons referred to in paragraph 3 of Article 94) of a series of offences, among which, in paragraph 5, are expressly indicated those set out in Legislative Decree No. 231 of 8 June 2001.

This is done with the clarification that the assessment of the relevance of the professional offence may be assessed in the event of a "*final conviction*, *the irrevocable criminal decree of conviction*", but also in cases where "**the conviction is not final, or in the event of the adoption of real or personal precautionary measures, if issued by the criminal court**".

In practice, this introduces the possibility of recognising certain cases that are **not final** for the purposes of professional misconduct if they relate to the most serious

offences, such as those listed in Article 94 (which, of course, **also include offences against the public administration**).

On this last point, there is therefore a risk of great confusion as to the conditions of application of the provision, given that even the mere allegation of one of the offences referred to may be susceptible to a negative assessment by the contracting authority.

Summary

With regard to the grounds for exclusion, Legislative Decree No. 36/2023 innovated by:

- distinguishing 'automatic' from 'non-automatic' grounds;
- modifying the subjects to be controlled, eliminating 'ceased from office' persons and the majority shareholder for companies with less than 4 shareholders, but adding 'de facto directors';
- by creating a specific provision for 'serious professional misconduct', with the possibility of exclusion also on the basis of non-final court orders;
- (above all) providing for the possibility of overcoming every ground for exclusion - both automatic and non-automatic - if 'self-cleaning' measures are taken (except for non-payment of taxes and duties!)

Sub-threshold procedures and the principle of rotation

The new Code of Public Contracts contains a thorough revision of the provisions on sub-threshold tenders and, in particular, on negotiated procedures.

In the specific case of sub-threshold provisions, if the invitation letter is sent after 1 July, the rules to be applied will be those of the new regulatory framework, whereas if the invitation is sent before that date, the rules of Legislative Decree No. 50/2016 will continue to apply.

The sub-threshold is the subject of ''*Book II of Contracts Part I - on the Contracts below the European Thresholds*'' from Art. 48 to Art. 55, along with a specific annex (Annex II. 1) intended to replace the ANAC Guidelines No. 4.

The first relevant provision is to be found in **Article 48**, where it is provided that the RUP - which in the new Code is the Italian acronym of 'Single Project Manager' (*Responsabile Unico di Progetto*), before starting the inquiry to identify the usable procedure, "*having assessed the existence of a certain cross-border interest, shall follow the ordinary procedures set forth in the following Parts of this Book*".

This is a rule that should replace the possibility of launching ordinary procedures, but there is no doubt that the meaning of Article 48 is unprecedented, since the new Code conditions the use of open procedures only in the event that the Single Project Manager actually sees an objective need to do so. In practice, the choice to use an open procedure is not left to the free judgement of those who must prepare and conduct the procedure, but requires objective 'guarantees' so as to open the procedure to maximum competition.

Article 48 reiterates the need to apply the general principles set out in the Code as well as the use of telematic platforms and negotiation tools in tender procedures.

The subsequent **Article 49**, on the other hand, enshrines the '**Principle of rotation**',

which generally remains unchanged with respect to the provisions of the ANAC Guidelines No. 4 and the jurisprudential approaches, except for one aspect to be discussed below.

Rotation remains mandatory, except in the very limited cases of micro-purchases (below Euro 5,000), which may be waived in the event that the entity adopts special regulations or the Single Project Manager initiates an invitation procedure that is substantially 'open' to all. In all other cases, the contractor awarded the previous contract, which has as its "*object a contract falling within the same product sector, or the same category of works, or the same service sector*", may not participate in the tender. The novelty of ANAC guideline no. 4, therefore, is that **the principle of rotation no longer involves the operator who was 'invited' to the previous procedure, but only the successful tenderer.**

This is an important change in which the legislator balanced the interests at stake and considered it excessively burdensome to exclude from a new procedure the economic operators that were only invited. Instead, the previous contractor may be re-invited but only if the market, apart from the exceptions mentioned above, does not present any alternative technical solutions and the contractors has performed the previous contract to the satisfaction of the contracting authority.

Returning to sub-threshold procedures, **Article 50** regulates:

- **direct award procedures for amounts below Euro 140,000 for goods/services and below Euro 150,000 for works**;
- **three negotiated procedures** (two for works and one for services/supplies) for amounts above these thresholds but below the European thresholds.

As mentioned above, the model from which the Legislator drew inspiration is the one inferable from Legislative Decree 76/2020 Art. 1, paragraph 2, letter b), but with a significant novelty: the reference to Art. 63 of Legislative Decree No. 50/2016 (i.e. to the negotiated procedure without publication of the notice) is in fact deleted. This reference had often led to misunderstandings, suggesting that even the negotiated

sub-threshold procedure should (in certain cases) be duly justified, like extraordinary procedures without publication of the notice.

For works, letter c) of paragraph 1 of Art. 50 provides two different thresholds (with different numbers of invitations):

- the first **between Euro 150,000 and Euro 1,000,000** for which the RUP, through market surveys or by means of an internal list/register, must invite at least 5 operators to the procedure.
- the second **between Euro 1,000,000 and Euro 5,382,000** for which invitations must be extended to at least 10 operators (provided they are objectively available).

For goods/services, on the other hand, letter e) of the same paragraph 1 states that:

- **for amounts of Euro 140,000 or more and up to Euro 215,000** (or Euro 750,000 for social services) invitations are to be extended to at least 5 operators, always identified according to market surveys or through an internal list/register.

An interesting novelty is that, in relation to the negotiated procedure for works between one million and the EU threshold, the rule states that it is "*without prejudice to the possibility of using the procedures for the choice of contractor set out in Part IV of this Book*". This is an important change given that the previous provision required the RUP to give adequate reasons for using the open procedure. This clause has disappeared, but it is considered that the justification for adopting an open tender instead of a simplified one (unless there is a cross-border interest) must still be present, so as to specify the reasons that led to the choice of an aggravated procedure.

With regard to invitations to tender, as in the current legislation, the choice of operators will be made by means of a Notice of Expression of Interest or by selection from the internal Register of the contracting Public Administration. However, as from 1 July, for procedures yet to be launched, the rules on Notices and the Register will be fully defined by Annex II. 1 ("*Lists of economic operators and market surveys for the awarding of contracts below the European thresholds*").

The Annex in question replaces the ANAC Guidelines No. 4 and does not contain any significant changes, providing for the possibility for the contracting authority to adopt its own internal regulation to regulate:

- the procedures for conducting market surveys, possibly broken down by value brackets (with the obligation to apply the principle of rotation);
- the procedures for drawing up and revising the List of economic operators, broken down by category and value bracket;
- the criteria for choosing the entities to be invited following a market survey or by drawing from its own List of economic operators or from those present in the MEPA or other similar instruments managed by the relevant central purchasing bodies.

The most important novelty, however, is to be found in paragraph 2 of Article 50, second sentence, where it is expressly states that **it is not possible to use random drawing methods for the selection of the operators to be invited**. In particular, the paragraph provides that "*contracting authorities may not use a random draw or any other method of selecting names for the purpose of selecting the operators to be invited to negotiated procedures, except in exceptional and duly justified cases where no other method of selecting operators can be used*".

This suggests that it is necessary to establish barring criteria as early as the public notice in order to skim off participation. In fact, the rule seems to channel the choice on operators in a 'qualitative' sense, i.e. imposing a preliminary screening on the operators that are to compete.

Article 50 goes on to clarify in paragraph 4 how, in sub-threshold contracts, the RUP may choose the award criteria (without prejudice to the limits set out in Article 108(2) for the criterion of the lowest price). It should also be noted that, in the case of the use of the criterion of the most economically advantageous bid, Article 51 provides, in an unprecedented manner, that the Tender Commission may also be chaired by the RUP (even though it is not a director/manager of the service).

The subsequent paragraph 6, on the other hand, generalises the possibility of immediately commencing the performance of the contract but, unlike the regime introduced by Decree Law 76/2020 art. 8, paragraph 1, lett. a), the immediate delivery can only take place after the positive verification of the requirements and without prejudice to the fact that, in the event of failure to conclude the contract, the operator is entitled to the payment of the expenses incurred and the services provided.

Finally, it is provided that performance may no longer be 'verified' by the Certificate of Acceptance (for works) or the Certificate of Conformity (for supplies or services), but by means of the Certificate of Proper Execution issued by the Director of Works or by the Director of Execution (DEC), if appointed.

Article 52 provides instead that, for contracts with a value of less than Euro 40,000, compliance with the requirements can be certified by a simple declaration subject to random checks. If, following verification, the fulfilment of said requirements is not confirmed, "*the contracting authority shall terminate the contract, enforce any definitive guarantee, notify ANAC and suspend the economic operator from participating in awarding procedures called by the same contracting authority for a period of between one and twelve months from the adoption of the measure*".

Also worth mentioning is **Article 53**, under which the provisional deposit becomes optional and, if required, may not exceed 1% of the tender amount, while with regard to the final deposit the RUP may not require it in justified situations, but if it does, it is capped at 5% of the tender amount.

Again, in sub-threshold procedures without cross-border interest, if the award is made at a lower price, the anomalous tender may be excluded immediately "*when the number of admitted tenders is five or more*", whereas automatic exclusion does not apply to direct awards.

In any case, contracting authorities may assess the fairness of any other tender which, on the basis of specific elements, appears abnormally low. The methods of verification, which are always possible, may also be chosen by drawing lots from among those listed in Annex II.2 (**Article 54**).

Finally, in order to accelerate the transition from tendering to execution, **Article 55** excludes the application of the so-called 'standstill' (35-day between the award and the conclusion of the contract) and the contract must be signed within only thirty days of the award (instead of sixty days, as provided for above-threshold procedures).

In conclusion, analysing the major innovations introduced by Book II, we can say that we are faced with the **creation of an ultra-simplified procedural set-up**, which undoubtedly reflects the legislator's intention to favour timeliness and less formalism, while nevertheless respecting values such as transparency and objectivity that cannot be derogated from.

Summary

- The new thresholds are set out in a table for ease of reference:

PUBLIC PROCUREMENT IN ORDINARY SECTORS	OLD THRESHOLD	NEW THRESHOLD
Public works and concessions	€ 5,548,000	€ 5,350,000
Supplies and services awarded by central government authorities; public design contests awarded by central government authorities	€144,000	€ 139,000
Supplies and services awarded by sub-central contracting authorities; public design contests awarded by sub-central contracting authorities	€ 221,000	€ 214,000
Social and other specific services listed in Annex IX	€ 750,000	Unaltered: € 750,000

PUBLIC PROCUREMENT IN SPECIAL SECTORS	OLD THRESHOLD	NEW THRESHOLD
Works	€ 5,548,000	€ 5,350,000
Supplies and services; public design contests	€ 443,000	€ 428,000
Service contracts; social services; other specific services listed in Annex IX	€ 1,000,000	Unaltered: € 1,000,000

- The principle of rotation no longer applies to the operator who was invited to the previous procedure, but only to the successful bidder;
- Impossibility of using a lottery, or random drawing methods to select the operators to be invited;
- The provisional deposit becomes optional and the final security may, in justified situations, not be required by the RUP;
- If the award is made at a lower price, the possibility of immediately excluding an anomalous tender is generalised if the number of admitted tenders is five or more;
- Finally, the application of the so-called 'standstill' (35 days pause from award to signature) is excluded and the contract must be concluded within (only) 30 days from the award.

The new rules on access

The New Code of Public Contracts (Legislative Decree no. 36/2023) introduces, with Articles 35 and 36 (set out in Part II of Book I on the "*Digitalisation and life cycles of contracts*"), important innovations also on the subject of access to documents, both in the substantive and procedural/processual spheres.

It should be noted, however, that although the new Code entered into force on 1 April 2023, the part relating to the so-called 'Digital Procurement Ecosystem' will only come into force on 1 January 2024 and, with it, also the new access regulation (as it is strongly conditioned by the full digitalisation of procurement procedures).

First of all, Legislative Decree no. 36/2023 incorporates the most recent case law on access, giving full effect to the provisions of Plenary Assembly No. 10/2022. In fact, unlike the previous approach (Art. 53 Legislative Decree No. 50/2016), it recognises the possibility of using, also in the matter of public contracts, not only the documental access under Law No. 241/1990 but also the civic and generalised access under Articles 5 and 5-bis of Legislative Decree No. 33/2013.

Consistent with the objective (the complete digitalisation of tenders), **Art. 35** of the new Code specifies that the contracting authorities must **ensure access** to the records of the procedures for the awarding and execution of public contracts **in digital mode** through the direct acquisition of the data and information entered into the platforms.

In this context, a prominent role is entrusted to the **Digital Procurement Platform**, i.e. the set of IT services and systems that will be made available to contracting authorities to ensure the full digitalisation of the entire life cycle of public contracts.

According to the perspective followed by the New Code, digitalisation is, on the one hand, an effective measure to prevent corruption and, on the other hand, a guarantee of transparency, traceability, participation and control in compliance with the principle of legality. It is precisely the right of access that guarantees the maximum expression of transparency of administrative action and, in its various forms, contributes to achieving

the ambitious project of making the Public Administration completely transparent.

Therefore, if transparency is the rule, confidentiality is the exception for administrative activity and, in this regard, a significant innovation is contained in paragraph 4 of Article 35, which distinguishes the cases of exclusion from the right of access into two categories: those of documents, data and information that may be excluded and those that must necessarily be excluded.

Exclusion by right applies to:

- Legal opinions obtained by entities required to apply the Code, for the settlement of potential or ongoing disputes relating to public contracts;
- Confidential reports drawn up by the works manager, the executing director and the inspection body on the applications and objections of the contractor;
- Digital platforms and IT infrastructures used by the contracting authority or the awarding body, where covered by intellectual property rights.

On the other hand, there is the **possibility to exclude access on the grounds of technical or commercial secrecy**, following a reasoned and substantiated statement by the tenderer, although the right of access is always guaranteed if it is essential for the defence in court of the legal interests asserted in relation to the tender procedure.

The new Code thus takes the view that **the disclosure of technical documentation must always be permitted** because the tenderer, by participating in the tender procedure, has assumed the risk of having its documentation made available to other competitors.

In fact, **Art. 36** provides that, with a view to speeding up and streamlining procedures, the **tender documents of the first five operators in the ranking list must be published**, thus avoiding the need for reciprocal requests for access (and resulting in said documents being easily accessible on the digital platform). The tender of the successful bidder thus becomes of public interest, although the limit of the first five participants is set as a guarantee to avoid the risk of pretextual participation by economic operators and for the purpose of not burdening the access procedure.

The possibility of challenging the administration's refusal is instead provided for in paragraph 4 of Art. 36, which regulates a new procedural process. In particular, the operator may challenge the administration's decision on its request for obscuration within ten days of the communication and the matter will be submitted for discussion in the Council Chamber as soon as possible and will end with the publication of the decision within five days.

The publication of unobscured tenders will only take place after the expiry of the time limit for appeals.

Lastly, it should be noted that repeated requests for the obscuration of one's documentation, if instrumental and/or not motivated, will be assessed by the Administration, which, pursuant to paragraph 6 of Article 36, may forward a special report to the ANAC so that it may impose a fine for unlawful obstruction of access.

The innovations introduced by the New Code undoubtedly reinforce the general trend towards greater transparency in the work on the Public Administration, making it more tangible and accessible to citizens.

Summary

With the actual entry into force of the section on document access, important innovations are introduced that can be summarised as follows:

- Full operability of civic access in public procurement;
- Prevalence of access over confidentiality and discretionary power of the Public Administration to balance the interests at stake;
- New fast-track procedure for access and challenging refusal of access in court;
- Reporting to ANAC by the Administration in the event of specious obscuration requests by operators.

The preservation of contractual balance

The new Code has also introduced important innovations in the execution phase of public contracts.

Undoubtedly, the most important aspect is that the so-called **preservation of the contractual balance** during the performance of the contract has been elevated to **a fundamental principle** (Art. 9).

The Legislator's intention to regulate this principle in detail is the result of a need that emerged during the period of the pandemic and subsequent macroeconomic crisis, which highlighted all the fragilities of the public contracts sector. In order to overcome these difficulties, at first the Legislator intervened with a series of emergency measures that then led it to regulate, within the New Code, the principle of contractual balance, which today represents the synthesis of the will to meet the needs of economic operators and contracting authorities.

With the New Code, the concept of **renegotiation in good faith** is thus introduced in public contracts, based on the civil law principle of contractual balance and fairness, providing for the right of the disadvantaged party to renegotiate the contract to restore the original balance. The Code thus elevates renegotiation to a right by giving value to the logic of preserving the contract, saving its effects and avoiding its termination. The rationale of this rule is therefore to restore and preserve the contractual synallagma, going beyond ordinary economic fluctuation and market risk.

However, the legislator also places a limit on **the restoration of the contractual balance**, specifying that the renegotiation must not alter the original economic balance since the imbalance must have been caused by extraordinary and unforeseeable circumstances outside the normal scope of the contract.

In addition to the renegotiation of the contract in good faith, the New Code has also introduced in Article 60 important novelties concerning **price revision**.

The rise in inflation due to the pandemic period and then the Russian-Ukrainian war, caused a dramatic rise in the cost of raw materials, which was a heavy blow to economic operators in the field of public contracts.

While in relations between private parties it has always been permissible to request changes to the economic conditions during the term of the contract, including the possible termination of the contract in the event of disagreement, in public contracts this is not permitted except in a few certain very specific cases, i.e. when there is a revision clause in the contract or in cases expressly provided for by law.

The regulatory system under the old Code severely limits the possibility of modifying contracts in the course of performance without a new tender procedure, since Art. 106 (Leg. Decree 50/2016) provides for the possibility of revising the price only if specific contractual clauses are provided for in the tender documentation, in the absence of which only civil law remedies are available.

The exceptional increase in costs, on the other hand, led to the need to provide for a mandatory price revision regime upon the occurrence of particular conditions of an objective nature, which could not be foreseen at the time of formulation of the tender. However, the emergency regulation did not prove to be particularly effective since contracts for goods and services remained unprotected.

Art. 60 of the new Code therefore places service and supply contracts on an equal footing with works contracts, filling the regulatory gap left by the emergency regulations and providing for the **obligation for contracting authorities to include price revision clauses in the initial tender documents, thus introducing an automatic revision mechanism** which is triggered in the presence of circumstances that determine a variation above a certain threshold.

Essentially, these clauses can be triggered whenever there is a change in price due to an objective condition, whether or not the triggering factors are known at the time the tender is drawn up.

These important innovations certainly mark the beginning a new era for the execution

phase of public contracts, in the name of preserving the contract as a guarantee for economic operators and contracting authorities.

Summary

The major innovations affecting the execution phase can be summarised as follows:

- Introduction of the principle of preservation of the contractual balance (Art. 9)
- Right of the disadvantaged party to renegotiate the contract in order to restore the original contractual balance.
- Obligation for contracting authorities to include price revision clauses in tender documents.

Public-Private Partnerships

Book IV of Legislative Decree No. 36/2023 is entitled "On Public-Private Partnerships and Concessions" and covers Articles 174 to 208.

In public procurement, the Public-Private Partnership (or PPP) is **everything that is NOT a contract**, by which is meant all the contractual relationships involving a Public Administration that are not of a passive nature (meaning that the administration does not have to provide for an outlay of money).

This definition 'by subtraction' has always made it difficult to identify a precise category of PPP, so much so that Legislative Decree No. 50/2016 first defines the 'concession' and then attempts to identify its characteristics - operational risk, fees, economic-financial plans, etc. – which, when present in other types of contracts, allow them to be classified as PPPs.

The 2023 Legislator adopts a different approach, clarifying from the outset that **the PPP is not a contract but 'an economic transaction' (Art. 174)** characterised by the following conditions:

- a long-term relationship with the objective of a '**public interest result**';
- a financial investment predominantly ('**to a significant extent**') made by the private sector;
- a clear allocation of tasks: the public party is responsible for defining the objectives and monitoring their achievement, the private party for project implementation and management;
- finally, the operational risk must be borne by the private party carrying out the works or managing the services.

There can then be two different types of PPPs:

- **contractual** (concession, leasing, availability contract etc.);
- **institutional** (mixed public-private companies for in-house contracts).

The awarding procedure

In order to proceed with a PPP, Public Administrations must adopt a three-year programme indicating the 'public needs' that they intend to meet 'through forms of partnership' (Art. 175). Recourse to PPPs must then be preceded by a preliminary evaluation of suitability and feasibility, aimed at assessing whether:

1. the project is suitable for financing by private resources,
2. the project can generate innovative solutions,
3. operational risk is properly allocated,
4. the Public Administration has the necessary debt capacity and budgetary availability,

and, for this purpose, it is necessary to assess the costs and benefits of using a PPP rather than a procurement contract.

Once the decision to proceed has been taken, the Public Administration entrusts the RUP with monitoring the private party's activity, with the main task of verifying that the operational risk remains with the private party for the entire duration of the PPP. This is to comply with the Eurostat decision that if the public investment exceeds 50% during the PPP, it must be entered in the public budget... thus losing the characteristics of a PPP!

Concessions

The most common form of Public-Private Partnership is certainly the concession, which, in addition to the characteristics seen above, can only be properly used if '*under*

normal operating conditions' the concessionaire is not guaranteed to recover investments nor costs incurred, i.e. if it is 'actually' exposed to market fluctuations.

The greatest difficulty encountered in awarding a concession lies in the need to preserve, for the entire duration of the relationship, on the one hand the economic and financial convenience of the concession - for both the public and the private sector - and on the other hand, the allocation of the risk to the concessionaire. This does not mean that, if this balance is not guaranteed, the public party cannot provide economic support to the concessionaire (**Art. 177**), but the concessionaire can NEVER be relieved of the risk of economic losses, as this would transform the concession into a public contract.

To guarantee this, therefore, the concession contract must contain specific clauses preserving the economic and financial balance and risk allocation exactly as they were established at the time the contract was signed.

The duration of the concession has a considerable impact on the operation, since it must be predetermined in order to allow for the recovery of the investment. For this reason, the duration must be specified in the tender documents so that the economic operator can assess the concessionary remuneration and it cannot be extended, as the concessionaire's remuneration has been established for an exact time frame and its extension could be an undue favour to its advantage.

Project Financing

The term "project financing" refers to a particular procedure in which the Public Administration makes itself available to finance a project, of public or private origin, by searching the market for the party able to carry it out.

This particular procedural/contractual type had little luck when it was introduced (it was already present in Legislative Decree No. 50/2016), but it hit the headlines with the adoption of the PNRR and the consequent sudden availability of huge resources on the part of contracting authorities, to be deployed against an apparent lack of planning capacity. This was a result of the long-standing decline of public spending as well as

the centralisation of purchases, which emptied Public Administrations of the skills and knowledge needed to draw up projects.

This is why project financing has suddenly become topical, as it combines the possibility of satisfying the public interest with the private interest of carrying out a works or services concession (**Art. 193**).

The Project can be activated by submitting to the Public Administration a proposal containing a feasibility project, a draft agreement and a sworn economic and financial plan, which the administration has to evaluate within 90 days of its submission, except for any requests for changes and additions, which the Proponent must carry out, otherwise the proposal may be rejected. At the end of the evaluation, the Public Administration must then either approve the project (declaring it to be of public utility) or reject it expressly with a reasoned measure.

If the project is approved, it then becomes the subject of a procedure (to be awarded to the economically most advantageous tender), in which the option right may be established in favour of the Proponent, which therefore not only also participates in the tender (for the realisation of its project) but in case it fails to win, it may also activate the pre-emption right by being awarded the contract (after reimbursement of the cost of participation to the pre-selected tenderer).

In this way, the Proponent can guarantee itself the right to realise its proposed project in any case, whereas other competitors may compete in a tender 'devised' by one of their competitors but whose particular know-how (as used in the design of the project itself) they become aware of through said participation.

Project financing is therefore expected to have a great development and use in the near future, due to all the characteristics and peculiarities highlighted above.

Summary

The Public-Private Partnership is 'everything that is not a contract' and, given the definitive affirmation of the principle of the contractual autonomy of the Public Administration (Art. 8), is destined for great use in the coming years, representing the future of public procurement.

Special Sectors

Legislative Decree 36/2023 regulates, among other things, also the so-called 'special sectors' of the economy, introducing a series of provisions concerning activities or infrastructures of strategic importance for security and public order, and therefore provides for a part headed 'On the procurement of special sectors' (Book III), which contains 32 articles divided into three parts:

- General Provisions
- Contractor Selection Procedures
- Selection of Participants and Tenders

With regard to the nomenclature of sectors, the new Code, in **Articles 146 to 152** refers specifically to the sectors of '**Gas and thermal energy**' (including the extraction of solid fuels), **Electricity, Water, Transport Services, Ports and Airports** and, finally, **Postal Services**.

On the one hand, the new legislation seeks to confirm the 'closed' nature of the provision of these services, insofar as they are of national interest (and thus essentially exempt from competition), while on the other hand it attempts to combine the presence in these sectors of entities that provide these specific services through purely private forms and not only according to 'public administration' logic.

This follows from **Art. 141**, Paragraph 2, which provides that public enterprises and "*Entities holding special or exclusive rights*" shall also apply the provisions on special sectors for 'instrumental contracts' from a functional point of view to the activities envisaged by Arts. 146 - 152 of the new Code. This means that entities operating under private law are not required to carry out public procedures for the award of contracts to third parties, if the activity to be entrusted is not 'functionally instrumental' to the activity of the special sector.

From the outset, it is necessary to adopt a broad interpretation of the concept of

'instrumental activity', as can be found, for example, in the ruling of the European Court of Justice (Case C-521/18), which analysed the nature of an activity that is ancillary to the provision of a special service, specifically a postal service. The Court stated that "*…it is difficult to imagine that postal services may be adequately provided in the absence of the caretaking, reception and access control services for the premises of the provider concerned. That finding applies both to premises which are open to the recipients of postal services and thus admit the public and to premises used for administrative functions*.".

In the light of the above, the question of the interpretation of the concept of 'instrumentality' could then remain open, given that the European Court of Justice itself, in the specific example, would have ideally extended its boundaries to services that could also be indirectly related, thereby potentially obliging public undertakings and holders of special or exclusive rights to carry out public procedures in many more cases than expected.

As mentioned, the new Code allocates an entire book to Special Sectors, detailing in Art. 141 which provisions of Book I (on general principles) and Book II (on procurement) are to be considered applicable. In particular, the applicability of the provisions on 'digitalisation' (Book I, Part II) is indicated, in the same way as for the entities operating in the ordinary sectors, which means that, **from 1 January 2024, entities operating in special sectors should also use the system of digital platforms** that we discussed in the previous chapter '**The National Digital Procurement Ecosystem**'.

Another feature that characterises the special nature of the sector is the presence of self-regulation rules: Article 141 reiterates, for example, that public undertakings and the holders of special or exclusive rights have the right to set up and manage qualification systems for economic operators, to lay down rules on the functions of the RUP in relation to their own organisation as well as to specify, according to the needs of the market, the concept of 'alteration during works'.

Companies will also be able - and this is one of the most important innovations to be noted - to determine the size of the subject matter of the contract and the lots into which it may be subdivided, without the need for additional justification and taking

into account the requirements of the special sector in which they operate.

With regard to the choice of contractor, **Article 156** highlights a greater discretion for companies operating in the special sectors, both with regard to the information to be provided to economic operators, and with regard to the evaluation and the deadlines for the receipt of tenders, by agreement of the contracting authority and all the selected candidates.

Contracting and awarding authorities are also given the option of using open and restricted procedures (which are more constrained), as well as more flexible procedures such as Competitive Dialogues, Partnerships for Innovation and Competitive Negotiated Procedures, all without any further motivation requirements and with the exception of negotiated procedures without publication of a notice (see **Articles 155 to 158**).

Article 168 defines tendering procedures with qualification systems reserved for special sectors. In essence, contracting authorities or awarding bodies will be able to set up and manage a qualification system of economic operators from which they can draw to choose competitors to be invited to restricted or negotiated procedures. For their part, economic operators will be able to request to be qualified at any time, and the qualification system will have to allow for the definition of requirements that may even differ from the ordinary participation, economic-financial or technical-professional capacity requirements for the purpose of registration of economic operators.

It is also worth noting **Art. 169 para. 1** which provides that public undertakings and the holders of special exclusive rights may establish, in advance, which conduct constitutes serious professional misconduct for the purposes of Articles 95-98 of Legislative Decree No. 36/2023. Thus, it seems possible for the contracting authorities to decide autonomously which conduct they consider relevant for the purposes of the definition of grave professional misconduct.

Finally, as to the rules governing the execution phase, the civil law rules generally apply and, therefore, the rule of the Code of contracts on the advance payment of the price (equal to 20% calculated on the value of the contract to be paid to the contractor) does not seem to be applicable, a rule that is now found in Part VI of the Code (Article

125).

On the other hand, by express provision of Article 141, the rules on subcontracting (**Art. 119**), contract amendments (**Art. 120**), performance requirements (**Art. 113**), and contract termination mechanisms (**Art. 122**) will apply in the execution phase, even for special sectors.

With regard to the non-applicability of rules, it should be noted that even in the case of activities inherent to the special sectors, the Code does not apply to contracts intended for an activity directly exposed to competition on freely accessible markets (**Art. 143 paragraph 1**), to contracts awarded for the purpose of resale or lease to third parties (**Article 144**), to contracts awarded by contracting authorities or awarding bodies for the performance of activities pertaining to the special sectors in a third country, in circumstances, however, that do not entail the material exploitation of a network or geographical area within the European Union (**Article 145**).

Summary

The subjective scope of application of Book III and the general provisions of the other Books that apply to special sectors, are identified in a substantially complete manner. There is also a general self-sufficiency of the rules for the special sectors.

The subjective and objective scope of the rules governing the special sectors does not seem to have changed compared to the previous rules and is therefore in a regime of substantial continuity with the old Code.

However, there is certainly greater clarity for operators in the sector, who will find all the applicable rules in a single Book.

In the section on procedures for the selection of contractors, references characterised in the old Code by the wording 'within the limits of compatibility' have been removed, in favour of more precise and specific references.

The rules laid down in Book III, Part III outline in detail the content and manner of communication and publication of notices, information, tender documents, with specific provisions aimed at guaranteeing the protection of the confidential nature, if any, of the information contained therein.

On the subject of the selection of participants and tenders, Part IV sets out in detail the general provisions applicable, including to special sectors, with regard to the selection of participants and tenders, as well as to the procedures for choosing contractors. However, it introduces further provisions relating to specific areas, in particular those concerning qualification systems (Article 168) and regulated tendering procedures (Article 169).

An 'ordinary and residual' tendering procedure is thus outlined, meaning that it is applicable on condition that contracting and awarding bodies do not intend to use the tendering procedure by means of the qualification system (under Article 168) or the regulated procedure (under Article 169).

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