

The impact of competitive tendering on the execution of public contracts and concession contracts

Italy

Preliminary remarks: competition in the execution phase of public procurement in Italy¹

The Italian Public Contracts Code includes competition among the principles of the awarding phase, following the European Directives on Public Procurement.²

Yet, competition is not taken into due account in the procurement process as a whole, particularly at the execution stage³. The problem of a lack in competition, transparency, and accountability after the award of a public procurement is widespread in any legal system and it increases in the highly advanced procurement systems. This leaves a “black hole”, hiding incompetence, inefficiency, or lack of integrity. Also, EU directives neglect the performance phase and fail to consider that improper behavior at the execution stage may eventually end up undermining the fairly competitive outcome at the awarding stage.

Even recently, the European Court of Justice (ECJ) limited the modification of contracts during their term, safeguarding principles of non-discrimination, transparency and competition: ECJ maintained that material amendments are modifications which goes beyond the scope of the awarded contract⁴.

Such material amendments to the subject matter of the contract might have led to different set of tenderers and, possibly, to a different winning tenderer, and the situation is equivalent to the illegal direct award of a public contract without a contract notice. So, the ECJ is allowed to declare the ineffectiveness of such a performance of a public procurement process as amended, which otherwise falls outside the EU competence, aiming “to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete”.⁵

The ECJ preserves the right of any economic operator for fair competition both in the award phase and in the execution, otherwise this principle of fair competition is considered violated

¹ All Prof. Gabriella M. Racca’s publications on public procurement are available, in open access, [at this link](#) on the [Ius Publicum Network Review website](#).

² Legislative Decree No. 50/2016 (the “Italian Public Contracts Code”).

³ The role of third parties in the monitoring of the correct execution has been explored in G.M. RACCA, [The role of third parties in the execution of public contracts](#), in L. FOLLIOT-LALLIOT, S. TORRICELLI, *Contrôles et Contentieux des Contrats Publics – Oversight and Challenges of Public Contracts*, Bruxelles, Bruylant, 2018, available in part on [Public Procurement International](#) blog (Prof. C.R. YUKINS); see also G. M. RACCA, R. CAVALLO PERIN, [Material changes in contract management as symptoms of corruption: a comparison between EU and U.S. procurement systems](#), in G. M. RACCA – C. R. YUKINS (a cura di) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, Bruylant, Bruxelles, 2014, 247-274.

⁴ ECJ, 19 June 2008, *Presselext Nacltricl, tenagentur OmbH v. Republik Osterreich*, C-454/06, ECR I-4401,

⁵ Dir. 2007/66/EC, recital no. 14.

in case of a significant, material, and unforeseeable amendment to the contract conditions during executions⁶.

Also in Italy, scholars have pointed out that the safeguard of competition must also be ensured in the execution phase.⁷

The Italian jurisprudence up to 2020, however, followed the traditional approach according to which after the stipulation of the contract the legal relationship ends between the parties, with a limited relevance with respect to the public interest and third parties. A recent judgment of the Italian State Council brought a great innovation, recognizing that the execution phase must respect the outcome of the tender conducted according to the rules of transparency, non-discrimination, and competition.⁸

Concerning transparency issues, a crucial role goes to the monitoring of the entire procurement cycle by the unsuccessful tenderers, by social witnesses, NGOs, the press, citizens, which might cumulatively help assure correct performance, and might well create an incentive for proper conduct by officials and contractors during the award and execution of a contract⁹, considering also technological development and the digitalization both of the public procurement cycle and databases¹⁰.

Case study 4: parties hold differing meanings as to the interpretation of an ambiguous term in the contract

Italian Supreme Court, Civil Division, Section I, Judgment of 12/07/2016, no. 14181

In this judgment, the Italian Supreme Court stated that in the procurement of public works on a lump-sum or fixed-price basis, the successful bidder bears the risk of additional work than foreseeable. In general, it has been pointed out that in the case of public works contracts on a lump-sum or fixed-price basis, the agreed price is fixed and invariable, pursuant to article 326 of Law 2248/1865, appendix F.

⁶ G. M. RACCA, R. CAVALLO PERIN, [Corruption as a violation of fundamental rights: reputation risk as a deterrent against the lack of loyalty](#), in G. M. RACCA – C. R. YUKINS (a cura di) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, Bruylant, Bruxelles, 2014, 23-48.

⁷ G. M. RACCA, R. CAVALLO PERIN, [Material Amendments of Public Contracts during their Terms: From Violations of Competitions to Symptoms of Corruption](#), in *European Procurement & Public Private Partnership Law Review*, 4/2013, 279-293; G. M. RACCA, R. CAVALLO PERIN, G. L. ALBANO, [Competition in the execution phase of public procurement](#), in *Public Contract Law Journal*, 2011, Vol. 41, n. 1, 89 -108; R. CAVALLO PERIN, G. M. RACCA, G. L. ALBANO, [The safeguard of competition in the execution phase of public procurement](#), in *Quaderni Consip*, VI, 2010.

⁸ Italian State Council, Plenary Assembly no. 10/2020.

⁹ G.M. RACCA, [Public Procurement and Corruption: the EU challenges](#), in E. Carloni, D. Paoletti, *Preventing corruption through administrative measures*, Morlacchi Editore, 2019, 95-103; but also G. M. RACCA, R. CAVALLO PERIN, G. L. ALBANO, [Public Contracts and International Public Policy Against Corruption](#), in M. AUDIT- S. W. SCHILL (eds. by) *Transnational Law of Public Contracts* Bruylant, 2016, 845-878.

¹⁰ G. M. RACCA - C. R. YUKINS (eds. by), [Joint Public Procurement and Innovation: Lessons Across Borders](#), Bruxelles, Bruylant, 2019, available online on [Public Procurement International](#) blog (Prof. C.R. YUKINS), and [at this link](#).

Therefore, if the parties to that relationship have complied with their obligation to act in good faith under article 1175 of the Italian Civil Code and, therefore, all the elements that may affect the successful bidder's estimate of expenditure have been correctly represented by the contracting authority, the first bears the risk of the additional amount of work that becomes necessary compared to the foreseeable amount, since the higher cost of the work is considered to be part of the normal risk of the contract to be carried out.

Case study 5: contract does not provide for a particular matter and may need supplementation with an additional term

Italian Supreme Court, Civil Division, Section I, Judgment of 12/10/2018, no. 25554

In this judgment, the Italian Supreme Court pointed out that in the execution phase of public works contract, the reasons of public interest or necessity that may justify the suspension of the works, although not specified in the contract, may be identified exclusively in objective and supervening public needs, not foreseen or foreseeable by the Public Administration.

The identification of the supervening reasons of public needs must be done through the use of the ordinary diligence according to article no. 1206 of the Italian Civil Code and cannot therefore be invoked in order to remedy the negligence or lack of foresight of the contracting authority, which is responsible for obtaining the administrative authorizations necessary for the execution of the works.

More generally, the duty of fairness in the performance of the contract applies to both public and private parties and is reflected in the duty to co-operate in the contractor's performance by carrying out all those activities that are necessary to achieve the result to which the obligatory relationship is directed.

Case study 6: contracting authority invokes an allegedly unfair contract clause

Italian State Council, Judgment of 10/06/2016, no. 2497

According to the Italian State Council, all the provisions governing the conditions, the behavior, and the conclusion of the tender procedure for the selection of the private contractor, when contained in the notice or in the letter of invitation and in their annexes (specifications and annexes), constitute the applicable contract rules.

Consequently, in case of unfair clauses or ambiguity or error attributable to the contracting authority, on the basis of the necessary principle of good administration, impartiality and good faith in the conduct of negotiations and in the formation of the contract, it is necessary to apply the contractual rules in such a way as to protect both parties, interpreting them for what

they expressly say, without reconstructing, through hermeneutical and supplementary investigations, further and unexpressed meanings.

In the present case, an appeal was brought against the decision to exclude the company from a tender procedure for the award of the contract for catering service for health authorities and hospitals, following the incorrect interpretation of the duration of the contract and the subsequent incorrect formulation of the tender (the duration of the contract was 48 months, given that the tender specifications provided for the possibility of a 12-month extension). The court of first instance (Regional Administrative Tribunal) found that the tender documents were contradictory, such as to create uncertainties in the formulation of the offer, and that in the case of conflict between the tender documents, the notice should have prevailed; moreover, it should have provided for the preliminary assistance, before proceeding to the exclusion from the tender. The Italian State Council upheld the decision of the T.A.R. and annulled the tender.