

New delegation law on the implementation of the new European procurement package

On 28 January 2016 the Italian Parliament formally approved Law no. 11 which authorises the Italian Government to transpose the new European procurement package (i.e., Directive 2014/23/EC on the awarding of concession contracts, Directive 2014/24/EC on the awarding of public contracts of works, services and supplies and Directive 2014/25/EC on procurement by entities operating in the water, energy, transport and postal services sectors).

In particular, the Italian Government is now authorised to enact the following legislative decrees:

- by 18 April 2016, an “implementing decree” (*decreto di recepimento*) of the new European procurement package, which shall *-inter alia -* repeal the provisions of Legislative Decree 12 April 2006, no. 163 (the “Code of Public Contracts”) not compatible with those of the “implementing decree” and introduce the required measures of coordination and transition from the previous to the new regulatory regime;
- by 31 July 2016, a “reorganization decree” (*decreto di riordino*), through which also the remaining provisions of the Code of Public Contracts shall be repealed, as well as those of the Decree of the President of the Republic of 5 October 2010 and any other law provisions to be specifically indicated. The reorganization decree shall encompass also the contents of the implementing decree, and shall introduce any correcting and/or integrating provisions that may be required.

The Italian Government could in any case decide to enact one single decree, having the contents of both the implementing decree and the reorganization decree. In this case, the deadline for the Government will be 18 April 2016.

Within one year of the date of operation of the decrees, the Government is also authorised to adopt any further provisions which should be necessary to

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integrate and amend the implementing decree and/or the reorganization decree.

The new delegation law

The purpose of the Law no. 11/2016 is to transpose into the Italian system the new European procurement package, by adopting a new consolidated act which should replace and unify the current legislation on public procurement, thus reducing and rationalising the current set of laws and regulations governing procurement matters in Italy, simplifying the procurement procedures and reducing the procedural constraints for the realization of public works.

Such new consolidated act should also - *inter alia* - (a) ensure a smooth and coordinated transition from the current to the new procurement regulation; (b) ensure coordination with law provisions governing other legal matters, such as, environmental protection, environmental impact assessment, protection and promotion of artistic heritage, anti-corruption regulation; (c) avoid uncertainties in the interpretation of the Italian procurement legislation with respect to the EU regulatory framework and (d) improve transparency, publicity and traceability of procedures.

To this end, Law no. 11/2016 establishes the main principles and guidelines to which the Italian Government will be bound in the adoption of the implementing decree and the reorganization decree.

Key principles and guidelines

Among the principles and guidelines set by Law no. 11/2016, the followings appear to be of particular interest.

> **Simplification of tender procedures.** Law no. 11/2016 instructs the Government to introduce measures aimed at - *inter alia* - (i) reducing the set of documents and the economical charges imposed to the private operators that are willing to participate in public tender procedures, (ii) implementing the use of the European Single Procurement Document (ESPD) to simplify the self-certification of the requirements by private operators, (iii) introducing the obligation for small municipalities to manage tender procedures jointly and (iv) revising the tender processes of the central purchasing bodies (*soggetti aggregatori*) in order to make such processes more efficient by reducing the relevant timing and costs. In addition, the National Anti-bribery Authority (ANAC) will be entitled to adopt guidelines, standard tender documentation, standard public contracts and “soft law” instruments, that will be binding for the contracting authorities.

> **Facilitate SMEs access to public procurement.** This will include – *inter alia* – (i) the promotion of e-procurement, (ii) strengthening the duty to divide projects into different lots, and (iii) favouring those contractors and concessionaires that will involve SMEs in the execution of public contracts.

> **New rules for private operators subject to insolvency procedures (i.e., *fallimento, concordato con continuità aziendale o con cessione dei beni, concordato preventivo*)** allowing such private operators, under certain conditions, to participate in procedures for the awarding of public contracts and concessions and to continue the execution of those public contracts already entered into.

> **A new qualification system for private operators that will participate in public tender processes.** The new system shall be based on reputation requirements of the private operators and on objective criteria. A centralized database of the general qualification requirements of private operators shall be set up and managed by the Ministry of Infrastructure and transports.

> **Reorganization and simplification of the system of guarantees/bonds.** The new system of guarantees and bonds will become effective once an agreement is reached with the banks and insurance companies that will assume the relevant entrepreneurial risk.

> **More transparency.** Publication duties connected to the awarding of contracts to in-house entities will be strengthened and a national data base of in-house contracts will be set up and managed by ANAC.

> **Harmonization and simplification of concession regulation.** Such new regulation shall - *inter alia* - (i) bind the concessionaires to the full implementation of the economic and financial plan and to the timetable of the construction works; (ii) be aligned with the principle of the transfer of the operational risk to the concessionaire provided by Directive 2014/23/EC; (iii) provide a specific regulation governing the transition phase from outgoing concessionaires to the incoming ones at the end of the validity period of concessions and the relevant compensation in favour of the former, and (iv) in case of concessions having a value exceeding 150,000€, introduce the obligation for the concessionaires to subcontract a quota equal to 80% of the value of the works, supplies and services through public tender procedures. The obligation sub (iv) above will apply also to concessions already awarded, but the concessionaires will benefit from a grace period (24 months) to conform their activities. In any case, project finance concessions and concessions awarded in compliance with EU regulation will not be subject to the obligation sub (iv) above.

> **New regulation for toll motorway concessions.** New public tender procedures shall start, at the latest, 24 months before the expiration of the concessions in place. Clauses allowing the extension of the concessions' validity period will not be allowed. A special transition regime shall be provided for those concessions (i) that will be already expired or about to expire as at the date of entering into force of the implementing decree, and (ii) in which the concessionaire is an in-house entity.

> **Revision of awarding criteria.** The implementing decree and/or the reorganization decree shall – *inter alia* – (i) reinforce social and environmental standards, and (ii) select the economically most advantageous tender (EMAT) as general rule, thus limiting the recourse to the lowest price award criterion.

> **Quality of awarding commissions.** A national register of the awarding commissions' members shall be set up and managed by ANAC. Commissions' member shall meet specific moral and professional requirements and shall be assigned to awarding commission by lots and in a way to ensure rotation between the eligible members.

Law no. 11/2016 provides further guidelines for the Government, concerning for example the introduction of new limits to the use of negotiated procedure without the prior publication of the call for bids (*bando*), limitations to project variations after the awarding of contracts, the revision of the rules concerning the possibility for the private operators to avail themselves of third parties' requirements and new rules for legal proceedings concerning the awarding of public contracts.

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

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