



**ITechLaw In-House Counsel Committee's  
International Public Procurement  
Guide for In-House Counsel**

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## Public Procurement Law in Italy

### General

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The Public Contracts Code<sup>38</sup> has implemented in Italy both Directives 2004/17/EC and 2004/18/EC and it is applicable to public procurements relating to several "special fields" (i.e., gas, thermal energy, water, transport, mail services and exploitation of geographical areas) as well as to public procurements relating to "ordinary fields" (i.e., any matter other than special matters as above described).

With reference to the ordinary fields, the Public Contracts Code provides different regulations depending on the value of the relevant procurement. In particular, public procurements having a value below the following thresholds are subject to a simplified procedure (which includes, among others, an easier framework for the advertising of the call for tenders and reduced procedural terms):

- i. EUR 130,000 for public supply and service contracts other than research and development services awarded by central government authorities
- ii. EUR 200,000 for any other supply and service contracts
- iii. EUR 5,000,000 for public works contracts

The Public Contracts Code is also applicable in the fields of defence and security (i.e., the supply of weapons, ammunitions, military equipment, sensitive equipment and relevant services) only as far as they are not otherwise regulated by Legislative Decree of November 15, 2011, no. 208, which has implemented in Italy the Directive 2009/81/EC.

Finally, the Public Contracts Code shall not apply to some kinds of public procurements (such as those relating to TV broadcasting/producing contracts, arbitration agreements, etc.) although it provides some minimal requirements such as the issuance of invitations to tender to at least five candidates (if possible).

### Procedures

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The Public Contracts Code offers the following procedures:

- i) Open procedure (In Italian "*procedura aperta*"): a procedure according to which any interested economic operator may submit a tender
- ii) Restricted procedure (In Italian "*procedura ristretta*"): a procedure according to which any operator may request to participate, but only those economic operators invited by the contracting authority may submit a tender. If the public procurement has a value of at least EUR 40 million, the public contractor has to invite at least 20 candidates among the operators having requested to participate and having met the requirements set forth by the call

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<sup>38</sup> Legislative Decree of April 12, 2006, n. 163, as further amended.

- iii) Competitive dialogue (in Italian "*dialogo competitivo*"): a procedure according to which any economic operator may request to participate, and the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender. This procedure is used for public procurements that are particularly complex
- iv) Negotiated procedure (in Italian "*procedura negoziate*"), with or without advertisement: a procedure according to which the contracting authority consults the economic operators and negotiates the terms and conditions of the relevant contract with one or more of the operators that it has selected. There must be at least six candidates
- v) Design contests (in Italian "*concorsi di progettazione*"): a procedure according to which the contracting authority is entitled to acquire a plan or design selected by a jury after being put out to competition with or without the awarding of prizes. This procedure applies mainly for public contracts in the fields of town and country planning, architecture and engineering, or data processing
- vi) Dynamic purchasing system (in Italian "*sistema dinamico di acquisizione*"): a completely electronic procedure for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority. This is limited in duration and open throughout its validity to any economic operator that satisfies the selection criteria and has submitted an indicative tender that complies with the specification

The procedures under points iii) to vi) can be used only in specific cases as set forth by the Public Contracts Code.

### **Dedicated bank accounts**

Pursuant to the Italian anti-mafia legislation, a dedicated bank account shall be used for any transaction related to public procurements (i.e., the transactions among the bidder, sub-contractors and any other third parties).

In particular, the bidders have to provide the relevant public contractors with the details of their dedicated bank accounts and promptly give notification of any variation in them.

In addition, according to such legislation, any public contract as well as any sub-contracts shall expressly include a clause according to which the relevant parties shall comply with specific traceability obligations for any transactions relating to a public procurement as set forth by Law of August 23, 2010, no. 136. In case of breach of the above-mentioned obligations, the contract will be terminated. The bidders shall also notify the public contractor and the police if they become aware that a subcontractor is not complying with the above-mentioned traceability obligations.

## Contractual Terms

Public contracts are generally subject to the Italian Civil Code, unless otherwise regulated by the Public Contracts Code.

Please also note that, for ICT supplies and services contracts, the National Center for Informatics in the Public Administration (now renamed as National Agency for Digitalization of the Public Administration) has issued some guidelines relating to the drafting of ICT public contracts. Such guidelines do not contain any mandatory provisions, but they suggest the inclusion of specific provisions regulating: (i) non-disclosure obligations, (ii) risks of destruction of devices containing data during maintenance activities, (iii) restrictions on the possibility of performing remote maintenance activities, etc.

## Remedies

Italian regulation of public contracts provides for both administrative and judicial remedies, depending on the object of the claim.

In particular, any controversies regarding irregularity in procedures are subject to the pertinent Administrative Courts (i.e., Regional Administrative Court in the first instance and the Counsel of State in appeal).

Should the irregularity concern infringements of the rules on competition in public procurements carried out by public entities, it is possible to file the relevant claim also before the Authority for the Supervision of Public Contracts for Works, Services and Supplies.

Any other disputes between the parties arising out of a public contract (including, for example, any disputes as to its validity, enforceability, interpretation, performance and termination) should be filed before the pertinent ordinary Courts. Please note that jurisdiction issues in relation to public contracts are currently still highly debated among case law legal experts and commentators.

### For further information, please turn to:

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