

March 2016

## Public Contracts - update

### AMENDMENTS TO DRAFT LAW FOR THE ADOPTION OF A NEW PUBLIC CONTRACTS CODE AND IMPLEMENTING REGULATION

On March 3, 2016 the Council of Ministers (CoM) has approved the draft legislative decree to implement the European Directives 2014/23/EU on the award of concession contracts, 2014/24/EU on public procurement and 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

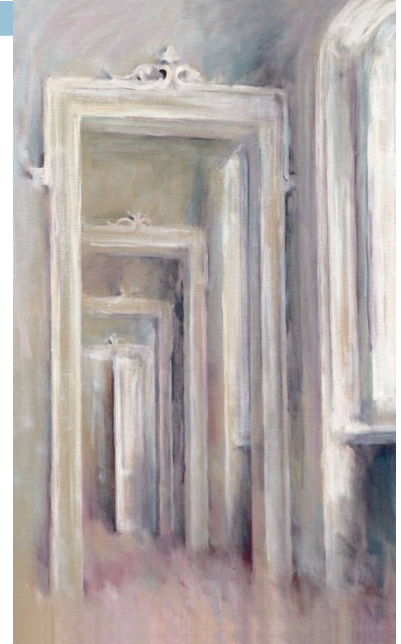
This is not the definitive text. According to the delegation law, the deadline to adopt the new public contracts code is set for April 18, 2016. Within the next 45 days therefore the draft will need to obtain the opinion by the Council of State' and the Unified Conference State-Regions and approval by the Parliament.

The draft approved by the CoM is comprised of 217 articles (compared with previous texts which featured more than 600) and is not supposed to be implemented further by regulations but rather to be supplemented by guidelines to be adopted by the Ministry of Infrastructure in coordination with the National Anti-Corruption Authority (ANAC).

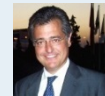
The draft is based on the following principles, in line with the delegation law.

With reference to economic operators:

- Reduction and simplification of laws and regulations and procedural transparency;
- Reduction of documents to be submitted for the participation in the procedures;
- Reform of the system of qualification of economic operators, providing for the automatic loss of such certification in case of bankruptcy proceedings and introducing advantages for economic operators complying with past contracts' terms and conditions and taking into account the new rules on «*rating di legalit *»;
- Reform of the rules on reliance on the capacities of other entities ("*avalimento*"), providing for a strict duty of the contracting authority to verify the capacities of the entities relied upon and the performance of the relevant tasks by the latter;
- Adoption of adequate transparency rules also for public procurements below European thresholds.

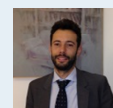


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## Focus: The 2014 European Directives on public procurement

In December 2011 the Commission proposed the revision of Directives 2004/17/EC (procurement in the water, energy, transport and postal services sectors) and 2004/18/EC (public works, supply and service contracts), as well as the adoption of a directive on concession contracts.

The Directives were voted by the European Parliament on 15 January 2014 and adopted by the Council on 11 February 2014.

The Member States have until April 2016 to transpose the new rules into their national law (except with regard to e-procurement, where the deadline is September 2018).

In particular the new Directives are :

- European Directive 2014/23/EU on the award of concession contracts;
- European Directive 2014/24/EU on public procurement; and
- European Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

With reference to contracting authorities the main provisions relate to:

- The introduction of a system of valuation of, and surveillance over, the contracting authorities entrusted to ANAC;
- Simplifying the verification of the prerequisites of economic operators;
- Limiting the recourse to mixed design-construction contracts (*«appalto integrato»*), in favour of design contests for the adoption of the detailed design to be used for the works;
- The preferential recourse to the «most economically advantageous tender» as award criterion, based on the “best quality/price ratio”;
- The creation of a list of qualified experts, managed by ANAC, from among which the members of the jury panels for the evaluation of tenders shall be elected ;
- The granting to contracting authorities of more penetrating controlling powers on the performance of the contracts, also in relation to contracts awarded to general contractors;
- The granting to ANAC of wider surveillance and intervention powers.

Other important provisions relate to the following aspects:

- The creation of a Coordination Centre (*Cabina di regia*) within the CoM to supervise the implementation of the new public contracts code;
- The introduction of a comprehensive regulation of concessions contracts, based on the definition of «operating risk» and «normal operating conditions»;
- The encouragement of public private partnerships, with particular reference to project finance initiatives and financial leasing, and other forms of horizontal cooperation;
- The introduction of the administrative barter for socio-cultural initiatives, without administrative costs;
- The introduction of a specific regulation for labour-intensive service contracts, defined as those contracts where the cost of workforce is at least 50% of the contractual amount;
- The introduction of forms of involvement of citizens (based on the French *débat public*) for huge infrastructure projects having a major impact on the environment and the territory;
- A reorganization of the alternative dispute resolutions procedures;
- The introduction of a DAB-like Technical Consulting Board for assistance during the execution phase, whose determinations shall not be binding;
- A new simplified chamber procedure for dealing with disputes on exclusion of economic operators.
- The abrogation of the former global guarantee and its substitution by two new guarantees: the definitive guarantee and the extra costs guarantee.

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Studio Legale Padovan specialises in advising contractors, sub-contractors and designers on all aspects of major infrastructure projects in Italy and abroad.

The Firm regularly assists clients on all stages of the projects, ranging from the tender procedure (including review of tender documents, advice on selection criteria, drafting of joint venture/consortium agreements, sub-contracts and disposal of resources commitments) to the contract execution and performance, and the handling of claims and disputes with contracting authorities, sub-contractors and other entities involved in the project.

The Firm has substantial experience in project finance initiatives in Italy and abroad and International Financial Institutions practices. The Firm is a FIDIC Affiliate Member and a full member of DRBF. All of the lawyers at Studio Legale Padovan have a strong working knowledge of FIDIC and Joint Contract Tribunal contractual forms and practice.