

Coronavirus (COVID-19) impact on public procurement in Italy

Information applicable as of 4 April 2020

1. Are public procurement procedures due to the Corona pandemic automatically suspended? (If not: Are contracting authorities suspending procedures on their own initiative? Or if not: Do they suspend upon request of bidders?)

In Italy, the government measures adopted for the current health emergency do not contain explicit reference to the performance of launched tender procedures and the execution of ongoing public contracts.

Nevertheless, by notice dated 25 March 2020, the Minister of Transport and Infrastructure has clarified that, in application of the general suspension provided for the term of the administrative procedures in the period starting from 23 February 2020 to 15 April 2020, all the time-limits related to the procedures for the award of contracts or concessions already pending on 23 February 2020 or commenced after that date shall be suspended for a period of 52 days (i.e., from 23 February 2020 to 15 April 2020).

2. Does the current situation allow for extended use of simplified procurement procedures (direct award or negotiated procedure without notification)?

Yes. By Law Decree dated 17 March 2020 (the so-called "Cura Italia") the Italian Government has adopted measures to speed up tender procedures in certain sectors by increasing the possibilities for Contracting Entities to use simplified procurement procedures as follows:

- purchase of IT products necessary to increase smart working in Public Administrations: in this case the Contracting Authorities can seek recourse to the negotiated procedure without a prior call for tenders and the contract can be signed and executed immediately after the end of the procedure without having to comply with the stand-still period of 35 days;
- purchase of tools to promote "remote teaching" in schools: in this case educational institutions, in the event that it is not possible to use the MEPA (Electronic marketplace of public administration), are allowed to proceed to purchase such tools by way of derogation from the provisions of the Italian Public Procurement Code (i.e. direct award).

Furthermore, for the entire duration of the COVID 19 emergency the Civil Protection Department can purchase personal protective equipment by way of derogation from the rules set forth in the Italian Public Procurement Code.

3. Does the current situation allow for special measures during a procurement procedure (shortening of deadlines)?

Protection Department n. 655 dated 25th March 2020) it has been established that in order to fully and immediately implement the measures previously adopted by the Italian Government to face the COVID 19 emergency, Local Authorities (Municipalities, Provinces, Regions) can proceed to award service and supply contracts by way of exception from the ordinary rules. Consequently, Local Authorities can derogate from

the ordinary terms and procedures for publication of calls for tender provided for by Articles 60, 61, 72, 73 and 74 of Legislative Decree n. 50/2016 (Italian Public Procurement Code).

4. Is it possible to use electronic means for presentations or rounds of negotiations?

We believe that this is possible provided that the use of such telematic systems do not alter equal access to operators or prevent, restrict or distort competition. In fact, the Italian Public Procurement Code already provides for the possibility for the Contracting Entities to carry out tender procedures through telematic trading platforms (art. 58).

5. Are the deadlines for remedies automatically suspended?

The Law Decree dated 17 March 2020 (the so-called "Cura Italia") has established that in the period from 8 March 2020 to 15 April 2020 ("suspension period") all terms related to the administrative process are suspended. This provision also applies to the time limits for filing a complaint against the tender documents and the award decisions.

During the suspension period referred to above, interested parties may lodge a request of precautionary measures with the administrative courts. The decision on such applications is taken by decree of the President of the Regional Administrative Court "out of the hearing" (i.e. by a decision taken without hearing the parties concerned).

6. Which possibilities does a contracting authority have, if no offer has been submitted?

According to article 63, par. 2, let a) of the Italian Public Procurement Code (Legislative Decree 50/2016), if no (suitable) tenders or no (suitable) requests for participation have been submitted in response to an open procedure or a restricted procedure, a contracting authority may select the negotiated procedure without prior publication, provided that the initial conditions of the contract are not substantially altered.

According to the Italian Public Procurement Code, the contracting Authority must invite at least 5 eligible economic contractors to participate in such negotiated procedure.

7. Modifications of existing contracts in the context of the current situation?

The Italian Public Procurement Code sets limitations to modifying an existing contract after its award (see article 106 "*amendments of the contracts during their period of validity*").

Generally speaking, a public contract can be modified/be subject to variation (without a new tender procedure being launched) in the following cases:

- objective amendments already set out in the original contract;
- "additional" works, services, supplies";
- amendments due to "*intervened, unforeseen and unforeseeable circumstances*" for the Contracting Entities;
- non-substantial amendments.

In particular, according to the Italian Public Procurement Code "modifications due to unforeseen circumstances" for the Contracting Entity are admissible provided that the following conditions occur:

- 1) The required amendment is determined by unforeseen and unforeseeable circumstances for the Awarding authority or for the Contracting Entity. In said cases, any change to the subject-matter of the contract is called "variance during execution". Said circumstances may also include the adoption of new legal or regulatory provisions or new measures adopted by authorities or entities responsible for protecting material interests;
- 2) The change does not affect the general nature of the contract;
- 3) Any price increase resulting from the variance does not exceed 50% of the initial contract value.

Although, as far as we are aware, there are no specific provisions on this point in the regulations recently adopted by the Italian Government, in our opinion the COVID 19 emergency could fall within the

abovementioned case and therefore justify an amendment to the ongoing public procurement contracts upon request of the Contracting Entities

For any further information and legal assistance, please contact our legal experts [Pietro Cavasola](#), [Marco Iannacci](#) and [Tiziana Masone](#) from CMS Italy.