



•ALERT•

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# The New Public Contracts Code

**Some of the main new elements and principles of the new Contracts Code, which will take full force and effect on 1 July 2023**

On 31 March 2023, **Legislative Decree No. 36/2023**, regarding the «Public Contracts Code in implementation of Article 1 of Law No. 78 of 21 June 2022, delegating to the government on public contracts» (“**New Public Contracts Code**”) was published on the Italian Official Journal; it replaces and repeals Legislative Decree No. 50 of April 18, 2016.

These are the main topics.

## 1. ENTRY INTO FORCE, EFFECTIVENESS AND TRANSITIONAL RULES

The New Public Contracts Code has entered into force on April 1, 2023, but will take effect on July 1, 2023.

Therefore, Legislative Decree No. 50/2016 will be repealed as of July 1, 2023, and will continue to apply exclusively to proceedings already underway on that date.

Some regulations of Legislative Decree No. 50/2016 will continue to apply, on a transitional basis, until December 31, 2023 for the performance of activities related to: a) the drafting or acquisition of acts relating to procedures for the planning, design, publication, awarding and execution of contracts; b) the transmission of data and documents relating to the procedures referred to in a) above; c) access to tender documents; d) the submission of the Single European Tender Document; e) the submission of bids; f) the opening and preservation of the tender file; and g) the technical, accounting and administrative control of contracts, even during their execution, and guarantees.

Therefore, Articles 21, paragraph 7, 29, 40, 41 paragraph 2-bis, 44, 52, 53, 58, 74, 81, 85, 105, paragraph 7, 111, paragraph 2-bis, 213 paragraphs 8, 9 and 10, 214, paragraph 6 of Legislative Decree No. 50/2016 will remain in force on a transitional basis until December 31, 2023.



## 2. PRINCIPLES

The first part of the New Public Contracts Code is dedicated to the principles.

Some new principles have been established:

- the **principle of the best possible result** in the awarding and execution of public contracts (see Article 1);
- the **principle of trust** in the legitimacy, fairness and transparency of the actions of the authority, its officials and economic operators (see Article 2);
- the **principle of preservation of the contractual balance**, granting the right of the disadvantaged party to renegotiate in good faith the contract when extraordinary and unforeseeable circumstances (unrelated to ordinary economic fluctuations and market risk) have arisen altering materially the original balance of the contract (Article 9).

## 3. DIGITISATION OF THE CONTRACT'S LIFE CYCLE

Articles 19 to 36 of the New Public Contracts Code are dedicated – as a priority of the new discipline – to the digitisation of all phases of public procurement, including the entire cycle of contracts.

## 4. DESIGN

The spirit of simplification of the New Public Contracts Code has affected the various phases of the design process.

There are now **two phases** instead of the previous three: the so called “**technical-economic feasibility project**” and the so called “**executive project**”. Instead, the so called “**final**”

project”, preceding the “**executive project**”, has been eliminated. For ordinary or extraordinary maintenance work, the first level of design can be avoided, provided that the executive project contains all the necessary elements. It is now mandatory that the costs related to the design process shall be borne by the contracting authority.

It is unclear whether these provisions can actually lead to a simplification and a hoped-for acceleration in the process, in particular with respect to complex works that necessarily require an in-depth examination of the project before the executive level (especially for the evaluation of the project’s environmental impact).

## 5. INTEGRATED PROCUREMENT

With the introduction of Article 44, the New Public Contracts Code reintroduces the so called “**integrated procurement**”, which will once again be applicable without the limitations introduced by Legislative Decree No. 50/2016. It will therefore be possible to award jointly the executive design and execution of works to the same economic operator, with the only exception of contracts for ordinary maintenance works.

## 6. BELOW-THRESHOLD CONTRACTS

With regard to below-EU threshold contracts, the New Public Contracts Code, in accordance with the special procedures introduced during the emergency period of the Covid-19 pandemic, has given wider margins of flexibility to the contracting authorities.

### Works

- **direct awarding** in case of works whose value is less than **150,000 euros**, even without consulting more than one economic operator, on the assumption that an economic operator with documented experience has been chosen, possibly identified from lists or registers kept by the contracting authority;
- **negotiated procedure without a call for competition**, consulting at least five economic operators, where possible, identified on the basis of market surveys or through lists of economic operators, in case of works whose value is **equal to or greater than 150,000 euros and less than 1 million euros**;
- negotiated procedure without a call for tenders, after consulting at least ten economic operators, where possible, identified on the basis of market surveys or through lists of economic operators, for works whose value is equal to or greater than 1 million euros and up to the EU thresholds (Article 14), without prejudice to the possibility of

using ordinary procedures (Article 70 et seq.).

### Services and supplies

- **direct awarding** of *services and supplies*, including engineering, architectural and design services, whose value is **less than 140,000 euros**, even without consulting more than one economic operator, on the assumption that an economic operator with documented experience has been chosen, possibly identified from lists or registers kept by the contracting authority;
- **negotiated procedure without a tender**, consulting at least five economic operators, where possible, identified on the basis of market surveys or from lists of economic operators, for the awarding of *services and supplies*, including engineering, architectural and design services, whose value is **equal to or greater than 140,000 euros** and up to the EU thresholds.

## 7. SUBCONTRACTING

The regulations on subcontracting have been revised and simplified. In particular, the removal of quantitative limits on subcontracting is confirmed and the possibility of so-called “cascading subcontracting” is introduced (Article 119, para. 17), on the assumption that the contracting authority indicates in the tender documents the activities that must necessarily be performed by the contractor.

## 8. PRICE REVISION

Article 60 is dedicated to the regulation of the price revision mechanism, stating that **it is mandatory to have a price revision clause in the tender documents**. Said clause is triggered upon the occurrence of elements not foreseeable at the time of the formulation of the tender that produce a variation in the cost of the work, supply or service. The variation must be an increase or decrease of more than 5 percent of the total amount, and the revision operates to the extent of 80 percent of the variation. Official indices of price changes, approved by ISTAT, shall be used to calculate the variation.

## 9. SERIOUS PROFESSIONAL MISCONDUCT

Article 98 of the New Public Contracts Code clarifies that the “non-automatic” disqualification of an economic operator from tender for “serious professional misconduct” can be decided by the contracting authority in case all the conditions set out in the provision are met.

The New Code sets out precisely the serious professional misconduct cases and the relevant means of proof that may discretionally (and not automatically) lead to the disqualification of the economic operator.

In particular, a serious professional misconduct can be

ascertained in case of measures issued by the criminal court (even if they are still open to appeal: precautionary measures and decision) against the economic operator who has been charged of the crimes for which automatic disqualification from the tender is provided for under Article 94 (by way of example: criminal-mafia association, fraud, false corporate communications, extortion, bribery, etc.) and, in addition, for other specific types of crimes (abusive exercise of the profession; bankruptcy and tax crimes, urban planning crimes and crimes under Legislative Decree 231/2001).

## 10. PUBLIC PRIVATE PARTNERSHIP (PPP)

The use of PPP must be preceded by a preliminary evaluation of convenience and feasibility. Article 63 of the New Public Contracts Code distinguishes public authorities eligible to enter into PPP contracts on three distinct ranges of value:

- basic qualification, for services and supplies up to €750,000 and for works up to €1 million;
- intermediate qualification, for services and supplies up to 5 million euros and for works up to the threshold referred to in Article 14;
- advanced qualification, with no amount limit.

The New Public Contracts Code modifies the regulation on public contribution, in particular by eliminating the quantitative limit of 49 percent of the public contribution.

Only the private-initiative project financing procedure is now envisaged, while public-initiative projects are no longer permitted. In case of PPP above the threshold described in Article 14, para. 1, a), it is now mandatory (and not discretionary anymore) to establish a special-purpose company.

Economic operators are allowed to propose projects that have already been planned by the authority, on the assumption that they propose a different project.

## 11. ANAC'S ROLE

ANAC – the supervisory authority for public contracts – has been reorganized and the authority's Guidelines have been repealed.

## 12. LITIGATION

The New Public Contracts Code intervenes in the field of administrative justice by updating Articles 120, 121 and 124 of Legislative Decree No. 104/2010 (Administrative

Process Code) and extending the jurisdiction of the Administrative Judge also to **actions for damages brought by contracting authorities against economic operators** who, through unlawful conduct, have determined an unlawful outcome of the tender.

By the Department of Administrative Law

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