

THE ONE-FIFTH INCREASE IN MIXED GROUPS OF COMPANIES

Note to Council of State, Plenary Session, Judgment no. 2 of 13 January 2023

The Plenary Session of the Council of State, in Judgment no. 2 of 13 January 2023, ruled on the scope of application of article 61, paragraph 2, Presidential Decree No. 207 of 5 October 2010, concerning the so-called one-fifth increase.

As well known, the one-fifth increase in the classification held by the economic operator carries two different rules: (i) the possibility of the individual company to participate in tenders and perform works within the limits of its own classification increased by one-fifth, thus opening the market to small and medium-sized enterprises, without implementing a detriment to the basic conditions of technical and financial reliability of each business structure, and (ii) the application of this institute to each grouped or consortium company, provided that the company is qualified for a ranking equal to at least one-fifth of the amount made up of contest, so that the overall efficiency and adequacy of the successful aggregation is not compromised.

The judges of Palazzo Spada – remitted of the question following the referral under article 99, paragraph 1, Code of Administrative Procedure – affirmed that the reward one-fifth increase applies not only to the horizontal group of companies, but also to the mixed one (consisting of a form of vertical association within which there are horizontal sub-groups) with regard to the prevailing or spun-off category, whose works have been taken on by several companies, coming to create, with reference to the single horizontal sub-group, a division of tasks and competences not dissimilar to that of the so-called totalitarian horizontal group.

With this ruling, an interpretive contrast that had arisen in the Council of State, which saw two distinct and opposing interpretations, is solved.

According to a part of case law (e.g., see Council of State, Section III, 13 April 2021 No. 3040), in the case of a group of companies, the recognition of the benefit of the one-fifth increase would recognise the possession of the qualification to a company competing in aggregate form, for an amount equal to at least one-fifth of the amount made up of contest; in this case, the "amount made up of contest" must be understood as the total amount or tender starting price.

On the other hand, according to a different and later orientation, such an interpretation would lead to a *"paradoxical result"* every time the 20 percent of the amount made up of contest was higher than the amount of work in the category for which the one-fifth increase is requested. In order to avoid this, Court of Administrative Justice of the Sicilian Region, Sect. I, April 11, 2022 No. 450 suggests a "rationalizing" solution: without prejudice, in accordance with the words of the legislative provision, to the reference to the amount made up of contest, *"the figure to be placed in the numerator should be homogeneous and thus include the total qualifications possessed (even in other categories) by the company participating in the group of companies that intends to take advantage of the one-fifth increase"*.

The above judgment, not agreeing in full with any of the aforementioned orientations, has indeed put forward an "adaptive" interpretation of Article 61, paragraph 2, Presidential Decree 207/2010, holding that, in the case of a so-called mixed group of companies, *"the amount made up of contest"* must refer to the

individual amounts of the prevailing category and the other sub-categories of the tender, and not to the total amount of all the works put up for tender.

In other words, *"the provision - dictated for the ordinary hypothesis of the so-called totalitarian horizontal grouping, where the amount made up of contest and the complex of homogeneous works coincide - in its generic wording indeed leaves sufficient interpretative margin to consider, as the ordinance of remittal suggests according to a criterion of logicality and reasonableness, that this amount should be commensurate with the type of works that the specific horizontal sub-grouping is to carry out"* (Plenary Session 2/2023, point 12.1).

To this conclusion, the Plenary Session reached on the basis of an articulated reasoning that moves, first of all, from the assumption that, although article 61, paragraph 2, Presidential Decree 207/2010 refers to the hypothesis of a horizontal grouping and not to the vertical or mixed one, from a systematic point of view, there are no reasons to exclude the applicability also to the horizontal sub-groups of a mixed group, in relation to which *"a division of tasks and competences is created, not dissimilar to that of the so-called totalitarian horizontal group"* (Plenary Session 2/2023, point 12.2).

Finally, in the opinion of the Council of State, a different and more restrictive interpretation, than the one enunciated, would be, on one hand, clearly anti-competitive and not in line with European principles that promote broad participation in tender procedures of temporary groups and, at the same time, a maximum freedom of self-organization of companies; on the other hand, conflicting with the regulation – characterized by a system of qualifications and classifications built on individual categories of work – and even less protective for contracting authorities, interested in contracting with companies qualified, on the basis of category classification, to perform the specific work in the mixed group.

Lastly, it should be noted that the rule of the one-fifth increase is re-proposed with almost identical wording in Article 2, paragraph 2, of Annex II.12 of the Draft Legislative Decree on the new public contracts code, which is currently being examined by the competent parliamentary committees and is expected to be issued by the end of March.

Therefore, it is deemed to assume that the Plenary Session's hermeneutical approach will remain valid following the entry into force of the new public contracts code.

DISCLAIMER

The sole purpose of this Client Alert is to provide general information. Consequently, it does not represent a legal opinion nor can it in any way be considered as a substitute for specific legal advice.

Laura Sommaruga, Partner
Via Dante, 9
20123 Milano
Email: laura.sommaruga@grplex.com

Enrico Cassaro, Junior Associate
Via Dante, 9
20123 Milano
Email: enrico.cassaro@grplex.com