THE QUALIFICATION OF CONTRACTING AUTHORITIES: FIND A SOLUTION IMMEDIATELY!

The new Italian Procurement Code introduces, for contracting Authorities, a complex and articulated qualification system in order to certify – according to criteria of quality, efficiency and professionalism, and in compliance with the principles of affordability, effectiveness, timeliness and fairness – their ability to directly manage the activities that characterise the process of acquiring a good, a service or a work, as well as their ability to verify the contractual performance.

This is a mechanism that should have already been applied by virtue of Legislative Decree 18 April 2016 no. 50, but - having not been implemented, given the failure to adopt the Prime Minister Decree provided for in Article 38, paragraph 2 - it has remained a dead letter.

The qualification of contracting authorities will become compulsory as of 1 July 2023, with the consequent freezing of the issuance of the Tender Identification Code (*Codice Identificativo Gara – "CIG"*) for all non-qualified contracting authorities. Only those who have obtained the qualification will be able to proceed, directly and autonomously, to the acquisition of supplies and services for an amount exceeding the thresholds envisaged for direct awarding, as well as to the awarding of works for an amount exceeding Euro 500,000.00; on the other hand, non-qualified contracting authorities will be obliged – where they need to carry out tender procedures whose value exceeds the aforementioned limits – to turn to qualified ones.

More specifically, Article 63 of Legislative Decree 31 March 2023 no. 36 provides for the establishment in the National Anti-corruption Authority (*"ANAC"*) of a list – "open" and not "closed" – of qualified contracting authorities; in this list, central purchasing bodies and aggregating entities are also included in a specific section.

As established by paragraph 2 of the aforementioned article, *"qualification for design and awarding is divided into three levels of amount: a) basic or first level qualification, for services and supplies up to the threshold of 750,000 euro and for works up to 1 million euro; b) intermediate or second level qualification, for services and supplies up to 5 million euro and for works up to the threshold referred to in Article 14* (i.e., the European threshold, currently set at 5,382,000 euro)*; c) advanced or third level qualification, with no amount limit".*

In order to achieve qualification, the contracting authority must meet the requirements set out in Annex II.4 of the Code, which relate to (i) the organisation of the spending function and processes, (ii) the solidity, experience and competence

of the human resources and, finally, (iii) the experience gained in the activity of designing, awarding and executing contracts.

The submission of applications for enrolment in the list, which is necessary for qualification purposes, has been possible since 1 June. ANAC must verify the information and data transmitted and assign a certain level of qualification, also on the basis of what is contained in the National Public Contracts Database.

As stated in the Report to the Public Contracts Code, the *ratio legis* is to *"guarantee a hard core of competences adequate to cope with a large part of the tasks entrusted to these administrations, also in anticipation of the loss of qualification for orders of higher value. This also pursues the objective of avoiding an overload of tasks for the central purchasing bodies, ensuring the overall sustainability of the system from the outset. And this, also by allowing qualified contracting authorities to carry out joint procurements and to perform ancillary procurement activities, which include the management of procurement procedures in the name and on behalf of non-qualified contracting authorities"*.

However, the legislator's choice to resort to such a qualification mechanism does not seem to be shared by many experts. In a Code that advocates maximum effectiveness and efficiency of administrative action (in this respect, it seems useful to recall the elaboration of the principle of the result), it is surprising that recourse is made to mechanisms that are certainly inefficient and harbingers of possible delays in tenders, at least in the first months of application of the new Code.

First of all, the provision for the qualification of contracting authorities burdens small public Entities and other entities subject to the code regulations which, although they make extensive use of direct awarding, nevertheless carry out tenders exceeding the European thresholds or in any case exceeding the amount ranges set by Article 63. On the basis of the new legislation, these entities – if they fail to meet the requirements necessary for qualification – will find themselves forced to enter into agreements pursuant to Article 30 of Legislative Decree 18 August 2000 no. 267 or pursuant to Article 15 of Law 7 August 1990 No. 241 with the qualified contracting authorities or central purchasing bodies.

Secondly, from the reading of the text it is not fully understandable (i) the tendering activities that will have to be delegated to the qualified contracting authorities and those that will instead remain with the ones beneficiary of the intervention, (ii) the functions of the Single Project Manager (*Responsabile Unico del Procedimento – "RUP")*, who will have to take charge of the relations between the two contracting authorities and, finally, (iii) the criteria for the attribution of liability in the performance of the phases of the awarding or execution of a public contract.

The Firm will closely follow the forthcoming developments in the field of qualification of contracting authorities and will remain at your disposal for any needs.

The Court reached this conclusion on the basis of an articulated reasoning that moves, first of all, from article 3-*septies*, paragraph 1 of Legislative Decree 30 December 1992 No. 502, according to which "*sociomedical services are defined as all the activities aimed at satisfying, by means of integrated healthcare paths, the needs of the individual that require unified health services and social protection actions capable of guaranteeing, even in the long term, continuity between care and rehabilitation actions"*.

On this point, the same Third Section has already stated that *"in the event that healthcare services can be provided only in conjunction with social assistance activities, [...] the healthcare nature of the service prevails in any case, since the other services – of a different nature – must be considered linked to the first by a necessary instrumental link, being aimed at enabling the care of the patient's health"* (Court of Cassation, Section III, order no. 28321 of 28 November 2017).

However, the issue does not appear to have been definitively resolved: the inseparability of the hotel-welfare and healthcare services has not been generally recognised by the Court, with the possibility that, on the basis of the patients' health histories, the burden of paying part of the in-patient fees may be deemed legitimate.

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