MINIMUM ENVIRONMENTAL CRITERIA IN PUBLIC PROCUREMENT: ANAC GUIDANCE ON THEIR APPLICATION

The Italian National Anti-Corruption Authority (ANAC) and the Ministry of the Environment and Energy Security (MASE) have circulated a draft joint communication, currently subject to consultation, providing guidance on the application of the minimum environmental criteria (also known by the acronym 'CAM') in public procurement. The publication of a joint statement by ANAC and MASE is consistent with the complex nature of the regulatory framework governing the minimum environmental criteria, the legal basis of which is laid down in Legislative Decree No 36/2023, while its practical implementation is entrusted to ministerial decrees adopted by MASE.

1. Mandatory nature and scope of application

At the regulatory level, in Italy, the minimum environmental criteria are governed by Article 57(2) of Legislative Decree No 36/2023. The CAMs are environmental requirements established for the various stages of the procurement process, with a view to identifying the design solution, product or service that performs best in terms of environmental sustainability throughout the entire life cycle of the contract, taking into account market conditions and availability.

The Communication first and foremost confirms the binding nature of the CAM, as firmly established in administrative case-law, which has clarified that the provisions laid down in the CAM decrees are not merely programmatic in nature but impose binding obligations on contracting authorities in the preparation of public procurement procedures.

The obligation to incorporate the CAMs into the procurement documents applies to all contracts, public procurement procedures and concessions, irrespective of their value, including below-threshold contracts and direct awards pursuant to Article 48(4) of Legislative Decree No 36/2023, as well as contracts in the special sectors. Moreover, the obligation applies to private entities subject to the requirements of the Public Procurement Code. Only in the case of *in-house* awards does the Communication leave it to the discretion of the contracting authority to determine whether the CAMs should be applied, although their application is nevertheless considered desirable.

2. Right to bring proceedings against the contract notice

The established position of the administrative case-law is likewise confirmed: the obligation to incorporate the CAMs into the procurement documents cannot be deemed to have been fulfilled by a mere formal and non-specific reference to the applicable decrees, where such reference has no effective bearing on the procedure. Article 57(2) of Legislative Decree No 36/2023 requires, in particular, the effective incorporation into the design and procurement documents of the technical specifications and contractual clauses laid down in the CAM decrees in force on the date on which the procurement procedure is launched.

Where the CAMs are entirely absent or reference is made to criteria that are no longer in force, an economic operator may bring an action against the contract notice immediately, without having to await the adoption of the contract award decision. In all other cases an economic operator may be required to bring an action immediately only where it is demonstrated that the non-compliant clauses prevent it from effectively participating in the procurement procedure.

3. Supervision and sanctions

As regards verification of compliance with the applicable rules, the document provides that, at the tender stage, the technical offer must first be assessed for compliance with the CAMs laid down in the contract notice. As these constitute essential elements of the tender, failure to comply with the CAMs leads to the offer being declared inadmissible and entails the exclusion of the tenderer, without recourse to the procedure for the supplementation or clarification of documentation (the so-called *soccorso istruttorio*). The evidence prescribed by the CAM decrees must subsequently be obtained in order to substantiate the commitments made by the economic operators. As re-

gards environmental award criteria under the most economically advantageous tender, the relevant evidence must be provided by the undertakings as part of their bid. Finally, during contract performance, responsibility for verification lies with the project manager, the works director or the contract execution manager, who are required to carry out periodic verifications throughout the contractual term to ensure compliance with the environmental obligations and requirements assumed by the contractor.

As regards sanctions, the Communication expressly provides that failure by the contracting authority to comply with its verification obligations is subject to sanctions imposed by ANAC pursuant to Article 222(3)(a) of Legislative Decree No 36/2023. These sanctions consist of pecuniary penalties ranging from EUR 500 to EUR 5,000.

Furthermore, where the technical tender submitted by an economic operator does not comply with the prescribed CAMs, the tenderer shall be excluded from the procurement procedure, with no possibility of subsequent regularisation. The award criteria declared in the tender thereby become contractual obligations, and failure to fulfil them exposes the contractor to the penalties provided for by the contracting authority and, in the most serious cases, to termination of the contract due to deficiencies in performance.

4. Concluding remarks

Beyond the issues on which ANAC and MASE invite stakeholders to provide input, the Communication addresses the widespread difficulties encountered in the implementation of the CAM framework and consolidates the systematic approach already established by the applicable legal framework. Accordingly, the CAMs do not constitute a mere formal requirement in the procurement procedure. Rather, they shall be effectively incorporated and applied by the contracting authority from the design stage and throughout the performance of the contract, thereby influencing the definition of the services and supplies covered by the procurement, the determination of the corresponding costs, the preparation and assessment of tenders, and the verification of due compliance with the contractual obligations.

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