

ACCESS TO PROCUREMENT DOCUMENTS AND THE ULTRA-EXPEDITED JUDICIAL PROCEDURE: FAILURE BY THE CONTRACTING AUTHORITY TO COMPLY WITH ITS INFORMATION OBLIGATIONS AND THE REQUIREMENT FOR A SPECIFIC AND EXPRESS DECISION ON REQUESTS FOR REDACTION

On 9 September 2026, the Council of State, in plenary session, issued its Judgment No. 8, ruling on the interpretation of Article 36(4) of the Italian Public Procurement Code set out in Legislative Decree No. 36/2023. The provision subjects the contracting authority's decisions on requests to redact parts of bidders' tenders to the judicial review procedure under Article 116 of the Code of Administrative Procedure, which normally provides for a 30-day time limit. This period is reduced to 10 days under the provision, running from the electronic notification of the award. Namely, the Plenary Session held that the ultra-expedited procedure under that provision may be initiated only after the contracting authority has complied with its obligations to publish and notify the procurement documents and has expressly ruled on any requests for confidentiality made by the other tenderers under Article 35(4)(a) of Legislative Decree No. 36/2023. This approach strikes a balance between procedural efficiency, effective access to the procurement documents, and the right of defence of the unsuccessful tenderer.

1. Factual background

The dispute arose from an open procedure launched by the Sette Laghi Socio-Sanitary Territorial Authority for the award of a service contract for Legionella parameter sampling and the supply of filtration devices for the water network, based on the most economically advantageous tender criterion. The contract was awarded to Sterimed S.r.l. On 21 October 2025, the second-ranked tenderer, Bioh Group Filtrazione S.r.l., received, upon request, a copy of the award decision. Following a request for access, on 22 October 2025 it was granted access to further documents through the contracting authority's platform, including the successful tenderer's technical offer in redacted form. The contracting authority had neither notified the award pursuant to Article 36 of Legislative Decree No. 36/2023 nor disclosed the decisions taken on the request for redaction. Bioh Group therefore served its application challenging the award on 18 November 2025. By Order No. 793/2026, the Regional Administrative Court for Lombardy, Milan, declared inadmissible the part of the application seeking full disclosure of the technical offer and the documents supporting the abnormality assessment, holding that the ten-day limitation period under Article 36(4) of Legislative Decree No. 36/2023 had started to run from the date on which the redacted offer was disclosed. Bioh Group appealed to the Council of State. In light of the conflicting case law concerning the interpretation of Article 36(4) of the Public Procurement Code, the Council of State referred the issue to the Plenary Session by Order No. 4327 of 29 May 2026.

2. The Plenary Session's decision

The judgment first examines the legal framework governing the right of access to public procurement records following the completion of the procedure and the adoption of the final award decision. The relevant provision is Article 36 of Legislative Decree No. 36/2023, which introduced an innovative system of access to procurement records based on digital and automatic disclosure. Under this system, tenderers are entitled to access the procurement documents through the e-procurement platform, without having to submit a specific request or initiate a separate administrative procedure.

In particular, Article 36(1) requires the contracting authority to provide all candidates and tenderers who have not been definitively excluded with the successful tenderer's offer, together with all tender records and the documents, data and information on which the award is based, directly and simultaneously with the award. Paragraph 2 further requires the reciprocal disclosure of the tenders submitted by the operators ranked among the top five, in order to provide the information necessary to enable them to make informed and considered decisions as to whether to

bring legal proceedings. Paragraph 3 further provides that, in the notification of the award, the contracting authority or the contracting entity shall also state the decisions taken on any requests for the redaction of parts of the tenders which, according to a reasoned and substantiated declaration by the tenderer, are covered by technical and commercial secrets. Finally, paragraph 4 grants tenderers a ten-day period from notification of the award to challenge the decisions taken by the contracting authority concerning the redaction of the tender.

The provision is intended to ensure the highest possible degree of transparency in public procurement procedures, thereby enabling judicial proceedings to be brought promptly and resolved within a short timeframe.

In this regard, the Plenary Session clarified that the mechanism established by Article 36 of Legislative Decree No. 36/2023, as provided for by an exceptional provision that cannot be extended by analogy, applies only where the contracting authority has complied with the information obligations set out in the preceding paragraphs and has also stated the decisions taken on requests for redaction.

Having established the exceptional and derogatory nature of Article 36(4) of Legislative Decree No. 36/2023, as a provision restricting tenderers' right to bring proceedings and right of defence, the Plenary Session therefore ruled out any possibility of its application by analogy. The wording of the provision was considered decisive: by express statutory provision, the shortened time limit for challenging the decision on redaction runs "from the digital notification of the award." Accordingly, where the tenders are not published on the platform, are published late, or the decisions on requests for redaction are not disclosed promptly, the special provision does not apply. In such cases, the ordinary access procedure under Article 116 of the Code of Administrative Procedure applies instead. Indeed, if the award and the decisions on redaction are not notified at the same time, the legislature's aim of coordinating the time limits for the proceedings concerning access and the award cannot be achieved.

The Court then examined the second issue: whether the publication of the technical offer in fully or partially redacted form, together with the award, could be regarded as an implicit decision by the contracting authority on the request for redaction. More specifically, the Plenary Session was asked whether such disclosure could be considered equivalent to notification of an implicit decision granting the request for redaction and, therefore, whether it could trigger the shortened time limit for challenging that decision under Article 36(4) of Legislative Decree No. 36/2023.

Once again, the wording of Article 36(3) of the Public Procurement Code was decisive. The requirement that the contracting authority "shall also state the decisions" taken on requests for confidentiality clearly requires an express and identifiable decision. That decision must ensure a proper balance between the right to an effective remedy and the protection of technical and commercial secrets. This requires a case-by-case assessment, supported by adequate examination and reasoning.

On this basis, the Plenary Session held that the special ultra-expedited procedure for access under Article 36(4) of Legislative Decree No. 36 of 31 March 2023 requires a specific and express decision on the request for redaction. The mere publication of the technical offer in fully or partially redacted form is not sufficient, even where the publication is accompanied by the request for redaction.

3. Concluding remarks

The judgment follows the approach previously adopted by the Plenary Session in Judgment No. 12 of 2 July 2020. Under Legislative Decree No. 50/2016, that judgment stressed the close link between the contracting authority's duty to ensure timely access to the procurement documents and the tenderers' resulting obligation to bring any challenge within the applicable time limits. This principle was expressly incorporated into Legislative Decree No. 36/2023 through a comprehensive framework governing the matter. In the judgment under review, the Plenary Session clarified its scope of application.

In the view of the Plenary Session, only an award notice that complies with the legal requirements, namely one that is simultaneous, complete and expressly records the decisions on confidentiality, justifies the application of the ultra-expedited procedure aimed at safeguarding the public interest in the swift resolution of proceedings.

By contrast, where the contracting authority remains inactive, by failing to make the tenders available on the platform or to communicate its decisions on redaction together with the award, the economic operator may wait for a specific and express decision or, alternatively, initiate the ordinary procedure under Article 116 of the Code of Administrative Procedure. In this case, the interest in the swift resolution of judicial proceedings is subordinate to the tenderers' right to bring proceedings and right of defence.

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