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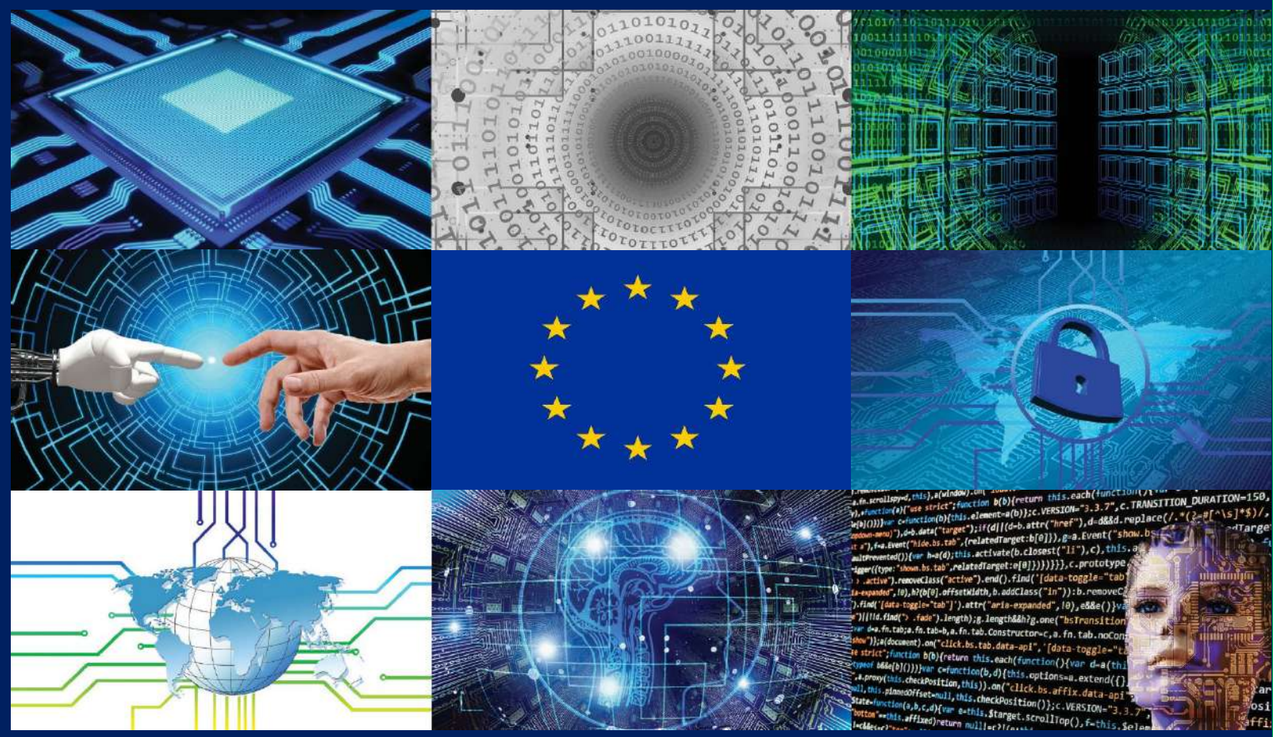

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*Public Tenders in Telematic Form. Suggestions about Risk Sharing between Administrations and Firms**

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T.A.R. LAZIO, ROME, sec. II, 7 February 2020, n. 1710 – Multiservizi s.r.l. *vs*. Roma Capitale

With regard to telematic administrative procedures, it is necessary to affirm that technical risk of unsuitable loading and transmission of data on an IT platform (i.e. network risk due to presence of overloads or decreases in network performance and technological risk due to features of software operating systems used by operators) is equally shared between participating subjects and proceeding administration, according to criteria of self-responsibility of users, who bears the burden of prompt and timely activation of procedures, so as to exploit residual time, with only the exclusion of system malfunctions attributable to the operator.

ABSTRACT **The aim of this work is to outline argumentative pathways for defining and equitably sharing technological risks between undertakings and contracting authorities in the context of telematic public tendering.**

1. *Public tenders in telematic form: towards a new model of interaction between contracting stations and firms*

The progressive and unstoppable process of digitization that is affecting all activities carried out by public administrations[1] also concerns the field of public tenders, in which digital technologies and methods are introducing changes to the whole chain of public procurement cycle.

On the subject, although not in a non-exhaustive manner, it is appropriate to fix some cardinal points, with positive legal references to Italian legislation, with the caveat that the issue, by its very nature, lends itself to a European, if not global, landing.

For the first time[2] in an organic way the subject matter is regulated by Letter bbbb) of article no. 3 of Legislative Decree no. 50 of 18 April 2016 (the current Code of Public Contracts) makes a reference to the notion of electronic market as an instrument for buying and trading through entirely electronic means. Article no. 40 requires communication and exchange of information on tender procedures managed by central purchasing bodies using electronic means of communication[3] in accordance with the provisions of the Digital Administration Code (Legislative Decree no. 82 of 7 March 2005).

Relationship between State and market - and in case of the investigation carried out here between contracting stations and companies - is undoubtedly altered by introducing telematic tendering tools, with obvious advantages and various risks, partly linked to digitalization of administrative activity in general[4] (given that contractual activity performed by public administration is fully included in it) and partly specific to tendering procedures[5], discussed later in this report.

The advantages of using electronic tendering are obvious; first, it allows effective compliance with principle of maximum market opening, allowing participation by all interested players[6].

* Article submitted to double-blind peer review.

[1] On the subject of keeping the classic categories of administrative law up to the digital challenges, J.-B. Auby, *Il diritto amministrativo di fronte alle sfide digitali*, in *Istituzioni del federalismo*, vol. 3 2019; S. Civitarese Matteucci and L. Torchia, *La tecnificazione dell'amministrazione*, in *A 150 anni dall'unificazione amministrativa italiana. Studi*, *vol. IV – La Tecnificazione*, L. Ferrara, D. Sorace, S. Civitarese Matteucci, and L. Torchia (eds.), Firenze, Firenze University Press, 2016, 7.

[2] Paragraph no. 2 of Article no. 9 of the former Public Contracts Code provided for a possibility to send the information electronically, limited to the so-called "Public Contracts Desk".

[3] Cons. Stato, sec. III, 5 December 2019, no. 8333, in *L'amministrativista*, 2019.

[4] Consider, among others, theme of seeking compatibility between the principle of legality and the imputation link interrupted between the administration and the citizen, due to the interaction of an algorithm between the decision-maker and the subject concerned by the decision, in relation to which reference is made to the complete study carried out by S. Civitarese Matteucci, *Umano troppo umano. Decisioni amministrative automatizzate e principio di legalità*, in *Diritto pubblico*, 2019, vol. 1, 5.

[5] See J. Elder and L. Georghiou, *Public procurement and innovation. Resurrecting the demand site*, in *Research Policy*, vol. 36, 2007, 949.

[6] G.L. Albano, *Il public procurement come stimolo alle PMI: il caso del mercato elettronico della pubblica*

Telematic management of the tender procedures makes it possible to overcome limited territorial areas and reduce communication times[7].

Secondly, compliance with procedural deadlines is guaranteed, which are no longer subject to the delays associated with the traditional management of tender procedures.

Thirdly, thanks also to the development of BIM[8] (Building Innovation Modelling), a cooperative model between administration and business is being developed, with the aim of timely implementation of the tendering procedure and effective management of public contracts.

Digitalization of tendering procedures - with a view to future of the e-procurement system[9] as a widespread model for the implementation of a single market, at least European if not global - entails countless advantages[10], but clear risks linked to factors linked to different aspects. What is certain is that the implementation of electronic tendering procedures radically changes the relationship between administrations (i.e. contracting stations) and economic operators (i.e. the market).

2. *Emergence of technical risks category (with uncertain boundaries)*

Current Public Contracts Code has provided for a detailed discipline and allocation of operational risk allocation, demand risk and availability risk in order to implement the claimed procedural flexibility of the relations between the contracting station and economic operators; the discipline on risk allocation has led to the legal and applicative definition of all alternative institutions to the contract, such as PPP models. However, no express reference is made to technical risk, or to the mechanism for apportioning it between public administration and business.

This aspect is not expressly regulated because although the subject of e-procurement is expressly mentioned - think of the references made in Article 29 of the Code to ensure transparency - it is not the only way of public tendering and therefore it was not considered necessary to regulate the aspect of risk sharing[11].

Ruling in question provides interesting ideas for the reconstruction of an issue which is obviously linked to technological development, to which the discipline must adapt, by means of primary rules or rather secondary provisions, and for this reason easily amendable.

2.1. *Case subject of judgment litigation*

In the case covered by the judgment of T.A.R. Lazio, the applicant company challenged the exclusion ordered by the administration from the tender procedure (in the specific, competitive dialogue) for the award of a service contract by '*Roma Capitale*'.

The tender procedure was managed through the *TuttoGare* platform and involved sending the application and the offer in telematic mode.

According to administration, the company was excluded because of a delay in sending the confirmation of participation (obviously electronically) in the tender which, in administration's opinion, would take place after deadline.

Delay in confirmation would have caused the technical and economic offer, which had been previously loaded, to be blocked. That company had contested the exclusion of the tender, as well as the non-activation of the investigation aid, an institution designed to ensure maximum participation precisely in the event of tender applications which need to be settled.

amministrazione italiana, in *Rivista di politica economica*, 2014, vol. 3.

[7] P. Otranto, *Net neutrality e poteri amministrativi*, in *Federalismi.it*, vol. 3, 2019, 4; in a compliant sense, but in more general terms, see A. Masucci, *Erogazione online dei servizi pubblici e teleprocedure amministrative. Disciplina giuridica e riflessi sull'azione amministrativa*, in *Diritto pubblico*, vol. 3, 2003, 991; among other things, this topic detects the complex relationship between simplification, bureaucracy and impact on economy, central themes in the field of public contracts, as shown by the analysis carried out by A.G. Orofino, *La semplificazione digitale*, in *Diritto dell'economia*, vol. 1, 2019, 87, requirements of competitiveness and markets, as is well known, require an administration able to provide itself with an organization in line with current needs, and to relate to its interlocutors in such a way as to ensure efficient management in relation to the objectives pursued. Entrepreneurial initiatives and capital are attracted by a number of converging factors, among which is certainly significant ability of institutions to provide entrepreneurs who ask for them with timely and predictable answers, and in this context, in the field of public contracts, the digitalization of procedures is a necessary starting point.

[8] Please refer to G.M. Racca, *La modellazione digitale per l'integrità, l'efficienza e l'innovazione nei contratti pubblici,* in *Le istituzioni del federalismo*, vol. 3-4, 2019, 739; A. Versolato, *La metodologia BIM negli appalti pubblici: le prime pronunce del giudice amministrativo e la fungibilità dei formati aperti proprietari*, in *Appalti e contratti*, vol. 1, 2019, 52; R. Picaro, *Notazioni di ermeneutica contrattuale evocate dalla digitalizzazione dei processi costruttivi*, in *Nuove autonomie*, vol. 3, 2018, 469.

[9] Please refer to L. Fiorentino, *L'e-Procurement*, in *L'e-government*, G. Vesperini (ed.), Milano, Giuffrè, 2004, 91.

[10] See M. Borghi, *Portabilità dei dati e regolazione dei mercati digitali*, in *Mercato concorrenza regole*, vol. 2, 2018, 223; M. Nijhoff, *Information Technology and the Law: ITlaw*, vol. 2, Berlin, 1993; see as a virtuous example in this respect, Austria's case, which is set out in detail in European Commission, *Public procurement - Study on administrative capacity in the EU Austria Country Profile*, in www.ec.europa.eu, 2014.

[11] Regarding the management of public tenders and the digitalization of selection of the private contractor, reference can be made to G. Cammarota, *I contratti telematici delle pubbliche amministrazioni. La digitalizzazione della fase di scelta del privato contraente nelle procedure di approvvigionamento mediante asta pubblica e licitazione privata*, in *L'e-government*, 111.

According to the company, the provisions of the Code of Public Contracts and the Code of Digital Administration (Legislative Decree No. 82/2005) and the good performance of administrative action referred to in article no. 97 of Constitution have been violated.

According to expert findings, Administrative tribunal reconstructed the whole matter according to the temporal sequence of the documents submitted electronically. The report showed that the bids were uploaded within well-known report time limits, while the final confirmation action was completed a few seconds after the expiry of the time limit.

According to the invitation to tender, the companies were aware of the burden of timely activation since the completion of the bid was linked to the loading of the bid itself and the sending of the confirmation (which took place after the expiry of the deadline).

Diligence in submitting the offer within the time limit was a condition for its acceptance; the company knew that the uploading of the offer was not sufficient but it was necessary to send confirmation of the participation with an independent and different activity from the first one.

Moreover, this splitting into two activities of the submission of the application to tender - in submission of the bid and confirmation of it - was planned in favor of companies, in order to be able to control the information uploaded.

Both activities, although separate, had to be completed before the deadline expired, since confirmation had arrived after the deadline had expired.

In other words, it was clear from the expert's report that the completion of the whole procedure had taken place after the deadline set by the call for proposals, because one of the two activities (the confirmation of participation) was sent after the deadline had expired.

2.2. *Decision of T.A.R. Lazio. Useful information for defining risks of a technological nature*

Ruling of T.A.R. Lazio, which defines this dispute between excluded company and contracting authority, provides useful hints and indications for the definition of an issue *in progress*, in the technological evolution and consequently in the reference discipline.

Court finds no defect in the manner in which tenders were submitted as laid down by the contracting authority in its tender notice, given that the applicant company did not complete the procedure since it started operations close to expiry of the time-limits laid down in the same notice.

There was no infringement of *favor partecipationis* in the invitation to tender and in the acts of the contracting authority, as there was a long-time limit for the submission of tenders.

In addition - and this is a figure that will shortly be said - the expert opinion and the appeal of the applicant did not reveal[12] any malfunctioning of the platform that could have caused delays and therefore cause damage to the company.

Court dismissed the company's application as unfounded and inadmissible for reasons of a highly procedural nature.

However, precisely on the subject of malfunctioning, the Court provides some interesting reconstructive and interpretative ideas on which it is appropriate to make some reflections.

2.3. *Network risk and technical risk. Starting points for risk sharing pattern among public and private parties*

The Court proposes, in the absence of any specific legislative provision on the subject, interesting remarks for a fair sharing of risks linked to telematic tendering between public and private sectors.

In relation to telematic tendering - which is not a special category of tenders and the discipline is fragmented into several rules and in various texts of law - there is the principle of fair distribution between the participant and the contracting authority.

More specifically, according to recent case law, there is an equitable sharing of technical risk (also called network risk) and technological risk, two concepts that are not expressly defined by law.

The risk of a technical nature, i.e. the unsuitable loading and transmission of data, must be broken down into network risk and technological risk, in order to identify the correct distribution of risk between administration and business[13].

Network risk is linked to network overload or performance drops, while the technological risk is due to characteristics of software systems used by the operators; differences seem to be faded, especially during the jurisdictional assessment[14].

[12] In its appeal, company complained about a generic and hypothetical failure, without enclosing or providing any evidence to support that view.

[13] In general terms, please refer to R. Hans, H. Zuber, A. Rizk, and R. Steinmetz, *Blockchain and smart contracts: disruptive technologies for the insurance market*, in *Twenty-third Americas Conference on Information Systems,* vol. 2, 2017, 4.

[14] In accordance with position of T.A.R. Lazio see judgment Cons. Stato, Sec. III, 3 July 2017, no. 3245, in *Foro amministrativo*, vol. 9, 2017, 1530, according to which provision of a time limit for registration on the portal as a preparatory operation for participation in the tender by electronic auction has the role of alerting the user to the importance of the time required to complete the procedures,

In any case, a requirement remains fully valid, namely the principle of the company's self-responsibility[15], which is subject to the obligation to activate the tender procedures in a timely manner. Self-responsibility on the part of companies is excluded in cases where there is a malfunctioning of the system that causes effective damage to firms' right to participate, situations in which the responsibility of the administration is revealed.

In the event that no system shutdown or malfunctioning attributable to the administration is detected, the company is required to exercise specific diligence[16] in transmission of the tender documents, to be finalized promptly before the deadline[17].

In addition, the Court points out that the principles of timeliness for service of judicial documents cannot be applied in the case of public tendering procedures, because the cases are not comparable in terms of the objective pursued by different measures.

The principle of equitable sharing of the technical risk of unsuitable loading and transmission of data on an IT platform (in various meanings of "network risk" due to presence of overloads or drops in network performance and "technological risk" due to the characteristics of the software operating systems used by the operators), according to criteria of user self-responsibility, on which the burden of prompt and timely activation of the procedures rests, so as to capitalize the remaining time.

3. *Brief concluding remarks. Towards establishing necessary balances in distribution of risks*

That ruling, which can be fully endorsed in the final interpretation, raises issues of absolute interest, on which the legislator is, as far as detailed rules are concerned, silent.

The entirely telematic management of public tenders is a necessity that can no longer be postponed in time; on the contrary, certainly, on the basis of the chrono-program established in European venues, it has come to this data with excessive organizational delay and with obvious cultural delay of a legal nature.

Advantages of telematic management of public tenders are evident, in terms of respect for deadlines, certainty of relationships, respect for the general principles governing the subject-matter.

However, risks must be adequately considered, both in terms of positive regulation and a reasonable split between administration and business.

This ruling, in this sense, provides for an interesting and equitable sharing of risks between the administration and companies.

In this sense, without prejudice to the case in which a malfunctioning of the system is detected, not attributable to the company, there is the need for particular diligence on the part of the contractor in the transmission of the tender documents, to be put in place with diligence in advance of the deadline, as a faculty compensated by the possibility of direct use of its computer station, with the related inability to preach acceptance by the contracting authority of these risks arising from the use of the computer model.

Participating companies must be required to comply with the deadlines and telematic procedures; in all cases where there are no malfunctions in the system, the administration is not responsible for failure to submit applications.

The issue is, however, more complex and will become more and more so as technological development advances.

The hope is that the legislator, also by means of soft-law acts or guidelines, will draw up a document that envisages these hypotheses for the sharing of technological risks between companies and administration, and that such a determination will not be reached with the timescale that it has taken for the definition of risks of an economic nature and use of *PPP* procedures.

taking into account the peculiarities of the telematic procedure compared to a paper one. Compared to traditional tendering, telematic tendering has the advantage of eliminating costs and inconvenience for the user, but inevitably takes into account the network risk due to the presence of overloads or drops in network performance, and the technological risk due to the characteristics of the software operating systems used by operators; on the subject, it is also interesting to see a shift in administrative competence, to which reference should be made, in general terms, M. Brollo, *Tecnologie digitali e nuove professionalità*, in *Diritto delle relazioni industriali,* vol. 2, 2019, 468.

[15] As regards the issue of self-responsibility, linked to the institute of investigative rescue, which is also cited in the judgment in comment, see the recent analysis by F. Saitta, *Contratti pubblici e soccorso istruttorio: il punto due anni dopo il «correttivo»*, in *Diritto amministrativo,* vol. 2, 2019, 3.

[16] *Ex multis*, Cons. Stato, Sec. VI, 22 January 2019, no. 544; in general terms are still current the considerations made by L. Bertonazzi, *La tutela dell'affidamento nelle procedure selettive*, in *Diritto processuale amministrativo*, vol. 1, 2010, 42.

[17] On this point, reference is made to the conclusions drawn by Cons. Stato, Sec. III, 2 July 2014, no. 3329, in *Ragiusan*, 2014, 367.