

PUBLIC PROCUREMENT AND COMPETITION

Luigi Fiorentino*

ABSTRACT. Public procurement is a key sector of the EU economy accounting for about 16% of GDP. The Directives adopted in March 2004 provide a legal framework aimed at modernising and opening up procurement markets – including through the expansion of electronic procurement – that is crucial to Europe’s competitiveness and for creating new opportunities for EU businesses. The correct and early implementation of the new provisions is essential to avoid legal, technical and electronic barriers to and distortion of competition. Barriers in the procurement may exist at different levels: restrictions economic operators access to the tendering procedure (e.g. the “in house” regime); lack of transparency and proportionality (content of advertising); anticompetitive collusion and restrictive agreements. Using information technology appropriately can contribute to making the procurement market more open, competitive and efficient.

INTRODUCTION

The efficient functioning of the public procurement market is fundamental for the competitiveness of Italy and of the European economy in general, in view of the enormous volume of resources that it is capable of producing and channeling.¹ The following aspects are important in this respect. In the first place the functioning of the public procurement market is an indicator of a country’s openness to European competition through appropriately publicized tender procedures structured in a way that does not give rise to discrimination and managed in a transparent manner within a framework of legal and financial certainty. The public sector, moreover, as the purchaser of a very wide range of goods and services in substantial quantities (consider only the demand of the national health service for pharmaceuticals and specialist

* *Luigi Fiorentino, Chief of Cabinet Office, Italian Antitrust Authority, is an Adjunct University Professor, School of Engineering, University of Rome “Tor Vergata”. His teaching and research interests are in public budgeting, public procurement, antitrust and public policy.*

equipment), can influence the structure of supply and encourage consolidation.

In addition, well-structured and managed competitive tendering and downstream contracts enable public authorities to acquire goods and services of good quality and at lower prices and to endow themselves reasonably quickly with the public works and infrastructures (with certain times to completion and with all or part of the cost borne by the private sector through project financing) that they need not only to increase the welfare of the population but also to attract investment.

Lastly, the working of the competitive tendering procedures for the selection of private-sector contractors and the monitoring of the performance of contracts are an important factor in assessing public authorities' planning, project development, technical and legal capabilities. In this sense the public procurement market is also an indicator of the quality of public administration.

But for the public procurement market to function efficiently, two essential conditions must be satisfied: there must be good legislation – establishing rules that are clear, certain and appropriate in the light of changes in the market and the needs of contracting authorities – and good governance mechanisms.

As is well known, neither of these conditions is satisfied adequately in Italy. On the one hand the legislation, especially that regarding public works, is tortuous, complex, continually changing and often confused, on the other the multiplicity of institutionally competent central and local government entities and their lack of coordination prevent the coherent management and organization of the public procurement market.

These two aspects are where many of the problems regarding the relationship between public contracts and competition are rooted and will be the focus of the rest of this paper.

DISCUSSION

A Code to Introduce More Competition Into Public Procurement

As regards the innovations in the legislation concerning the sector, a first step has been taken with the approval of the “Code of Public Contracts for Works, Services and Supplies”,² which by its nature appears to meet the fundamental need for the rules on public procurement to be simplified, modernized and made more flexible.

The public contracts Code – adopted pursuant to the mandate given to the Government by the 2004 Community Legislation Implementation

Law (Law 62/2005) to transpose Directives 2004/17/EC and 2004/18/EC – responds on a general basis to the key objectives underlying the original Community legislation. In particular, the work of codification is intended to meet the need, felt both at European level and in Italy, to:

- 1) simplify and strengthen the rules governing public procurement in order to make the related market more efficient, integrated and globally competitive;
- 2) modernize the applicable legislation and procedures, in order to permit the widest possible use of information and communication technology in public contracts (so-called e-procurement) and to create a real electronic market at European level;
- 3) ensure the maximum possible flexibility in the legal instruments used, so as to simplify the task of contracting authorities in managing competitive tendering.

In incorporating the two Community directives into Italian law and at the same time rewriting and harmonizing the complex and diversified existing primary legislation on public contracts (the regulation of the more detailed aspects is left to secondary legislation), the Code, in the same way as the Community “legislative package” seeks to reconcile the urgent need to give contracting authorities more flexible mechanisms with the task of bringing the exercise of such freedom into line with the *acquis communautaire*, i.e. with the principles of equal treatment, non-discrimination, transparency, reciprocity, proportionality and, above all, competition.

In particular, the Code introduces new legal, contractual and management instruments for public contracts. The most important statutory innovations are: the introduction of new thresholds, the adoption of a common procurement vocabulary (CPV); changes to the rules on technical specifications; the amendment of the regulation of award criteria, by increasing the scope for using the criterion of the most economically advantageous bid in accordance with European Court of Justice Judgment C-247/02 and requiring the contracting authority to indicate in the contract notice or the contract documents the weighting and evaluation methods chosen in relation to the nature of the public contract (including provision for a “range”).

It should also be noted that major changes have been made to the qualification requirements for public contracts (allowing bidders to rely on the capacities of other entities) and provision made for rigid criteria for the selection of tenderers and for social and environmental aspects to be considered in establishing the technical specifications and the award criteria.

Greater flexibility is ensured, instead, by the enlargement of the number and types of award procedures with the inclusion – alongside the classical open, restricted and negotiated procedures – of organizational and contractual instruments such as framework agreements (initially envisaged only for special sectors and now extended to traditional sectors), competitive dialogue (which permits an exchange of information between the contracting authority and the candidates admitted to the competitive tender procedure with the aim of arriving at one or more optimal solutions, on the basis of which the candidates will submit their bids), dynamic purchasing systems, electronic auctions and central purchasing bodies. By contrast, the reference to the regulation of “in-house providing” was removed from the final version and the definition of the interpretative criteria left to the decisions of the European Court of Justice.

With a view to the modernization of the sector, the Code provides for widespread use of electronic means for publications and communications (e.g. publications of notices and contract documents on the “buyer’s profile” and for the transmission of contract notices and information notices to the European Community) and for the submission of bids. More generally, the Code integrally and completely transposes the e-procurement system established by the Community directives. In fact both the definitions adopted and the provisions concerning the substantive and procedural rules for electronic auctions and dynamic purchasing systems and those on central purchasing bodies are virtually identical to those of the directives.

As for the relationship between public procurement and the principles of competition, the main aspect to be highlighted is, broadly speaking, that the entire discipline covering public contracts has been “revised and corrected” by the Code in a new light whereby, on the basis of a new concept of the general interest, competitive tendering is seen as an instrument serving the market and considered a value to be fostered and protected.

From this standpoint the rules concerning the various phases of competitive tendering – now brought together and harmonized in the Code – must be interpreted, integrated and implemented in the same way as the principles that regulate and structure the domestic market, where the pursuit of the public interest – for which public contracts are one of the cardinal elements of the system – can also be identified with the promotion of a truly competitive market.

At the same time, as a consequence of a sort of relationship of convergence and mutual implication of the two terms, the full play of

competition in the public procurement market is essential for the efficiency of public expenditure,

Competitive and transparent markets are in fact necessary for public authorities to be able to purchase goods and services at lower prices and of better quality, with a considerable simplification of the purchasing process and thus with a reduction of the related administrative costs and of the sector's other inefficiencies.³

Besides, the correlation found to exist between the public procurement sector and the principle of free competition appears, in all its complexity, throughout the Community legislation, starting with the considerations set out in the abundant recitals that, in accordance with the usual manner of drafting Community law, precede the articles of the two directives that the Code implements.

In reading the careful assessments made in the preambles, one is struck by the repeated references by the Community legislators to the principle of effective competition, as the flag to follow in building a "European law of public contracts".⁴

This emerges, for instance (but to cite only one of many cases), in a particularly significant and exemplary manner in the reasons accepted by the European legislators for restricting the scope of Directive 2004/17/EC to the water, energy, transport and postal services sectors, with the exclusion instead of sectors such as telecommunications,⁵ where a powerful liberalization process is under way and provision made as a general principle (Article 30.1) for the exclusion of activities that, even though in sectors falling within the scope of 2004/17/EC, are "directly exposed to competition on freely accessible markets".⁶

Many other aspects of the new Code promote, more or less specifically and directly, the objective of bringing the principles governing public contracts into line with competitive standards. The following are some examples: 1) a more rigorous predetermination of the criteria for evaluating the most economically advantageous bid; 2) provision for a more extensive exchange of views in the phase of verifying anomalous bids; and 3) the principle of the equivalence of the technical specifications for the performance of contracts, together with the introduction of the (new) organizational models, and of the technologies and processes described, oriented dynamically to create an administrative system favourable to competition.

The public and private sectors thus no longer appear as oil and water, almost two separate universes, but as elements linked by forms of collaboration based on new models for the conduct and organization of competitive tendering (first and foremost e-procurement).⁷

To this end, moreover, it does not appear possible to ignore the need for economic operators in the sector to undertake direct action aimed at getting public apparatuses to recognize and absorb – despite their still reluctance to engage in such “internalization” – the value of competition, a legal good that brings the public and private sectors closer and is capable (today more than in the past) of orienting and guiding the procurement activity and policies of public authorities.

The transposition of the two directives by the individual member states (in Italy through the adoption of the new Code) is therefore an important opportunity to make the public procurement market more open and competitive, both by providing mechanisms capable of guaranteeing flexibility and freedom of action and choice for contracting authorities when they turn to the market and by ensuring full compliance with the principles of equality, transparency, non-discrimination and competition.

In particular, wide-scale use of the new technologies in public procurement will increase the efficiency of administrative action and the effectiveness of competitive tendering and permit, in conditions of transparency and economical procedures, the broadest possible participation (especially for small and medium-sized enterprises) and increased competition.

In short, use of the new technologies, in addition to the benefits in terms of efficiency, can have a positive effect on competition. Besides, in its communication on e-government the European Commission itself, while stressing the complexity of competitive tendering procedures and the use of the new electronic systems, considered it indispensable to adopt a Community approach that would take account of the scale of the internal market.

The new technologies were initially seen as a means of facilitating the relationship between public authorities and firms but not as a mechanism for actually awarding public contracts (electronic market). It was during the examination of the new directive that, in response to pressure by some member states, the work went well beyond this initial concept to arrive in the final version at sophisticated procedures and systems of e-procurement based on electronic auctions and dynamic purchasing systems.

The handling of contracts within the setting of electronic markets, as provided for by the Community directives and the Code, should therefore ensure not only greater transparency, lower costs and increased rapidity of competitive tendering procedures but also broader participation and a more dynamic market. This naturally depends on these techniques being used in full compliance with the Community principles for public

contracts. It is also necessary, at the technological level, to guarantee complete interoperability and interconnection among the systems existing in the member states in order to prevent any distortion of competition.

In practical terms it is sufficient to consider the effect of an intelligent use of such methods on the world of small and medium-sized enterprises and to create a more open market. Many such enterprises (not infrequently located in marginal areas of the country) would have a better chance of competing for public contracts and incurring lower costs (very often the cost of participating represents an insurmountable “entry barrier”).

Public Contracts And Concessions And Rules Of Competition

Of fundamental importance to prevent the innovations introduced by the Code from remaining a dead letter and ensure their being applied in practice is the role assigned to the “guarantee bodies”, charged with continuously and carefully monitoring the public procurement sector and the compliance of the operational, procedural and organizational models put forward by the Code with the principles established by Community law and court decisions.

First in order are the task assigned by the new Code to the Supervisory Authority for Public Works, Services and Supplies (in accordance with the “integrated” notion embodied in the legislative decree) and the role played up to now by the Italian Antitrust Authority, which on various occasions has expressed its opinion on the relationship between the rules on public contracts and the development of competition and highlighted the key problems.

Among the most delicate aspects in this respect – just to mention some cases that have been reported to the competent government bodies and led to the imposition of sanctions – the Antitrust Authority has indicated the contents of contract notices, bid rigging (i.e. collusive behaviour by the firms participating in a competitive tender with regard to the manner of submitting their tenders, the prices offered and the agreed division of the lots available) and the use of temporary groupings of firms, which, while in economic terms they objectively perform an anti-monopolistic function, have often been found by the Antitrust Authority to lend themselves to forms of collusion among the companies involved.

In fact on several occasions the Antitrust Authority has drawn attention to the importance of contract notices being prepared so as to create the conditions for the comparison between competing firms to be based on the criteria of non-discrimination, proportionality and

transparency.⁸ The Antitrust Authority has also intervened frequently with regard to individual contract notices, often in response to a request for an opinion made by the contracting authority itself pursuant to Article 22 of Law 287/1990.

In this connection a key aspect is the identification of the subject of the contract. The contract notice for each competitive tendering procedure should refer to the performance of the contract in its entirety. It is therefore necessary to avoid unduly enlarging the subject of the contract notice, thereby excluding firms that potentially could profitably carry out a part and, on the other hand, to avoid splitting it up to such an extent that foreign firms are excluded.

A second aspect concerns the requirements for competing for public contracts: in identifying the requirements of a technical and economic and financial nature, contracting authorities should proceed on the basis of their objective needs and principles of reasonableness and impartiality. In other words it is necessary to avoid requirements that in practice are more favourable to some firms than others, such as having already performed contracts with the contracting authority comparable to those that are the subject of the contract notice or having generated their sales revenue in a specific geographical market. Rather, preference should be given to criteria that identify the real technical capabilities of the participants.

The same holds for criterion of a threshold for participants' sales revenue, which is likely to hinder access to the market, especially when it is disproportionate in relation to the amount of the public contract. As for the characteristics of products to be supplied, it is necessary to avoid restrictions based on the specification in the contract notice of trademarks or patents.

Other very important points concern the use of forms of association, such as temporary groupings of firms. These can lend themselves to being used in an anti-competitive manner, whereas they are intended to permit broader participation in public contracts. To avoid the distorted use of temporary groupings of firms, the Antitrust Authority has expressed the hope that contract notices will tend to exclude the possibility of this mechanism being used by firms that are able to satisfy the technical and financial requirements for participation on their own. It would also be advisable to prevent firms subject to a control relationship or that are affiliated from tendering for the same contract.

Another delicate aspect of the relationship between public procurement and competition is to be found in the ways public authorities award contracts for services, supplies and works. Here the

preference of the Community legislators and judges for open procedures is confirmed, especially by contrast with “in-house providing”. The extension of organizational models in which public authorities hold all or part of firms’ capital makes clarity necessary in this sphere. The approach must be two-pronged.

On the one hand it is necessary to reverse the tendency to use instruments established only formally under private law (*società per azioni* wholly-owned by public authorities) for tasks that can be entrusted to private-sector entities or performed by the authorities themselves. Very often this practice serves to get round rules intended to curb public expenditure and sometimes to get round the Community rules on public contracts. Recently the European courts have taken a clear position on the limits to and the conditions of legitimacy of the in-house providing.⁹

In the same way advantage needs to be taken of the opportunity provided by the transposition of the new Community directives on the award of public contracts to confirm what the Italian Antitrust Authority and the European Commission having been saying for some time, i.e. that although concessions are not explicitly covered by the rules on public contracts, they should be subject to the same general principles of non-discrimination, equal treatment, mutual recognition and proportionality. The use of competitive tendering procedures must therefore be considered a general principle applicable to concessions as well.¹⁰

By contrast, as shown by the Antitrust Authority, even in the case of public works concessions, considerable recourse is made to alternative procedures.¹¹

Article 19 of Law 109/1994 (Framework Law for Public Works) states that (the public works referred to in this law may be carried out exclusively on the basis of public contracts or public works concessions” and Article 20 that “the public contracts referred to in Article 19 shall be awarded by means of the open procedure or the restricted procedure”. Moreover, Article 2.3 of the same law states that “[...] contracting authorities may require, by means of an express clause in the concession agreement, public works concessionaires to award third parties contracts corresponding to a minimum of 30 per cent of the total value of the work covered by the concession contract or may invite the candidate concessionaires to declare in their tenders the percentage, if any, of the work covered by the concession contract that they intend to award to third parties.

For the carrying out of works provided for in agreements already concluded at 30 June 2002 or renewed or extended pursuant to the

legislation in force, concessionaires are required to award third parties contracts corresponding to a minimum of 40 per cent of the total value of the work and apply the provisions of this law [...].¹²

Despite this, data collected by the Antitrust Authority shows that 80% of the public works contracts for more than €1 million awarded from 1999 onwards were awarded using the negotiated procedure and only the remaining 20% using the restricted procedure. To have an idea of the scale of the phenomenon in economic terms, it is sufficient to consider that out of works totaling €1 billion, those carried out by firms selected on the basis of in-house providing amounted to €8.4 billion (78%). Moreover, no less than 31% of the works in connection with concession contracts awarded without a competitive tendering procedure were awarded to firms owned or controlled by the concessionaire. As noted in the report cited above, "Considering that such works are carried out by a small number of firms (14), just a few firms thus have the privilege of carrying out public works for a considerable sum in the absence of competition."¹³

It is therefore also necessary to set a new course for concessions. National law must be interpreted in the light of the general principles of Community law. In the first place the Treaties establish the principle of an open market economy with free competition and guarantee freedom to provide services in the European single market. In applying these principles, Community law provides rules on public contracts based on non-discrimination, equal treatment and transparency. Consistently with this approach, this discipline identifies competitive tendering as being the normally exclusive procedure for awarding public contracts.

Furthermore, these general rules, although laid down with reference to public contracts, have been considered as also applicable to public service concessions, as clarified by the European Commission¹⁴ and confirmed by the European Court of Justice (in its judgement of 7 December 2000, *Telaustria*, case C-324/98). As is well known, concessions differ from public contracts in several respects, including differences of a legal nature and the transfer of public rights to the concessionaire and the latter's assumption of the operational risk in relation to users' performance of their obligations.

On careful consideration, however, despite the differences between the two mechanisms and even though the discipline regarding public contracts is not abstractly applicable to concessions (as is also confirmed by the two new directives, 2004/17/EC and 2004/18/EC transposed in the Code of Public Contracts), it is nonetheless feasible that the general principles of non-discrimination, equal treatment, transparency, mutual recognition and proportionality will also apply to concessions.

Community and national law thus provide, according to the Antitrust Authority, only in exceptional circumstances for the rules governing competitive tendering procedures to be waived and recourse made to in house providing. Hence the need for local authorities that intend to award contracts for services in this way always to explain clearly the existence of circumstances justifying the desirability of such a choice insofar as, according to Community and national law, on a general basis the award of contracts for public services must, without prejudice to the exceptions explicitly established, comply with the principle of protecting competition, which translates into the need to proceed by means of competitive tendering.

Organizational Purchasing Models And Relations Between Centre and Periphery. New Governance Mechanisms

With reference to governance matters, instead, both the public works sector and that of purchases of goods and services show there is still scope for improving efficiency in many areas.

In this respect, experience with the law creating a fast track for public works (the “Legge Obiettivo”) has shown that the link between the institutionally competent bodies, both at the level of central government, and at that of local authorities (regions, provinces and municipalities) is the major problem, the key factor for the success of any programme for the creation of infrastructure. On the other hand, “the fluctuating legislation” concerning *Concessionaria Servizi Informatici Pubblici – Consip S.p.A. (“Consip”)* has prevented it developing a clear position, in relation both to the “obligatory/voluntary” dilemma and to the various diversified components of local government.

In particular, Italy’s experience with purchases of goods and services by governmental bodies is marked by considerable complexity, which has taken the place of a tradition of bureaucratic and administrative centralization, with no flexibility and excessive rigidity in the various stages of the management of the purchasing cycle.

The various relational models are expressions of the overall organizational approach that in a given historical period, in given circumstances, the governing classes consider as fulfilling the ultimate objectives of their mission. The centre-periphery system is therefore to be seen as set in a given historical context. There are several different possible centre-periphery relational models. Those adopted in various countries are as follows:

- a single purchasing office for all central government bodies, a model that can have some variants;

- individual bodies are granted autonomy. In this case a “centre” could be charged with monitoring tasks and the dissemination of information;
- there is a (corporate) service unit in the two variants: the Italian model (Consip), which offers opportunities to individual government departments and the French model (UGAP). Such units offer management flexibility and introduce negotiated procedures.

There are advantages and disadvantages for both types of model, centralized and decentralized. Centralized models make it possible to arrive at volumes exceeding the “critical mass” and thus to obtain economies of scale. However, they suffer from drawbacks in terms of the efficiency and efficacy of the processes: response times are long and the purchasing processes are subject to procedural complications that do not permit a rapid response. There are therefore management diseconomies that have repercussions on the management model. A managerial logic of accountability does not prevail but a logic of non-accountability, which divides the chain of responsibility into segments. By contrast, decentralized models stress the logic of autonomy, split up expenditure and adversely affect the prices that governmental bodies can obtain.

There is also a problem as regards the relationship with the market. The centralized models do not satisfy needs that are very strongly felt in the European economy: those of small and medium-sized enterprises and so-called “local markets”.

Another aspect concerns the move towards autonomy of public organizations, processes that have gathered pace in recent years, partly in response to the impulse of international organizations (the OECD and the IMF).

We are faced with the “convergence” of the management models of public-sector organizations towards those of private-sector organizations, which have the following characteristic features: management of resources based on budgets; and the introduction of strategic planning models and evaluation of the results. In particular, as regards the “management of financial resources”, this approach envisages the allocation of financial resources to so-called “centres of responsibility” and by these to centres of expenditure (corresponding to organizational units at different levels). These autonomy-based processes have encouraged the spread among public authorities of a tendency to adopt decentralized models for the management of purchasing.

In the run-up to the single currency most of the countries involved (including Italy) pursued restrictive budgetary policies in order to meet the targets laid down in the Treaty of Maastricht. And it was then, at that

historical moment, that new relational models were formulated at the level of central government and between central government and local government.

Thus it can be seen that two processes emerged:

- the State's commitment vis-à-vis the European Union (in the so-called "Stability Pact");
- the commitment of public authorities (central, regional, provincial and municipal bodies, health service entities and universities) vis-à-vis the State.

It is in this context therefore that a new approach was adopted to the question of curbing the cost of the functioning of the government apparatus and thus the expenditure on goods and services. It is important that this occurred at a time when advances were being made towards greater federalism or, in other words, towards the devolution of powers and resources from the state to the regions and from them to the other local authorities.

It is in this context that a new management model was drawn up, a framework agreement. Initially this was mandatory for central government bodies and showed a tendency to involve the other public authorities: first through the creation of specialized aggregates for certain categories of goods and then providing for (or hypothesizing) mandatory solutions for the regions and the other local authorities.

The regulation of these matters has thus been faced in recent years with the dilemma whether adhesion to the agreements should be mandatory or voluntary.

Three different factors led to a growing crisis in the working of the system, until recent legislation attempted to restore positive conditions:

- the extension of the mandatory scope of the measures (to include local government and public enterprises);
- an excessive broadening of the range of categories of goods subject to the agreements and the inclusion of unsuitable services (such as facilities);
- changes to the role assigned to Consip, from innovatory structure to almost a buying centre for public contracts (reproducing in part the role of the PGS).

The implementation of the recent legislation on procurement aimed at reviving Consip's role is not plain sailing, however, since there are both interpretative difficulties (whether the convention is applicable on a

national or a regional basis) and operational difficulties (the relationship between Consip and regional, provincial and municipal systems, especially as regards interoperability).

Consip's history thus shows that the decision-making processes in the public procurement sector in a system like Italy's, which is increasingly based on "multilevel governance", require new methods of handling the consequent "complexity". A legal approach is not sufficient.

Legal mechanisms, however perfect, are not enough. Methods for dealing with complexity are needed that, from the planning phase onwards, can have recourse to organizational modules, procedures and information systems permitting all the competent entities to participate and cooperate while ensuring decisions that are rapid and hopefully not controversial (at least as regards the body having authority to take them). Appropriate governance mechanisms must also be put in place for the procedures used for the financing of works, with special reference to financial resources deriving from a variety of sources.

It is therefore necessary to strike a balance. Mechanisms serving to accelerate decisions taken by central government must be accompanied by others to guarantee the effective participation of the regions and other local authorities, as well as the involvement of other institutional and social entities.

More generally, the legislative innovations introduced by the Community directives and the Code must be given practical effect in the daily life of the public authorities, so as to really achieve the highly desirable objectives of a more open and competitive market for public contracts. To this end the adoption of effective "governance" mechanisms is indispensable.

Public procurement is a major component of public expenditure (more than 12% of GDP in 2003). It is in the country's interest to obtain benefits from its "governance" at the systemic level and not only as regards the efficient working of the government apparatus. Organizational choices are thus not indifferent, especially in view of the multilevel nature of Italy's legal system.

The choices made in the last two legislatures have strengthened the role of Consip S.p.A., although the tendency for the legislation to fluctuate has prevented it from establishing a clear position in relation either to the "obligatory/voluntary" dilemma or to the diversified world of local government. It is therefore necessary to strengthen the organization's identity, in the sense of clearly specifying its mission and defining its field of action.

In the case of public procurement, and in that of public contracts in general, it is therefore necessary to provide a system of governance in accordance with the new configuration of the state. What form of public procurement for a federal system, that is the question. This is a key issue, a fundamental decision that will affect Consip's role and functions and its relationship with local government.

Consip must enhance its role of providing intelligent coordination and acting as a pivot, in other words it must organize itself less as a modern purchasing body and become the focal point for the construction of the electronic market: guarantee the interoperability of e-procurement systems, help the regions and the other local authorities to build coherent systems, permit the use of its platform and encourage the creation of local electronic markets. In a word, it must be a motor of innovation.

New laws are not needed to achieve this goal. On the contrary, it is necessary to declare a legislative moratorium. The myth of obligation must be abandoned in its various forms (especially for local authorities). The potential that is present within Consip must be developed. An approach must be adopted based on budgets and managerial accountability, well aware that a different approach (i.e. based on public-sector-wide centralization) would probably result in paralysis and inefficiency and cause problems and tensions in the local economic fabric.

In short, it is necessary to draw up a "Strategic Plan for E-Procurement". A plan that is comprehensive and coordinated among the various levels of government, consisting of action to be taken and projects to be carried out in the short term, so as to make an electronic public contracts system a reality. Public authorities are required to invest in appropriate technical infrastructure, reconsider their institutional and organizational arrangements, upgrade their administrative procedures and systems, and reorganize and modernize the management of the purchasing of goods and services in the public sector. The legal framework and above all the resulting operational framework should provide both purchasers and suppliers with adequate incentives to shift from a paper-based system of procurement to an electronic system.

To achieve this in practice, Consip must organize and implement the electronic market and the other dynamic procurement systems. In addition, in its relations with the local authorities it must perform as an agency for the governance of a modern networked system, and foster and support the construction of a network of interoperable platforms guided by a set of shared rules, so as to eliminate the creation of "electronic barriers".

Looking ahead one can thus envisage a new design for a “National Procurement System” characterized by the presence of entities at the different levels of government and linked overall by strict procedures able to ensure that public authorities’ procurement decisions and their effects are widely publicized.

From this standpoint the expanded use of electronic means for the purchase of goods and services (e-procurement) and, more generally, the efficient functioning of the system of public contracts can represent not only a technical mechanism but also an opportunity to modernize procurement processes and create a more profitable system of relationships between firms and public authorities, ultimately with a view to improving Italy’s overall competitiveness.

RESULTS

Diverse factors impinge on the efficient functioning of the public procurement market. Some relate to the constraints and shortcomings of the legislation in force, and the new Code of Public Contracts for Works, Services and Supplies addresses these by rationalizing and stabilizing the legislative framework.

Other factors are bound up more generally with striking a fair balance between two different needs. On the one hand, there is the need for contracting authorities to be able to resort to the market with greater flexibility and freedom of action, through new legislative, organizational and operational instruments that are also technologically up to date and consistent with both contracting authorities’ requirements and the solutions the market can offer. On the other, this freedom of action must be exercised completely in accordance with the fundamental principles of equal treatment, transparency, non-discrimination and competition, which must always guide the award of contracts in order to ensure the proper and efficient functioning of the market.

The transformation of the public works market in terms of improved efficiency and enhanced competition depend in part on the ability of the contracting authorities to reconcile these needs in practice.

Still other factors concern more properly the organizational and operational, or better, governance aspects of the public procurement system, within the framework of compliance with the principles of the free market and competition. Here the effort must focus on seeking new means of achieving effective linkage and coordination between the different levels of government.

Administrative decentralization makes it increasingly important that the principles of competition be known and practiced at local government level. Indeed, the reform of Title V of the Constitution has entrusted local authorities with stewardship of important sectors of the economy.

Consider, for example, the positive affect on competition if local authorities adopt criteria and procedures based on the sunshine principle, transparency and non-discrimination in the award of contracts for management of public services or the choice of minority private-sector partners. Quite plainly, every liberalization measure passed by legislators must be followed by consistent implementation on the part of the administrations concerned, or else the goal of opening up markets will not be realized.¹⁵

Furthermore, as the Antitrust Authority has pointed out on several occasions, when companies holding special or exclusive rights also operate in markets open to competition, public intervention should be directed towards creating “conditions that are basically even and equal for all economic operators”.¹⁶

At the same time, in the case of privatizations that are such only in form but not in content, governmental bodies risk simultaneously playing the role of regulator, owner and at times customer as well.¹⁷ Conversely, when they find themselves adopting general regulations that can affect the conditions of access to a given market while operating in that market through companies they control, they must avoid any measure that de facto favours some firms over others that intend to do business in that market.

The role the Antitrust Authority can play in seeking to accompany governmental bodies on this virtuous path towards a culture more firmly rooted in competition rests largely on its advisory and reporting activity under Articles 21 and 22 of Law 287/1990.

It has been observed that it was precisely the intention of assigning powers of this kind to an institutional entity that induced Parliament to entrust those regarding competition to an independent administrative authority rather than to the ordinary judiciary.¹⁸ By its very structure and institutional vocation, an independent authority is in fact in a better position than others to follow the evolution of the markets and accordingly to offer suggestions to the public institutions charged with the duty of regulating.

The task is difficult for the Authority, because the action to promote and solicit the adoption of pro-competition criteria or procedures often requires it to take into account needs of a general nature that deserve to

be safeguarded and in any case cannot be neglected. In these cases, the Authority's evaluation turns on a delicate balancing of interests on the basis of "proportionality" criteria whose adoption, though promoted and encouraged by the Authority, should be made their own first of all by the bodies to which the Authority's reports and advice are addressed.

Within governmental bodies themselves, then, it is necessary increasingly to promote and pursue pro-competition and pro-efficiency models, in an awareness that the very legitimation of administrative power depends on its "ability to interpret social demands and to provide the best response to these".¹⁹ And free competition and administrative efficiency are without doubt now more than ever specific and pressing "social demands".

In conclusion, governmental bodies can work to make competition a systemic objective, not a constraint but an opportunity. If this goal is to be achieved, it is necessary that competition become a current "parameter" for their operations: in their internal affairs (management activity, etc.), in strategic decision-making (for example, in the choice between in-house providing and recourse to the market), and in relations with the market. And that policymakers be aware of the importance of competition and assist this approach by introducing incentives.

Thus, it must be a matter of policy to reward those governmental bodies that decide to open up to the markets, introduce mechanisms favouring competition, break up private monopolies. To cite an example, if provision were made in the Finance Law or other legislation for rewards, in terms of budget transfers, for municipalities that decided wisely to make sectors until now exclusively under public management open to the market, this might serve as an incentive to break up local public monopolies and create a competitive environment. In local markets, moreover, the preconditions exist for this to be realized in a balanced fashion, through company-based management of infrastructure and supplies.

NOTES

¹ At European level this market exceeded 16% of GDP between 1995 and 2003 and in 2003 is estimated to have amounted to more than €1,525 billion. In Italy, although below the European average over the same years (12.3% of GDP), the public procurement market is estimated to have amounted to €159 billion.

-
- ² Legislative Decree no. 163 of 12 April 2006 “Code of Public Contracts for Works, Services and Supplies, transposing Directives 2004/17/EC and 2004/18/EC”, published in “Supplemento Ordinario” no. 107 of the “Gazzetta Ufficiale” of 2 May 2006. The Code enters into force sixty days after its publication.
- ³ See. COM (2003) 283. On this point see also the notice published by the Antitrust Authority (AS187), “Bandi di gara in materia di appalti pubblici”, in *Bollettino*, no. 48/1999. See also C.H. Bovis, *The new public procurement regime in the European Union: a critical analysis of policy, law and jurisprudence*, who states that “Through the principles of transparency, non-discrimination and objectivity in the award of public contracts, it is envisaged that the regulatory system will bring about competitiveness in the relevant product and geographical markets, will increase import penetration of products and services destined for the public sector, will enhance the tradability of public contracts across the Common Market, will result in significant price convergence and finally it will be the catalyst for the needed rationalisation and industrial restructuring of the European industrial base.” On p. 609 of the same publication Bovis refers to antitrust regulation “as a complementary regime for the regulation of public markets”.
- ⁴ On this point see also the following European Court of Justice judgements: 12 December 2002, case C-470-99, *Universale-Bau AG*, in *Racc.*, pp. I-11617, point 89; 17 September 2002, case C-513/99, *Concordia Bus*, point 81; 16 September 1999, case C-27/98, *Metalmeccanica Fracasso s.p.a.*, in *Racc.*, pp. I-5697, point 26, in *Foro it.*, 1999, IV, p. 508 et seq., with a note by A. Barone.
- ⁵ See the 5th, 6th and 7th recitals of Directive 2004/17/EC and the 21st recital of Directive 2004/18/EC. On this point see also L. Iannotta (2005). “Gli appalti esclusi”. In *Il nuovo diritto degli appalti pubblici nella direttiva 2004/18/CE e nella legge comunitaria n. 62/2005*, R. Garofoli e M.A. Sandulli (1999) (Edits), Milano, pp. 69-85. F. Cardarelli – V. Zeno-Zencovich (1999), “Il diritto delle telecomunicazioni”, Turin. F. Bonelli and S. Cassese (1999) (Edits). “La disciplina giuridica delle telecomunicazioni”, Milan. R. PEREZ (2002), “Telecomunicazioni e concorrenza”, Milan.

-
- ⁶ To this end the “special” sectors directive provides for a specific procedure to establish whether an activity is directly exposed to competition based on recourse to “criteria conforming with the provisions of the Treaty concerning competition, such as the characteristics of the goods or services in question”. The rules for this “liberalization clause” are contained in the decision of the European Commission of 7 January 2005 [2005] OJ L-7/7, cited by R. Roniger – F. Neumayr – H. Hemmelrath (2006), “Public procurement 004/2005: The legal framework and practice keeps developing”, p. 58, in *Global Competition Review, The European Antitrust Review*, Special Report, p. 57 ss. On this point see also C.H. Bovis, cit., pp. 626-627.
- ⁷ On this point allow me to refer to L. Fiorentino (2005, November 23). “Nuovi modelli organizzativi, tecnologie, processi nel public procurement: opportunità per maggiore concorrenza, efficienza, rinnovamento del mercato”?. Paper presented to the seminar on “Più valore alla pubblica amministrazione. Appalti pubblici tra efficienza e trasparenza”. Available at www.astrid-online.it.
- ⁸ See the report on Contract Notices for Public Contracts, 28 September 1999, and the report on Contract Notices prepared by Concessionaria Servizi Informatici Pubblici – Consip S.p.A., 30 January 2003.
- ⁹ European Court of Justice. 11 June 2005, Case C-26/03, Stadt Halle and RPL; 21 July 2005, Case C-231/03, Coname; 13 October 2005, Case C-458/03, Parking Brixen. See also the Conclusions of the Advocate General, L.A. Geelhoed, presented on 12 January 2006, in Case C-410/04 and the Conclusions of the Advocate General, C. Stix-Hackl, presented on 12 January 2006, in Case C-340/04. See also Constitutional Court decision no. 29 of 1 January 2006.
- ¹⁰ See the recent joint report by the Antitrust Authority and the Supervisory Authority for Public Works on “The Manner of Awarding Contracts for Works in connection with Public Concessions”, where, among other things, it is shown that the choice of public works concessionaires was made in 80% of the cases using the negotiated competitive tendering procedure and only in the remaining 20% using the restricted procedure.
- ¹¹ Antitrust Authority (2006), Report AS336, in *Bollettino* no. 11/2006.

-
- ¹² The same percentages were confirmed in the Draft Legislative Decree containing the new Code of Public Works Contracts for Works, Services and Supplies approved by the Council of Ministers on 13 January 2006, with special reference to Articles 146 and 253.25.
- ¹³ Antitrust Authority (2006), Report AS336, in *Bollettino* no. 11/2006
- ¹⁴ Interpretative communication on concessions in Community law, 12 April 2000, 121/02.
- ¹⁵ A recent decision of the European Court of Justice on the procedures for the award of public service strongly circumscribes the scope for use by general government of in-house providing procedures. (EC Court of Justice, 11 January 2005, Stadt Halle case). For a commentary, see R. Ursi (2005). “Una svolta nella gestione dei servizi pubblici locali: non c’è ‘casa’ per le società a capitale misto”. *Foro it*, IV, p. 136 et seq., and C. Guccione (2005). “L’affidamento diretto di servizi a società mista”, *Giornale di diritto amministrativo*, no. 3, p. 271 ff.
- ¹⁶ Annual Report of the Antitrust Authority (30 April 1998).
- ¹⁷ See F. Panozzo (2000). “La riforma manageriale della pubblica amministrazione: ambizioni, risultati, problematiche e prospettive”. p. 73.
- ¹⁸ See P.L. Parcu (2003). “L’antitrust italiano”, Turin. p. 13.
- ¹⁹ R. Manfellotti (2003). “Amministrazioni indipendenti e collaborazioni preliminari al procedimento legislativo”, *Quaderni costituzionali*, no. 4, December 2003, pp. 773 ff.; the quoted passage is on p. 779.

REFERENCES

- L. Iannotta (2005). “Gli appalti esclusi”. In R. Garofoli e M.A. Sandulli (Eds.), *Il nuovo diritto degli appalti pubblici nella direttiva 2004/18/CE e nella legge comunitaria n. 62/2005*, Milano, pp. 69-85.
- F. Cardarelli – V. Zeno-Zencovich (1999). “Il diritto delle telecomunicazioni”, Turin.
- F. Bonelli and S. Cassese (1999) (Eds). “La disciplina giuridica delle telecomunicazioni”, Milan.

-
- R. Perez (2002), “Telecomunicazioni e concorrenza”, Milan.
- R. Roniger – F. Neumayr – H. Hemmelrath (2006), “Public procurement 004/2005: The legal framework and practice keeps developing”, p. 58, in *Global Competition Review, The European Antitrust Review*, Special Report, p. 57 ss.
- L. Fiorentino (2005, November 23). “Nuovi modelli organizzativi, tecnologie, processi nel public procurement: opportunità per maggiore concorrenza, efficienza, rinnovamento del mercato?”. Paper presented to the seminar on *Più valore alla pubblica amministrazione. Appalti pubblici tra efficienza e trasparenza*. Available at www.astrid-online.it.
- R. Ursi (2005). “Una svolta nella gestione dei servizi pubblici locali: non c’è ‘casa’ per le società a capitale misto”. *Foro it*, IV, p. 136 et seq.,
- C. Guccione (2005). “L’affidamento diretto di servizi a società mista”, *Giornale di diritto amministrativo*, no. 3, p. 271 ff.
- F. Panozzo (2000). “La riforma manageriale della pubblica amministrazione: ambizioni, risultati, problematiche e prospettive”. p. 73.
- P.L. Parcu (2003). “L’antitrust italiano”, Turin. p. 13.
- R. Manfrellotti (2003). “Amministrazioni indipendenti e collaborazioni preliminari al procedimento legislativo”, *Quaderni costituzionali*, no. 4, December 2003, pp. 773 ff.; the quoted passage is on p. 779.