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THE REGULATIONS OF PUBLIC TENDERS IN ITALY

An interview with avv. Pier Antonio Mori, bar of Modena, responsible for WILL ITALIA Administrative law group.

Interviewer: WILL affiliate and author avv. Giulia Perri, bar of Milan.

Let's talk about the regulation of public tenders in Italy with Adv. Pier Antonio Mori, whose office is established in the Northern part of Italy, in the beautiful town of Modena. He's an administrative lawyer specialized in public works.

The regulamentation of public tenders in Italy... complicated issue, isn't it?

You're right: it's often complicated to explain to our clients what to do when they participate to a public tender: we have to guide and assist them in the terms and methods of appeal of the tender announcement and documents, with one eye on the EU and Italian regulamentation and one eye on jurisprudence, always in evolution. For example, on 2th July 2020 the Plenary Meeting of State Administrative Court has taken an important decision about forfeiture: a very delicate issue because the error in identifying the moment from which starts the deadline for proposing appeal is just behind the angle.

What happens if appeal is challenged after the deadline?

In case of delay the appeal will be inadmissible. But, fortunately, jurisprudence has intervened with several judgments giving us some consolidated interpretative lines that help professionals in identifying the deadline for the challenge. First of all jurisprudence indicated some general rules, one of the most relevant being that the tender can be challenged only when the administrative procedures has come to its final act, the award provision. Only in this case, in fact, will be determined a detrimental effect towards the pre-authorized competitors.

What are the legal grounds for the appeal after the award to another competitor?

The appellant can challenge documents as prerequisite acts, including the announcement and the call for tender notices, if it is deemed that they contain elements of illegality. And it's important to point out that only the economic operator who participated in the tender has the right to appeal, because holding a qualified interest to contest the tender documents.

Is there a special Court for these cases?

In Italy we have a system of territorial Administrative Courts, named TAR -Administrative Regional Court - who are competent to judge such cases.

What is the deadline for the challenge and from which date does deadline start?

That's a good question, difficult to answer... In Italian legal system we have some laws disciplinating this, the most relevant being the Code of Public Contracs (Legislative Decree n. 50 of 2016). The application of this Decree and other rules have been subject to different interpretations, solved by the Council of State with the well known sentence of the Plenary Meeting n. 12 of July 7th 2020, that put a firm point on the issue.

The Plenary Meeting has established that the term of 30 days for the appeal of the awards starts from publication of the tender documents provided for by art. 29 of the Code of Public Contracts; otherwise, if earlier, from the communication of information about the award that public administration is required to give to competitor, according to art. 76 of the Code.

If the competitor requests for access to tender documents, there is a time extension of said term, that will run only from the moment of full knowledge of required documents.

But in order to benefit from the extention of the term, competitor must make the request within 15 days from the communication and the grounds for appeal must relate to defects emerging from such documents.

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It is very important to examine these documents, and quickly...!

In fact, when a competitor has doubts regarding the illegitimacy in the tender, it's fundamental to immediately check what is published on the profile of the contracting authority and to apply for access to unpublished documents within 15 days. From the date of access evasion, the 30 days term will run. But, as we've said, if the documents don't give any ground for appeal, competitor has to respect the 30 days term, without extension.

Must the tender always be challenged with the award or are there cases in which it has to be challenged first and independently?

Legislative Decree n. 104/2010 establishes that calls for tender must be challenged (within 30 day since their publication) in case they are independently harmful.

There have been some jurisprudential fluctuations about this issue, resolved by the Plenary Meeting of the State Council Court with the sentence n. 4 of 2018: the decision clarified that calls for tender must be challenged autonomously in case they contain the so called "excluding" clauses, involving the radical impossibility or extreme difficulty for the competitor to usefully take part in the tender.

But, exactly, which is the dies a quo for challenging the appeal?

The contracting authority must publish the call for tender on its profile and on the digital platform, giving advertising to publication at ANAC, the National Anti-corruption Authority. The legal effects should start from the publication on ANAC's digital platform, but - as it's not yet functional - in the meantime the transitional regulation apply, which continue to provide for the obligation for contracting authorities to advertise on the GU, the Official Gazette of Italian Republic: so, the term for challenging the appeal starts - currently - from the publication on GU.

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