The calls for tender and the direct, concrete and current interest, as a prerequisite for the right to challenge

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1. The procedure in public evidence

The negotiation activity of the Public Administration has a dichotomous nature, as it is carried out in two phases: the first "with public evidence [1]", the second, however, is governed by the rules of private law.

The public procedure accompanies the conclusion of contracts [2] between the Public Administration and the private citizen [3] and is governed

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[1] C. GRECO, *I contratti dell'amministrazione tra diritto pubblico e privato. I contratti ad evidenza pubblica*, Milano, 1986, 89; S. PERONGINI, *Le gare preliminari alla trattativa privata. Ipotesi di procedimenti amministrativi atipici*, Napoli, 1990, 150.

[2] R. DIPACE, *Manuale dei contratti pubblici*, Torino, 2021, 55; F. CARDARELLI, *Brevi considerazioni sui procedimenti telematici di evidenza pubblica*, Napoli, 2004, 78; A. MALTONI (a cura di), *I contratti pubblici. La difficile stabilizzazione delle regole e la dinamica degli interessi*, Napoli, 2020, 126; A. MASSERA, *Perplessità e interrogativi sul*

by the principles typical of administrative action such as impartiality and transparency [4] in the choice of the best contractor.

The first phase, or the one with public evidence, includes the resolution to contract, the drafting of the notice, the choice of the system for identifying the contractor, the choice of the selection criterion of the best offer, the completion of the related tender, the preparation of the contractual clauses.

The second phase, on the other hand, is characterized by the stipulation of a contract between the Public Administration and the private citizen and follows the private rules [5].

This distinction is relevant for the purpose of identifying the judge

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diritto dei contratti pubblici in epoca di crisi sanitaria ed economica, in *Astrid Rassegna*, 8/2020; M. CLARICH, *Commentario al Codice dei contratti pubblici*, Torino, 2010, 110; C. FRANCHINI, *I contratti di appalto pubblico*, Torino, 2010, 44; C. VOLPE, in M.A. SANDULLI-R. DE NICTOLIS-R. GAROFOLI (diretto da), *Trattato sui contratti pubblici*, vol. III, Milano, 122, 2008; P. SANTORO, *Manuale dei contratti pubblici*, Rimini, 2007, 780; G. DE GIORGI, *Appalti pubblici e sistema delle fonti,* in E. STICCHI DAMIANI, *Gli appalti pubblici,* Milano, 1998, 198; F. CARINGELLA-G. DE MARZIO, *I contratti pubblici di lavori, servizi e forniture*, Milano, 2007, 901-939; A. POLICE, *Tutela della concorrenza e pubblici poteri. Profili di diritto amministrativo nella disciplina antitrust*, Torino, 2007, 146; R. CAVALLO PERIN-G.M. RACCA, *La concorrenza nell'esecuzione dei contratti pubblici*, in *Dir. amm.*, 2010, 325; C. FRANCHINI, *Pubblico e privato nei contratti delle amministrazioni*, in C. FRANCHINI-F. TEDESCHINI (a cura di), *Una nuova pubblica amministrazione: prospettive di riforma dell'attività contrattuale*, Torino, 2009, 1; C. FRANCHINI, *Appalto di lavori, servizi e forniture stipulato con le pubbliche amministrazioni*, in C. FRANCHINI (a cura di), *I contratti di appalto pubblico*, in P. RESCIGNO-E. GABRIELLI (diretto da), *Trattato dei contratti*, Torino, 2010, 3; A. BENEDETTI, *I contratti della pubblica amministrazione tra specialità e diritto comune*, Torino, 1999, 74; A. CIANFLONE, *L'appalto di opere pubbliche,* Milano, 1982, 111; L. PERFETTI (a cura di), *Codice dei contratti pubblici*, 2017, 51.

[3] On this point, please refer to M. FERRANTE-C. GUCCIONE-A. SERAFINI, *I contratti pubblici*, in *Giorn. dir. amm*., 2021, 6, 753; S. VILLAMENA, *Codice dei contratti pubblici 2016. Nuovo lessico ambientale, clausole ecologiche, sostenibilità, economicità*, in *Riv. giur. edilizia*, 2017, 101 ss.

[4] M. CALARESU-F. PIGNATIELLO, *La nullità del provvedimento*, in M.A. SANDULLI (a cura di), *Principi e regole dell'azione amministrativa*, coordinato da F. APERIO BELLA, Milano, 2020, 521 ss. Sul principio di trasparenza, G. ARENA, *Trasparenza amministrativa*, in *Enc. giur.*, Roma, 1995, 102; S. FOA, *La nuova trasparenza*, in *Dir. amm.*, 2017, 65; A. POLICE, *La predeterminazione delle decisioni amministrative. Gradualità e trasparenza nell'esercizio del potere discrezionale*, Napoli, 1998, 256.

[5] However, there are also situations at this stage that require the assessment of the public interest and that may generate new determinations of the PA.

competent to resolve any disputes: for those relating to the phase prior to the signing of the contract, the administrative judge is competent, for those subsequent, the jurisdiction is attributed to the ordinary judge.

The normative placement of the procedure in public evidence can be found in art. 32 of the Code of Public Contracts (Legislative Decree no. 50/2016), which identifies, precisely, four moments: 1) the so-called resolution to contract; 2) the choice of the contractor, 3) the conclusion of the contract; 4) the approval of the contract.

The resolution to contract is the act with which the Public Prosecutor declares the purpose to be pursued and the way in which it is intended to be carried out.

This act constitutes the prerequisite of the future store, therefore, there is a relationship of instrumentality with the final measure.

In particular, the resolution to contract is the act with which the Public Prosecutor, expresses its willingness to conclude a contract, which contains the essential elements of the future contract, the procedure for selecting the contractor that the administration intends to adopt, as well as the criterion to be followed to select the best offer.

The resolution traditionally constitutes a purely internal act of the administration that has a programmatic nature and, therefore, cannot be directly challenged in court.

On the basis of the resolution to contract, the real act of the procedure with public evidence takes place, that is, that of the preparation and subsequent publication of the tender notice that contains the special regulations governing the single insolvency procedure and therefore constitutes the *lex specialis* of the procedure.

The second stage of the procedure with public evidence is that in which the public administration, through the completion of the tender, proceeds to the choice of the economic operator with whom to enter into the contract. The contracting authority, after verifying the award proposal in accordance with Article 33, paragraph 1, shall provide the award [6].

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[6] Cfr. N.A. TOSCANO, *Il provvedimento di aggiudicazione tra pubblicità e accesso agli atti*, in *Urb. e app*., 2021, 3, 293; F. CINTIOLI, *Per qualche gara in più. Il labirinto degli appalti pubblici e la ripresa economica*, Soveria Mannelli, 2019; A. MEALE (a cura di), *Manuale breve di diritto dei contratti pubblici*, Pisa, 2019; G.M. RACCA-S. PONZIO,

The award is, therefore, presented as an act of choice of the contractor by the proceeding Administration and is the last act of the procedure in public evidence, after which, in fact, the stipulation of the contract with the successful contractor is placed. The conclusion of the contract, without prejudice to the powers of self-protection of the Public Prosecutor, must take place within 60 days from when the final award became effective. However, the contract may not be concluded before 35 days after the last notification of the award decision has been sent. The execution of the contract may also be subject to approval by the competent authority; in this case, the contract shall be deemed to be conditional on the positive outcome of its possible approval and of the other controls provided for by the nature of the rules of the contracting authorities.

2. The call for tender and the invitation to participate in the tenders

The call for tenders and the invitation to participate in tenders are part of the preventive administrative acts, with which the administration regulates its activity in contractual matters.

With them, the activity of the administration is outsourced and brought to the attention of third parties; characteristics that differentiate the call for tenders and the invitation to all the acts put in place in the phase prior to the resolution to contract (for example, drafting of the project of the work, the draft contract and the specifications).

The notice and the invitation open the procedure aimed at choosing the subject with whom the administration intends to proceed with the stipulation of the contract. With them the administration initiates a contact with the audience of possible contractors, establishes the rules of the selection procedure in order to guarantee the equality of the competitors and the maximum effectiveness of the tender, and urges the interested parties to formulate their offers.

La scelta del contraente come funzione pubblica: i modelli organizzativi per l'aggregazione dei contratti pubblici, in *Dir. amm.*, 2019, 33 ss.; R. DE NICTOLIS, *I nuovi appalti pubblici. Appalti e concessioni dopo il d.lgs. 56/2016*, Bologna, 2017.

In more detail, the contract notice is the act with which a public tender begins and has the legal nature of a preparatory administrative measure.

It always constitutes a declaration of will and as such is part of the general administrative measures with prescriptive content.

As regards the addressees, the notice does not address subjects that can be determined a priori, but can only be identified *ex post*, during the execution of the act [7]. The regulatory paradigm of the call for tenders is Art. 71 of the new Code of Contracts.

Under that article, the procedures for selecting the contractor must be announced by means of a contract notice, except in cases where the contract is awarded by restricted procedure or competitive procedure with negotiation, in which case, in fact, a prior information notice is provided. The legislator provides that the contract notices must be drawn up by the contracting authorities in accordance with the notice – type adopted by the ANAC, obliging the administrations themselves to justify the cases in which they wanted to derogate from the specifications – type.

The creation of the unique models, valid throughout the national territory, has the aim of facilitating the activity of the contracting stations, making the pipelines homogeneous, simplifying the methods of participation [8] in tenders and ensuring correct competition between the participants.

The reading of the new public procurement code shows the intention of the legislator to proceed with a real restriction of the discretion of the Public Prosecutor's Office, which can only depart from the standard notices adopted by ANAC on a residual basis.

This *ratio* is also the basis of the regulatory provision found also and above all in art. 83, paragraph 8, according to which notices and letters of invitation may not contain any further requirements than those provided for by this code and other provisions of law in force, under penalty of their nullity.

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[7] The notices have no normative nature, since they lack the character of abstraction, not being aimed at the general and abstract discipline of an undetermined number of situations, and that of novelty, not having the capacity to innovate to the objective right. For further information, please refer to L. PERFETTI, *Codice dei contratti pubblici commentato*, Milano, 2017.

[8] F. CARDARELLI, *Requisiti di partecipazione*, in AA.VV., *Appalti, contratti, convenzioni, Enciclopedia degli enti locali,* Milano, 2008, 64.

The so-called invitation letter deserves attention, typical of the so-called restricted tender procedures (former private tender and tender contract). It is part of that sub-procedure in which competitors submit applications to participate, the administration chooses the subjects to be invited and sends the invitations to participate to the chosen ones.

It has a content of uncertain nature: an administrative measure and a negotiating act (which has a clear legal nature of an invitation to tender). In the latter case, the mechanism through which the prior choice of the administration is external is characterized, with respect to the call for tenders, by *intuitu personae*.

The letter of invitation shall be structurally and functionally similar to the call for tender. The latter, however, has its own autonomy, since it performs the function of providing legal knowledge of the possibility of competing for the award of a specific job; in other words, it must include all the useful elements, to any interested parties, to evaluate the opportunity to take part in the tender.

Unlike the notice, moreover, the invitation is addressed to specific subjects and, as a receptive act, does not produce any effect if it does not come to the attention of the recipients. The announcement, on the other hand, is known by all from the moment of publication [9].

3. The annexes to the notice

Also worthy of attention is the attachment to the notice, the so-called tender specification that is configured as one of the annexes of the notice and the first difference that stands out between the two documents, is that the specification [10] is not subject to the same formalities as the call for tenders, that is, the code does not provide for the publication of the speci-

[9] G.C. DE GIORGI, *Commento dell'art. 21 quater, legge n.241/1990*, in M.A SANDULLI (a cura di), *Codice dell'azione amministrativa*, Miano, 2011, 859, 875.

[10] The tender specifications are one of the annexes and in many respects, it is the most important, in addition to being a full-bodied document that sometimes exceeds 10 pages in which the type of procedure and other provisions that may vary from time to time are highlighted, depending on the type of contract and needs depending on the contractual object.

fication in the media indicated by art. 72 of the code; in addition to this formal detail, to view the specification you must connect to the website of the contracting entity indicated in the notice and download the copy; in some cases to obtain a copy of the specification you must send a request by email to the address of the contracting entity. The differences between the call for tenders and the related regulations can also be highlighted by their typical contents and by this comparison, it can be said that there is a hierarchy between the two documents. The specification, from a hierarchical point of view subordinate to the published notice, is a complex document because it describes the details of the tender that the competitor must comply with and recalls many rules of the code. The specifications indicate the rules regarding the methods of participation of competitors and the rules of compilation, but in particular, the contracting entity provides instructions on the documents that must be delivered together with the bid, terms and methods for the submission of the bid.

4. The legal nature of the call for tender

As regards the legal nature, the notice is the instrument by which the contracting authority makes known its intention to award a public contract and constitutes the *lex specialis* of the tender procedure [11], or the basic rule of the individual selection procedure of the contractor, by means of provisions of a binding nature, also for the same administration. The requirements contained in the call for tenders have a general binding nature, since they are subject not only to the participating companies and the tendering committee, but also to the administration which does not retain any margin of discretion in their concrete implementation nor can it disapply them, even if they are inappropriate or incongruously formulated, without prejudice to the possibility of proceeding with the self-

[11] P. PATRITO, *Il nuovo codice dei contratti pubblici e il primo decreto correttivo (in corso di approvazione): primi spunti di riflessione*, in *Resp. civ. e prev*., 2017, 1, 335; L. BERTONAZZI, *Bando di gara e procedura di scelta*, in R. VILLATA-M. BERTOLISSI-V. DOMENICHELLI-G. SALA (a cura di), *I contratti pubblici di lavori, servizi e forniture*, 2014, 664.

protection cancellation of the call for tenders. The binding nature of the call for tenders is confirmed by the same jurisprudence [12], according to which: "*During the tender procedures, the modification of the evaluation criteria of the tenders provided for by the call is prohibited, given that to consider that such power would mean disapplying the call for tenders in order to clauses to which the same administration has committed itself at the time it adopted the tender regulations and the contracting authority cannot, during clarifications, modify the provisions of the tender law, introducing binding provisions not inferred from the lex specialis*".

According to the jurisprudence, the clauses of the notice must be interpreted privileging not the meaning that can be given by a particularly wise entrepreneur, but the meaning that certain terms have in the language common to most of the subjects who operate in a certain sector and who are interested in contracting with an p.a., according to the principle of Article 1366 of the Italian Civil Code. The clauses contained within the call for tenders must be interpreted restrictively, in compliance with the principle of legal certainty and protection of custody, so that any exegesis not justified by an objective uncertainty of their meaning must be precluded. It follows that in the presence of unequivocal clauses of doubtful significance, the interpretation [13] that favors maximum participation must be preferred. In any case, a literal interpretation [14] should be preferred to protect the trust of the interested parties in good faith.

On the other hand, the case-law has stressed that the clauses placed under penalty of exclusion must be clear and precise and that in the event of interpretative uncertainty a less restrictive interpretation of the same must be favored, also in view of the wider participation, provided that the *par condicio* between competitors is not impaired.

However, there are no unambiguous arguments about the legal nature of the call for tenders and, therefore, it is possible to isolate two theories: one private – negotiating and the other public.

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[12] T.a.r. Lazio, Roma, sez., I-*quater*, 22.2.2018, n. 2058, Cons. Stato, sez., V, 17.5.2018, n. 2952.

[13] T.a.r. Campania, Napoli, sez., V, 6.4.2022, n. 2355 which claims that the interpretation of the call for tenders is subject to the same rules dictated by art. 1362 of the Italian Civil Code for contracts.

[14] Cfr., Cons. Stato., sez. III, 8.6.2021, n. 5203; sez. VI, 23.6.2021, n. 4817.

In the context of private – negotiating theses, a first orientation considers the call for tenders similar to the invitation to tender, that is, as an invitation to interested parties to submit a bid, with an indication of all those elements of the contract that the administration has not indicated. So it is the p.a. that accepting the proposal of the counterparty reaches the conclusion of the contract.

Always orbiting in private theses, the call for tenders could be considered as an offer to the public pursuant to art. 1336 of the Italian Civil Code, that is to say as a contract proposal addressed to a generality of recipients, so that the private offer is a mixed negotiating declaration, consisting in the acceptance of the object of the service indicated in the call for tenders and in the formulation of a price proposal.

On the other hand, it cannot be considered a proposal, understood as a pre-negotiating act typical of the contract formation phase; this is because it tends to provoke offers, that is, proposals, by subjects who intend to become contracting parties to the administration.

In addition, the contract notice deviates from the contractual proposal in that the latter contains all the elements of the contract to which it is directed, while the contract notice does not have the determination of the price, which is defined only after the choice of the offer. Neither is the notice revocable *ad nutum*, since the revocation is subject to the usual limits of the exercise of the power of self-protection by the public administration; unlike the contractual proposal that can be revoked until the acceptance comes to the knowledge of the proposer. For public theories, on the other hand, there are two contrasting orientations: one considers the call for tenders as a regulatory act and, therefore, as a *lex specialis* of the tender; the other, on the other hand, recognizes the call for tenders as a general administrative act.

The latter approach is prevalent and proceeds from the assumption that the call for tenders cannot be considered a regulatory act, as it lacks the requirements that characterize this act, namely generality, innovation and abstraction.

As they are not regulatory in nature, notices of invitation to tender also differ from regulations.

The consequence of this is that it is not permissible for the court, let alone the administration, to disapply the provisions of a contract notice if they are contrary to law or regulation.

This is because disapplication, within the general jurisdiction of legitimacy, is possible only with regard to regulatory acts, or because the public administration cannot fail to apply an authoritative administrative act, unless it cancels it, exercising a discretionary power in the existence of the legal conditions, and until it is annulled by the administrative judge.

According to the consolidated orientation of the case law, the rules contained in the call for tenders strictly bind the work of the relevant administration, which is obliged to apply them without any margin of discretion to preserve the principles of entrustment and equal treatment between competitors that would be prejudiced if it were allowed to modify the rules (or even disapply them) according to the various conditions of the participants [15]. The rules set out in the call for tenders must be applied by the administration, even if they are illegitimate or have become non-compliant with *jus superveniens*.

In particular, the reference made by the call to a certain rule, as a rule for the future action of the administration, is material and not dynamic. The rule, adopted by the contracting authority as a rule of the tendering procedure, becomes indifferent to the changes that subsequently occurred at the regulatory level, even if they have retroactive effect, that is, from the moment of the issuance of the act that gave application to it. In this case, as in general in any case of unlawful notice or invitation, it will be up to the administration to provide for the cancellation of the tender and, if anything, the consequent renewal; and it is clear that the public interest in the cancellation will be more or less relevant depending on the initial or advanced state of the procedure and the need to consider the possible entrustment of third parties. In any case, the nature of the general act of the notice entails some exceptions, with respect to the ordinary rules of the administrative procedure and the right of access to administrative documents established by Law no. 241 of 7.8.1990. In particular, the motivation [16] is not required (Article 3, paragraph 2); the term and the au-

[15] Cons. Stato, sez. III, 7.10.2021, n. 4295.

[16] According to the Reg. Adm. Court Lazio, Rome, Sec. II, 21.11.2017, n. 11517 "The call for tenders does not require a deadly motivation. In particular, the notice of invitation to tender, as a general act, does not give rise to an unfair statement of reasons. The justifying reasons, therefore, can well be deduced from the complex administrative and technical framework on which the decisions are based (tender specifications, specifications, supply conditions, nature of the services, determines the call for tenders, etc.)".

thority to which it is possible to resort must not be indicated (Article 3, paragraph 4); the provisions, regarding participation in the administrative procedure, contained in Chapter III of Law no. 241 of 7.8.1990 (Article 13, paragraph 1, of the same) do not apply; access to the preparatory acts during its training is not allowed (Article 24, paragraph 6).

5. Contents of the call for tender

With regard to the content of the contract notice, the Article 71 legislator has established that it must contain the information referred to in Annex XIV, Part I, letter C, and also the minimum environmental criteria referred to in Article 34 or the name, identification number, where applicable, the address including the NUTS code [17], the telephone, fax, e-mail and Internet address of the contracting authority and, if different, the service to which to contact for additional information, the e-mail or Internet address to which the contract documents will be available for free, unlimited and direct access.

The contract notice must also contain the type of contracting authority and the main activity carried out.

Where applicable, an indication that the contracting authority is a central purchasing body or that any other form of joint procurement is involved and the CPV Codes [18].

Where the contract is divided into lots, this information shall be provided for each lot. The contract notice [19] must also contain the conditions

[17] The nomenclature of territorial units for statistics, known as nuts (French: Nomenclature des unités territoriales statistiques), identifies the breakdown of the territory of the European Union for statistical purposes. It was devised by Eurostat in 1988 with the local administrative unit as the basic reference. Since then, it has been the main rule for the territorial redistribution of the EU Structural Funds, providing a single geographical distribution scheme, irrespective of the administrative size of the state bodies and based on the size of the population residing in each area.

[18] The CPV is a single classification system for public contracts aimed at unifying the references used by the contracting authorities and entities for the description of the subject of the contracts.

[19] The notice of invitation to tender to produce its effects must be published in the official gazettes (Article 72 of the Code). Mistakes cannot be ruled out in the publication of

for participation, a list and a brief description of the criteria relating to the personal situation of economic operators which may lead to their exclusion and the selection criteria, as well as the information required (self-certifications, documentation). It is clear that the contract notice must also describe in detail the contract with an indication of the delivery or delivery times of goods, works or services and, as far as possible, the duration of the contract. It must also indicate the type of award procedure; where appropriate, the reasons for the use of the accelerated procedure (in the case of open and restricted procedures and competitive negotiated procedures) and the related criteria for awarding the tender (s). Finally, it must contain an indication of the time limit for receipt of tenders (open procedures) or requests to participate and, finally, the address to which tenders or requests to participate are sent.

Among the requirements of the tender notice, the behavioral duties established by the so-called "Integrity Pact" are also found, consisting of an agreement between the participants and the administration with which they establish, in addition to the provisions contained in the notice, some rules aimed at ensuring the proper conduct of the tender, in particular fair competition and equal opportunities of access to all participants in tenders in the tender phase.

The lack of the declaration of acceptance of the integrity pact or the non-production of the same duly signed by the competitor can be considered regularizable through the preliminary assistance procedure referred

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the contract notice and in these cases a correction must be made. If the published text of the contract notice indicates elements other than the specification and no correction has been made, disputes between the contracting entity and the competitor cannot be excluded on the ground that, the effect of publication in the official journal is to make the notice prevail over the specification, in accordance with the general principle that publication is made in good faith and in the public interest, therefore, the constraint arises as soon as it is made public. In fact, the specification is one of the annexes of the notice and the first difference that stands out between the two documents, is that the specification is not subject to the same formalities of the tender notice, that is, the code does not provide for the publication of the specification in the media indicated by art. 72 of the code; in addition to this formal detail, to view the specification you must connect to the website of the contracting entity indicated in the tender notice and download the copy; in some cases to obtain a copy of the specification you must send a request by email to the address of the contracting entity. The differences between the call for tenders and the related regulations can also be highlighted by their typical contents and by this comparison, it can be said that there is a hierarchy between the two documents.

to in art. 83, paragraph 9, of Legislative Decree 50/2016, with the application of the pecuniary sanction established by the tender notice.

According to the case-law, the sanction clauses imposed on the competitor who has behaved incorrectly during the tender are legitimate.

Their legitimacy is based, as well as on the private autonomy of the administration, on the conformity of the rules contained in them with the principles of the legal system, such as good faith and fairness in negotiations.

As they are prepared unilaterally by the administration, the Integrity Pacts are entrusted to general conditions of contract, so they must be approved in writing. The discipline is affected by the privatistic effects referred to in art. 1341, paragraph 2, of the Italian Civil Code which prescribes the obligation of written approval of the unfair clauses, with the consequence that in the absence of the private party's acceptance, the criminal clauses contained therein are ineffective even if recalled by the notice. With regard to the competence in the adoption of standard notices, there is a change with respect to the previous regulations (contained in Legislative Decree no. 163/2006). In fact, before the reform intervened with the current Legislative Decree no. 50/2016, the tender models were prepared by the Contracting Authority and then approved by the AVCP. On the other hand, in the new Code, the standard notices are "prepared" by the Authority "in order to facilitate the activity of the contracting authorities".

The legislator has granted a margin of discretion [20] to the administrations, also allowing exceptions to the standard call, provided that they are expressly motivated in the decision to contract [21].

For the rest, the discipline of the procedures is characterized by a high degree of formalism in order to make its development transparent and to place the competitors on the same participatory level, so as to require everyone to be equally committed to diligence, attention and respect for the clauses of the notices and specifications. With this in mind, the new

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[20] L. PERFETTI, *Discrezionalità amministrativa, clausole generali e ordine giuridico della società*, in *Dir. amm.*, 2013, 3, 30.

[21] Ultimately, in addition to a necessary content specified by the legislator and ANAC, the call for tenders may contain any content at the discretion of the individual contracting authority, which may deviate from the provision of standard calls with adequate justification.

Code has increased ANAC's supervisory powers [22] and provided for a computerization process aimed at achieving high *standard* of transparency. The aforementioned Authority, through guidelines, standard tenders, standard specifications, standard contracts and other flexible regulatory instruments, however named, guarantees the promotion of efficiency, the quality of the activity of the contracting stations, to which it also provides support by facilitating the exchange of information and the homogeneity of administrative procedures and promotes the development of best practices (Article 213 of the Code).

6. Derogations to the procedures for selecting the contractor issued with a call for tenders

Article 70. Legislative Decree no. 50/2016 (pursuant to ex art. 63, Legislative Decree 163/2006) [23], entitled "Pre-information Notice" is presented as a direct implementation of Article 48 of Directive 2014/14/EU.

The aforementioned provision replaces the previous art. 63 of Legislative Decree no. 163/2006. In the previous legislation, the prior information notice was not used to call for a contractor selection procedure, i.e. as an alternative method of calling for competition. Indeed, the purpose of the pre-information was to enable the individual administrations to exercise the right to reduce the time limit for receipt of tenders if they had then proceeded to call for an open or restricted procedure for selecting the contractor by means of a call for tenders. The notice, therefore, unlike the new legislation, had to be followed by a contract notice indicating the date or dates of publication of the prior information notice in

[22] M. CORRADINO-G.F. LICATA, *Autorità nazionale anticorruzione*, in M.A. SANDULLI-R. DE NICTOLIS (diretto da), *Trattato sui contratti pubblici*, vol. I, Milano, 2019, 415; A. NARDONE, *I poteri di vigilanza, controllo e regolazione dell'A.N.A.C.: natura giuridica e strumenti di tutela*, in *Foro amm*., 2019, 1131 ss.; E. FREDIANI, *Vigilanza collaborativa e supporto in itinere alle stazioni appaltanti. La funzione "pedagogica" dell'A.N.A.C*., in *Dir. proc. amm*., 2018, 151 ss.; L. TORCHIA, *Il nuovo codice dei contratti pubblici: regole, procedimento, processo*, in *Giorn. dir. amm*., 2016, 605.

[23] F. CATALDO, *Sub art. 63*, in R. GAROFOLI-G. FERRARI, *Codice degli appalti pubblici annotato con dottrina, giurisprudenza e formule*, Milano-Molfetta, 2013, 928.

the Official Journal of the European Communities. The notice in question had a merely preventive informative purpose, in fact, it did not produce any legal effect in the event that it had not been followed by the execution acts (invitation letter and tender notice), given that the administration, despite the intention expressed with the aforementioned communication, was free not to follow up the tender, or to call a partially different tender, so that the notice was configured as a neutral act, unlikely to harm subjective positions and in any case unsuitable to determine a direct, immediate and current damage.

Ultimately, although configured by the standard as preliminary to the performance of the negotiation activity of the administration in the cases referred to in art. 63, paragraph 1, letters a) and b), the obligation to provide prior information was essentially unrelated to the tender procedures implemented by the contracting authorities during the year, since they could not, in any case, announce one or more tenders and, at the limit, none of the tenders in relation to which the related prior information had been carried out.

In the current Code, the advantage of using the prior information notice, instead of the call for competition, is that of inviting economic operators to submit a tender without further publication of a call for competition. In the event of a call for competition by means of a notice, the contracting authorities shall simultaneously invite, in writing, as a rule by means of electronic procedures, economic operators who have already expressed interest, to confirm interest again.

It shall enable the contracting authority to make known the essential characteristics of the works, service and supply contracts which it intends to carry out for the following year. In particular[24], the aforementioned regulatory provision allows the economic operators concerned to assess the possibility of taking part in the public procedures that will be launched in the territory of the Union. This is a generalized duty of pre-information, as the legislator has not provided for minimum requirements or specific characteristics but is provided for each type of contract that the client will enter into.

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[24] The notice is published by the contracting authority on its customer profile. For contracts with an amount equal to or greater than the threshold referred to in Article 35, the notice of shall be published by the Publications Office of the European Union or by the contracting authority on its client profile.