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Local public procurement regulations: The case of Italy

Francesco Decarolis [a], Cristina Giorgiantonio [b,*]

[a] Boston University, United States
[b] Bank of Italy, Structural Economic Analysis Department, Italy

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ABSTRACT

Regional and local authorities award 54% of the public works contracts submitted to the Authority for the Supervision of Public Contracts. This paper analyses the regulations adopted in the period 2000–2010 in all Italian regions and a sample of provinces and municipalities and shows how highly pervasive they are. In some cases they had positive effects that served the specific needs of the territory; in others, an anti-competitive orientation prevailed, with extra costs for the contracting authorities and less efficient allocation of resources. The paper's policy recommendations include: (*i*) greater coordination of reforms between the central and the local levels; (*ii*) an enhanced role for the sector authorities; (*iii*) improvements in national regulations so that the regional and local authorities have less of an interest in modifying them; (*iv*) greater transparency and better information quality.

1. Introduction

Local governments often play a crucial role in providing services to their citizens. Although some of these services are sometimes directly provided by the local governments using their own employees, it is common for local governments to contract with private firms for their provision. This implies that despite a country might have a national public procurement regulation, a relevant share of public procurement might take place under the specific rules set by local governments. Although in depth studies of local public procurement regulations are missing, it is evident that the presence of local regulations creates a trade-off. On the one hand the local regulation could serve to address the specific needs of the territory, but on the other hand it could be used to foreclose the market to non-local firms.

In settings similar to the Italian one, where 54% of all contracts for public works are awarded by local governments (Regions, Counties and Municipalities), the paramount importance of this question is evident. Moreover, as shown by the studies of Marion (2007, 2009) on the California bidding preference system, the presence of a local public procurement regulation that differs from the national one can be particularly useful to empirically evaluate how different procurement regulations affect the cost and efficiency of the public procurement process. The reason for this is the stability of the national regulations together with the difficulty to compare cross-country regulations. The combined effects of these features make the empirical evaluation of procurement systems particularly hard. However, in this paper we show how a careful look at local regulations can reveal a broad spectrum of interesting rule changes, leading to a clear empirical identification of their effects.

In this paper, we look at the Italian public procurement sector as an almost ideal case study to analyze the effects of a decentralized procurement system on procurement cost and firms competition. Indeed, the Italian system to is characterized by hyper-regulation at the regional and sometimes also at the municipal level, which makes legal compliance particularly burdensome for both entrepreneurs and contracting authorities. This occurs despite the fact that the Public Procurement Code (Legislative Decree No. 163 of 12 April 2006) expressly prohibits any local regulation that differs from the provisions of the Public Procurement Code, among other things, on the qualification and selection of private contractors, award procedures and criteria, design and safety plans. We will present both a legal and an economic analysis of the impact of local regulation along some of these dimensions affected by local rules. We will also present an empirical analysis more narrowly focused on reforms of the awarding mechanism and bid qualification requirements.

More specifically, the paper is divided as follows: the second section describes the national regulations on public procurement, the limits set by the Constitution for Regions and Local Authorities

* Corresponding author.
E-mail address: cristina.giorgiantonio@bancaditalia.it (C. Giorgiantonio).

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and the regulatory constraints arising from European law; the third section analyses the regulations adopted in the period 2000–2010 by all Italian Regions and a sample of Provinces and Municipalities (selected according to population and economic value criteria); based on the findings of the economic theory of auctions, the fourth section provides some evaluations of local regulations described in the previous section; the fifth section provides an empirical analysis aimed at quantifying the effects produced by the different local regulations; the sixth section concentrates on the critical aspects in the regulation of public works in Italy, providing a close examination of possible corrective measures. The seventh section concludes.

2. Public work contracts: the division of competences and national regulation

The Italian regulation governing the award of public works has undergone a number of reforms over the last fifteen years (Decarolis et al., 2010), in response among other things to EU law, aimed at improving the "design" of award procedures and enforcing the principles of publicity, transparency and equal treatment.[1] Alongside the development of national legislation, there has been a proliferation of regulatory initiatives at the local level (Regions, Provinces and Municipalities). This has led to a significant instability of the regulatory framework, leading to uncertainty for public and private operators in the sector. In what follows, on the one hand, we describe the division of competences between the State, Regions and Local Authorities provided in the Constitution and the limits arising from European law; on the other hand, we provides a brief discussion of the national regulation for the awarding of public works.

2.1. The division of competences: the principles laid down by the Constitutional Court

The Italian Constitution is "ambiguous" about the subject "public works" or "public contracts", which is not enumerated in the Constitution: this makes unclear whether legislative powers on such subject belong to the State or to the Regions.

However, Article 4.3 of the Public Procurement Code (henceforth the "PPC") expressly prohibits local legislation, among other things, of the qualification and selection of private contractors, award procedures and criteria, design and safety plans. On several occasions the Constitutional Court has intervened to affirm the legitimacy of the provisions of Article 4 of the PPC, rejecting the appeals of many Regions alleging infringement of the division of competences under Article 117 of the Constitution, and linking the principles of publicity, transparency and equal treatment to the protection of competition, attributed to the exclusive legislative powers of the State pursuant to Article 117(2)(e) of the Constitution.

Again with reference to the powers of the Special Statute Regions and the Autonomous Provinces of Trento and Bolzano[2] (despite having said that this kind of specific assignment must be applied if the special statute confers primary legislative powers in the field of public works to these Authorities[3]), the Constitutional Court has made it clear that in the exercise of their primary legislative powers, these Authorities must comply with the provisions contained in the PPC, which – to the extent that they are related to Article 117(2)(e) of the Constitution, and to the protection of competition – must be ascribed to the area of the fundamental rules of economic and social reform, and the rules by which the State has given effect to international obligations arising from participation in the European Union, which also limit the primary legislative powers of Special Statute Regions.[4]

As regards the powers of Provincial and Municipal Authorities, pursuant to Article 117(6) of the Constitution, these Institutions only have regulatory powers (not legislative) as to the organization and implementation of the functions attributed to them (they can only enact administrative resolutions): powers which, therefore, can never be exercised in conflict with national or regional laws.

2.2. Legislation at national level

Currently, the national legislation relating to procedures for the awarding of public works contracts is mainly contained in Legislative Decree No. 163 of 12 April 2006, which entered into force on 1 July 2006) and Presidential Decree No. 207 of 5 October 2010, which includes the regulation for the implementation and execution of the PPC, which entered into force, subject to certain conditions, on 9 June 2011). In what follows we provide a brief discussion of the legislation at national level, surveyed between 2000 and 2010, the time period to which the dataset analyzed in this paper refers, however reporting subsequent changes. In particular, we will focus on the following aspects: (*i*) award procedures and criteria and the assessment of so-called abnormal tenders or abnormally low offers; (*ii*) qualification requirements for companies; (*iii*) guarantees; and (*iv*) measures to combat the phenomena of corruption and organized crime.

(*i*) *Award procedures and criteria.* Open procedures and restricted procedures are "ordinary" procedures for the assignment of procurement contracts (in particular for contracts above the EU threshold). Both are marked by little discretionary power for general government entities in the choice of contractors and presume that the entity itself is capable of defining, accurately and from the outset, the subject of the contract and the relevant technical specifications, so that bidders may immediately submit definite, non-renegotiable offers (at least as far as the essential aspects of the contract are concerned). In the open procedure the entity publishes a call for tender containing, among other things, an accurate description of the subject of the contract. The call for tender precedes the presentation of the offers by all interested parties, whose fulfilment of the requisites is verified when the bids are assessed. The restricted procedure and the "simplified restricted procedure" applying to works worth less than €1.5 million[5] provide for an initial prequalification phase to ascertain requisites and identify the enterprises to invite on the basis of predetermined objectives and non-discriminatory criteria and a subsequent phase, where the

[1] There are now three different systems for selecting contractors: (*i*) for "strategic infrastructures", aimed at giving high priority to these projects; (*ii*) as introduced by Law 2009/2 of 28 January 2009, for projects falling within the National Strategic Framework; (*iii*) the "ordinary" system, governed by Legislative Decree No. 163 of 12 April 2006, known as the Public Procurement Code (PPC), for all other types of project. In this paper we analyze the "ordinary" system, which applies to most projects.

[2] In Italy Special Statute Regions (Valle d'Aosta, Friuli Venezia Giulia, Sicily and Sardinia) and the Autonomous Provinces of Trento and Bolzano benefit from special forms and conditions of autonomy, greater than those of Ordinary Statute Regions (Di Vita, 2012).

[3] According to Article 10 of Constitutional Law No. 3 of 18 October 2001, while respecting the Constitution, the principles of the legal order of the Republic and international obligations (including those arising from European law), given that in Title V of Part II of the Constitution there is no reference to "public works". See, in particular, the sentence of 12 February 2010, No. 45 (Bin, 2010).

[4] See, in particular, the sentence of 10 June 2011, No. 184 (Decarolis & Giorgiantonio, 2012).

[5] This threshold, originally €750,000, was raised to €1 million by Legislative Decree No. 152 of 17 October 2008 (known as the Third Corrective Decree of the Public Procurement Code) and entered into force on 17 October 2008. The threshold was then raised to €1.5 million under Decree Law No. 70 of 13 May 2011 (known as the Development Decree) and became effective on 14 May 2011, converted into Law No. 106 of 12 July 2011.