



## Verein Archimedes

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# Herausforderungen grenzüberschreitender Infrastrukturprojekte, dargestellt am Brenner Basistunnel

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*Besonderheiten des italienischen Vergaberechts in Verbindung mit  
dem Zustandekommen von Verträgen nach österreichischem Recht*

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# Presentation outline

1. Current situation
2. Overview of Italian Public Procurement Legislation
  - a) Applicable legislation
  - b) Authority for the Supervision of Public Contracts for works, services and supplies (Autorità per la vigilanza sui Contratti pubblici di lavori, servizi e forniture)
  - c) Review procedures concerning the award of public contracts
3. Open Issues

## DISCLAIMER

**It is a complex matter! This presentation is not intended to provide guidance on how Italian Public Procurement Legislation should or should not be applied, and how conflicts with applicable Austrian Law should be solved. It is not a substitute for due consideration of the legislation and appropriate legal advice!**



**Treaty between Austria and Italy for the  
construction of the BBT**

# Current situation

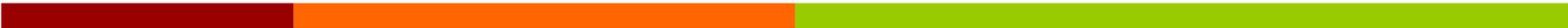
- April 30, 2004: Agreement between Austria and Italy for the construction of the the Brenner Base Tunnel (**BBT**)
- December 16, 2004: establishment of **BBT SE**, a European public limited company for the construction of the railway tunnel between Austria and Italy
- SE stands for Societas Europaea: transnational type of company provided for by European law
- BBT SE is 100% publicly owned: 50% Italian shareholders (41,885% RFI; 3,065% Bozen Province; 3,065% Trento Province; 1,985% Verona Province) and 50% Austrian shareholders (25% al Land Tirol; 12,5% Österreichische Bundesbahnen; 12,5% State of Austria)
- BBT SE is the contracting entity with respect to works and professional services necessary for the planning and building of the BBT

# Phase III

- Treaty between Austria and Italy for the construction of the BBT does not indicate the applicable legislation for award of contracts and for works performance
- Agreed solution:
- Procurement procedures subject to the legislation of the State where BBT SE has its legal seat
  - Phase II (project phase, from April 1, 2003 until April 18, 2011): BBT SE's legal seat in Innsbruck, Austria
  - Phase III (construction phase, from April 18, 2011): BBT SE's legal seat in Bolzano, Italy (July 1, 2011: main headquarters of BBT SE moved to Bolzano)
- Construction contracts subject to the legislation of the State where works have to be performed

# Applicable Law for Phase III

- Legislation applicable for construction works to be performed in Austria during Phase III:
  - award of contracts subject to Italian public procurement legislation
  - works performance subject to Austrian legislation



# **Overview of Italian Public Procurement Legislation**

# EU Procurement Directives

- Directive 2004/18/EC, on public procurement for works, supplies and services
- Directive 2004/17/EC, on procurement by entities operating in the water, energy, transport and postal services sectors (“special sectors”)
- Both EU procurement directives replaced with effect from 18 April 2016 by:
  - Directive 2014/24/EU, repealing Directive 2004/18/EC
  - Directive 2014/25/EU, repealing Directive 2004/17/EC

**Warning: European and Member states’ legislative framework will be modified in short**

# Italian Procurement Legislation

- Legislative decree n. 163 of 2006: Code of public contracts regarding works, supplies and services (**CPC**)
  - Part III (artt. 206 ss.): legislation concerning special sectors
- Presidential decree n. 207 of 2010: Regulation implementing the CPC (**Regulation**)
  - Part. IV (art. 339 ss.) : legislation concerning special sectors
- Case law
- Opinions rendered by the Authority for the Supervision of Public Contracts for works, services and supplies

# Suitability requirements

- The CPC sets forth requirements on the economic and financial suitability and on technical and professional knowledge or abilities of economic operators tendering for contracts
- The extreme detailed Italian discipline on suitability requirements (including personal situation, economic and financial standing and technical and professional ability) often leads to interpretative issues which courts try to settle through the application of principles such as favor participationis, equality of treatment and non-discrimination, in order to allow for the widest possible participation
- The Italian CPC (Art. 38) provides for the exclusion of participants who are substantially and mutually linked only insofar as it is proved that the relevant offers of the linked participants come from the same decisional structure. This is the case of firms using the same venues, having the same telephone number, whose chief executives are relatives.

# How possible conflicts have been solved

## Language

- Tender documents are to be drawn up in a bilingual fashion (Italian and German)
- For award of construction contracts, Italian language prevails
- After execution of contracts for works to be performed in Austria, German language will prevail

# Work suppliers' suitability requirements

- For public works whose value is no less than € 150.000,00, the tenderers' qualification requirements must be certified by private companies called SOA (Società organismo di attestazione), which are authorized and supervised by the Authority for the Supervision of Public Contracts
- The aim of this system is to limit participation only to firms that are potentially capable of efficiently executing the awarded contract. Each qualification lasts for 5 years, is renewable, and certifies the size of the contracts and the categories of works that a firm is qualified to perform
- Directive 2004/17/EC: mutual recognition concerning administrative, technical or financial conditions, and certificates, tests and evidence
- BBT SE recognizes equivalent certificates from bodies established in other Member States

# Constituent elements of the offer

- CPC: tenderers are to explain the constituent elements of the offer only in case of abnormally low tenders
  - In such a case, the contracting authority shall verify their constituent elements by consulting the tenderer, taking account of the evidence supplied
  - Tenders are rejected where: (i) the evidence supplied does not satisfactorily account for the low level of price or costs proposed, (ii) the tender does not comply with legislation in the field of social and labour law
- For construction works in Austria, compliance with Austrian social and employment law is necessary
- BBT SE: tenderers are requested to indicate the constituent elements of the tender with respect to the price offered and to compliance with Austrian social and employment legislation



**Authority for the Supervision of Public Contracts for  
works, services and supplies**

**Autorità per la vigilanza sui Contratti pubblici di lavori,  
servizi e forniture**

# Authority for the Supervision of Public Contracts

- The Authority for the Supervision of Public Contracts (**Authority**) has been established by law n. 109/1994 with the aim of supervising public contracts in order to grant compliance with applicable legislation
- The Board of the Authority is composed by 7 members appointed by the Presidents of the two Chambers of the Italian Parliament. The President of the Authority is elected by the members themselves. Decisions are taken by the majority
- The Authority has many competences: supervision on the procurement market, sanctioning functions, auxiliary reporting functions to the Parliament and the Government, interpretation of the CPC
- The Authority may solve disputes arising during the contractor selection phase, on demand of each or both the parties, by means of an opinion containing a resolution proposal. This opinion is not binding for the parties

# "Pre-litigation" dispute resolution regulation (March 2014)

- The "pre-litigation" procedure is an out-of-court dispute resolution tool that enables economic operators and contracting authorities to submit, individually or even jointly, an application to the Authority concerning disputes arising from public tender procedures covered by CCP
- The Authority provides a quasi-adversarial procedure, which is concluded with the issue of a formal opinion by the Authority. While formally not binding, the opinion wields considerable persuasive force, as it is usually spontaneously followed by contracting authorities and administrative courts
- Judicial proceedings and "pre-litigation" procedure can co-exist until a first instance judicial ruling is published, thus allowing private parties facing mandatory deadlines to initiate precautionary judicial proceedings while "pre-litigation" is pending

# pre-litigation procedure as an alternative to judicial review

- The "pre-litigation" can be activated either during the tender procedure or after the final award and - in the case of a joint application - also in relation to issues concerning public procurement contract performance
- "Pre-litigation" does not involve administrative costs, and the AVCP opinion is issued within 90 days from the date of the application
- The pre-litigation procedure before AVCP may therefore be a viable alternative to judicial review in cases where the matter is not of such value or importance to justify judicial proceedings. But It may also be used to effectively support judicial initiatives with an extremely influential opinion



## **Review procedures concerning the award of public contracts in Italy**

# Award of the contract

- On conclusion of the award procedure, the contract is awarded to the “best” tenderer
- The contracting authority is automatically to inform all competitors admitted to the procedure, within five days, of the final award of the contract (art. 79.5, CPC)
- The contract award decision and the statement of the reasons for it must be appended to the communication (art. 79.5bis, CPC)
- Competitors are to be allowed immediate access to the documentation relating to the tendering procedure, by consulting it and taking copies, within 10 days of the dispatch of the communication of the result of the tender (art. 79.5quater, CPC)

# Review of contract award decisions

- Italian law implemented the EU rules on the standstill period (Directive 2007/66/EC on review procedures concerning the award of public contracts)
- The contract may not be concluded before a period of at least 35 calendar days from the date on which the contract award decision is sent to the tenderers and candidates concerned (art. 11.10 CPC)
- Review procedures:
  - review by the contracting authority (administrative procedure)
  - Judicial review

# Review by the contracting authority

- The tenderer wishing to challenge the exclusion from the procurement procedure or the award of the tender to another tenderer, shall notify the contracting authority of the alleged infringement and of his intention to seek review
- The contracting authority shall make its decisions regarding the reasons given by the applicant within 15 days of receipt of the notice of appeal, stating whether or not to intervene in self-defense
- The lack of communication is tantamount to denial of self-defense.
- The notice of appeal does not suspend the further course of the tender process or the time limit for the conclusion of the contract, nor the time-limit for judicial review

# Judicial review

- ➔ Before the implementation of EU Directive No. 2007/66, the competence over public contracts litigation was divided between the administrative court, as for the disputes concerning the awarding procedure, and the ordinary courts (Tribunals, Courts of Appeals, Supreme Court), as for disputes regarding the contract performance which starts after the contract stipulation. After the implementation of EU Directive No. 2007/66, the administrative courts can declare the award void and the contract ineffective, whereas the ordinary courts maintain the competence over the disputes raising during the performance phase
- ➔ Judicial review can be requested to the competent Regional Administrative Court (TAR) within 30 days from receipt of the final award notice. TAR Trentino Alto Adige – Bolzano competent for judicial review concerning BBT

# Judicial review

- Interim relief may be granted provided that the claimant: (i) proves that it might suffer an irrecoverable loss, and (ii) shows a strong prima facie case
- The administrative courts (Tribunali Amministrativi Regionali and Consiglio di Stato) shall grant the renewal of the illegal awarding phases and the following new award, whenever it is possible
- After the contract subscription, the administrative court can declare its ineffectiveness (artt.121-122, CPC, implementing Art. 2d of Directive 89/665/EEC, as amended by Directive 2007/66/EC)

# Judicial review

- Alternative penalties may be imposed for the cases in which the principle of ineffectiveness is deemed to be inappropriate (art. 123 CPC, implementing Art. 2d of Directive 89/665/EEC, as amended by Directive 2007/66/EC)
- Imposition of fines on the contracting authority ranging from 0.5% to 5% of the total value of the award price, to be included in the State's budget
- Shortening of the duration of the contract, ranging from 10% to a maximum of 50% of the remaining duration of the contract

# Award of damages

- Whenever the declaration of ineffectiveness is not possible, the judge will rule for compensation of damages
- The quantification of damages for illegal awarding of a public contract amounts in any case to the expenses sustained in preparing and submitting the tender and, only if the excluded tenderer is able to prove that he would have been the awarding firm, also to the profit that the economic operator would have gained by performing the contract. Damages may also refer to the loss of qualitative selection requirements that the economic operator would have achieved with the contract performance



## Potential issues

# Contract performance

- The Italian CPC regulates the public contract performance phase as well
- The more detailed rules concern the execution of works contract (art. 130 et seq. CPC): contracting authorities have the power of supervision of works which entails the power of issuing orders on the performance of works

# Subcontracting

- The CPC provides a restricted and regulated use of subcontractors. Construction works can be subcontracted in accordance with the terms and conditions of the bidding documents and for a percentage not higher than 30% (art. 118 CPC)
- Subcontracting has to be authorized by the contracting authority and entails the disclosure of the subcontractors at the tender submission (art. 118 CPC)
- A list of conditions for subcontracting sets out detailed requirements and obligations on the contractor and the subcontractor(s)

# Works variation

- Variation during works performance are allowed only under the conditions listed by the CPC and are subject to the supervision of the contracting authority (art. 132 CPC)
- ECJ qualifies any amendments of the public procurement term and conditions during its performance as a new award in breach of EU rules on public contracts. In Italy any extension of a public contract, if not provided for in the contract documents and conditions, is forbidden as it would account for a new direct award without any prior publication of the contract notice

# Potential issues

- Once the contract has been executed, the contractual rights and obligations of the parties shall be interpreted, construed and enforced in accordance with the Laws of Austria
- Which provisions of Italian CPC regarding the works execution phase are to be included in the contract? Are Italian legislative provisions compatible with Austrian mandatory law? Are provisions of Italian CPC included in the contract to be interpreted in accordance with the Laws of Italy?



**Thank you for your attention!**

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