ITALY

Trends and Developments

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DWF is a global legal business headquartered in Manchester (England) with 31 offices across the world. In Italy, DWF provides full-service assistance to its international clients, having 15 partners and more than 80 attorneys. The labour and employment department, led by Giorgio Manca together with Andrea Morone, has ten attorneys.

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Outsourcing in Italy: The Use of Procurement Contracts

In Italy, procurement contracts represent the main means by which companies outsource activities not strictly within their core business.

Through procurement contracts, one party (the contractor), through the organisation of the necessary means and with management of the activity at its own risk, undertakes the performance of a work or service activity for monetary consideration, provided in favour of another party (the principal).

In Italy, contracting law (strictly as it pertains to aspects of labour law) is characterised by a strong bias towards the protection of workers who are employed by the contractor for the performance of work or services.

The main objective of contracting law is to avert the risk of procurement contracts representing a mere screen behind which, in reality, labour is simply provided by the contractor to the principal. Such activity is prohibited in Italy, except in cases where it is carried out by agencies accredited by the Italian Ministry of Labour and Social Policies and specially authorised for that purpose.

To this end, legislation identifies a number of requirements, upon the fulfilment of which the contract can be considered “genuine” for all intents and purposes. These requirements can be summarised as follows:

- the presence of a real organisation of means by the contractor for the performance of the work or service (which, in relation to the need for the work or service identified in the contract may also result from the exercise of organisational and managerial power over the workers named in the contract);
- the assumption of business risk by the contractor; and
- the possession of a proven level of specialisation and professionalism on the part of the contractor.

In the absence of the above requirements being met, and in the event that the contractor merely provides the service of making labour available to the principal, for example by handling only administrative management tasks with respect to the employment relationship without effectively exercising managerial power over the workers employed via the contract, unlawful contracting can be considered to have occurred.

To protect the workers employed by the contractor in such situations, Italian legislation gives them the option of applying for the employment relationship with the principal to be recognised. To avert this risk, the principal will have to carefully verify that the provider used to perform the outsourced services is, for all intents and purposes, fulfilling the requirements of the regulations in order to be able to legitimately carry out the contracted activities.

The propensity of Italian legislation to protect contracting workers is reflected in the regime of joint and several liability of the principal. Together with the contractor and any subcontractors, the principal is held jointly and severally liable – for two years after the termination of the contract – to pay workers employed in the performance of the contract their salaries, including severance pay, as well as social security contributions and insurance premiums due in accordance with the period of performance of the contract.

In addition to this instrument of protection, another instrument allows the worker employed in the contract to bring a direct action against the principal, without any time limit, to obtain what is owed by the contractor. The protection in question is only possible to the extent that any outstanding debt is owed by the principal to the contractor in connection with the contract through which the worker was employed.

Companies that intend to outsource part of their activities through procurement contracts are thus called upon to, in the first instance, pay special attention to all of the requirements of the entity that they decide to hire, considering both the organisation and professionalism of that entity, and proper management of all obligations (wages, contributions, etc) towards employees who will execute the work or services to be outsourced.

This is important not only to avoid the risk of the employee in question claiming a "direct" employment relationship with the principal, as well as the payment of any amounts accrued and not paid by the contractor, but also to avoid incurring the harsh penalties that Italian legislation establishes for cases in which the contract is not characterised by the typical elements of a genuine procurement contract, as briefly described in the foregoing.

Furthermore, these penalties have recently been enhanced by Decree Law No 19/2024, which has in essence brought the penalties for cases of unlawful contracting back under the framework of criminal law, as occurred in the past. Indeed, in the case of "non-genuine" contracts, principals risk being sentenced to imprisonment of up to one month or payment of a fine of EUR60 per day for each worker employed under the contract.

The new elements of the legislation mentioned above also effected a highly important change in procurement contracts that, on paper, looks likely to have a major impact on all principals and contractors who use the mechanism of such contracts.

In particular, Article 29, paragraph 2, letter b) of Decree Law No 19 of 2 March 2024, converted with amendments into Law No 56 of 29 April 2024, and with the introduction of paragraph 1 bis in Article 29 of Legislative Decree 276/2003, in essence identifies a minimum salary and standard regulatory conditions for "employed personnel" in contracting and subcontracting, with a corresponding redefinition of the scope of the joint and several liability incumbent on the principal, the contractor and any subcontractors.

The personnel employed in the contract are now granted the right to "overall financial and regulatory conditions not inferior to those provided for in the national and local collective contract stipulated by the comparatively most representative labour union associations of workers and the employers at the national level, applied in the sector and for the area strictly related to the activity being contracted and subcontracted".

This provision aims to address the widespread practice of outsourcing certain activities for the sole purpose of lowering labour costs to the detriment of workers. The chain of contracting and subcontracting is in fact often characterised by contractual deregulation such that, in the sequence of contractual relationships, national collective contracts that, although formally valid, incorporate financial and regulatory conditions that are worse than the national collective contracts applied by the principal are often applied,

even though they often pertain to the same core business.

The new legislation does not seem to have reintroduced a genuine obligation of equal treatment between the contractor's employees and those of the principal, since the collective contract that is to be taken as the parameter for determining the conditions to be guaranteed for the work is not the same as that applied at the principal's company; rather, it should be consistent with the specific activity contracted or subcontracted (and thus may well be different from that applied by the principal or subcontractor).

In addition, according to the literal wording of the law, compliance with the collective contract foreseen by the law does not seem to be guaranteed for individual clauses and institutions, but rather as a whole, with it being understood that assessment of compliance with the conditions applied must take into account not only financial aspects but also regulatory aspects.

In any event, the new provision should curb the phenomenon of the chain of contracts, designed merely to reduce labour costs, insofar as it imposes the obligation to guarantee workers employed via the contract conditions in line with those established by collective contracts, which are presumed to be adequate insofar as they are stipulated by labour union organisations, where such organisations are deemed reliable in terms of representing workers.

However, while the legislature's objective is well understood and clear, it should be noted that the wording of the law could give rise to interpretation problems given the considerable complexity; consequently, there are uncertainties in application and a risk of widespread litigation.

In this regard, it should first be recalled that, in Italy, there is no obligation for employers to apply a specific collective contract to their employment relationships with employees, where the employer can simply govern the relationship by referring to provisions of law.

The only case in which an employer is obliged to apply a specific collective contract to its employment relationships with employees is when the employer in question is a member of a trade association that is a signatory to the national collective contract. In that case, the employer will be required to apply the regulatory and financial provisions of that contract – ie, they will not have the freedom to choose. Otherwise, the employer will be free to apply, or not apply – ie, to choose without compulsion, the collective contract that they wish to use.

It is well known that this situation has led to a proliferation of collective contracts (in Italy, there are hundreds of collective contracts).

Against this backdrop, it thus seems clear that the new legislation, as anticipated, comes with several uncertainties regarding interpretation as well as difficulties in application.

Firstly, identification of the labour contract that should be applied to the procurement contract, as indicated by law through the usual reference to the criterion of comparative representativeness of the stipulating organisations, is made difficult by the lack of suitable legal criteria for measuring representativeness and the possible coexistence of multiple collective contracts signed by organisations traditionally considered the most representative.

These difficulties do not seem to have been solved by the specification that consideration

must be given to the sector and area "directly related to the activity being contracted or subcontracted", since the criterion used by trade unions to define the scope of application of collective contracts is often the specific listing of a wide range of activities. Therefore, when the same activity is listed in more than one collective contract, it is virtually impossible to determine from the outside which contract is most pertinent.

Even with the uncertainties in the interpretation of the new legislation described above, it seems clear that, based on the legislation, principals will henceforth have to pay special attention to the collective bargaining contracts applied by their contractors and subcontractors in order to try, at the very least, to prevent claims by workers employed under the procurement contracts based on wage differentials and whatever else they may claim from the principal under the joint and several liability regime.

Under certain conditions (that is, in the most extreme situations), as reported above regarding the applicable penalties for cases of unlawful contracting, it will not even be possible to rule out the risk of being implicated in a charge of complicity in the crime of labour exploitation.

It is hoped, therefore – by both businesses and practitioners – that there will be a rapid intervention by the legislature to clarify the situation. Failing this, it currently seems inevitable that there will be an exponential increase in litigation regarding procurement contracts, and a risk of principals being exposed to harsh penalties related to "improper" use of such contracts.