



MEMORANDUM OF UNDERSTANDING

for co-operative activities

related to “EXPO Milano 2015”

between

**The Italian National Anti-Corruption Authority
(A.N.AC.)**

and

The Organisation for Economic Co-operation and Development (OECD)

Report on the governance model and on the methodology

Background

With the Law Decree no. 90/2014 of 24 of June, transformed into Law no. 114 of 11 of August 2014, the President of ANAC (*Autorità Nazionale Anticorruzione* – National Anticorruption Authority of Italy) was committed functions of supervision and guarantee of the fairness and transparency of the procurement procedures related to the implementation of the EXPO2015 in Milan, due to open May next year.

To enable performance of these duties, article 18(7) gives the President of ANAC the power to make proposals to the Italian Government's Single Commissioner for Expo Milan 2015 and to the company Expo 2015 S.p.A. This power also covers the "recommendations", which are discussed in greater detail in this report (see below). Also, As part of this assignment in July 2014 ANAC established a special operational unit (UOS) to monitor the projects of the EXPO 2015¹.

¹ <http://www.anticorruzione.it/?cat=93>



In October 2014, ANAC and the OECD signed a memorandum of understanding (MoU) referring in particular to the supervision and monitoring of EXPO 2015 tender procedures. The MoU aims to put both organisations' anti-corruption experience into practice, in order to ensure the transparency, propriety, effectiveness and efficiency of procedures relating to staging EXPO Milan 2015. The agreement represents a pilot project that will have a direct impact on the EXPO, to which it explicitly refers. However, it may also provide a more general control template for institutional cooperation on the supervision of public contracting procedures, under the terms mentioned above, and of their subsequent performance, in accordance with the highest possible standards and leading international best practices.

In exercising its role the OECD is considering the analytical frameworks previously developed and related to the subject matter, namely the 2008 OECD Principles for Enhancing Integrity in Public Procurement², the 2009 Guidelines and the 2012 Recommendation for Fighting Bid Rigging in Public Procurement³ (all jointly referred hereafter as the OECD Principles). Additional OECD publications were taken into consideration, especially the Progress Report in implementing the aforementioned 2008 Principles and the upcoming draft Recommendation on Public Procurement, whose public consultation took place last August/September⁴.

A preliminary review of selected available documentation related to the project was conducted, focusing on the supervising methodology and on the transparency, integrity of procurement procedures. The existing governance model and inter-institutional arrangement was also verified.

Current Governance model

The appearance of ANAC as an oversight body for the EXPO 2015 changed the existing governance structure and forced the celebration of additional inter-institutional arrangements, namely with the entity responsible for the development of the exhibition, EXPO 2015 S.p.A. (EXPO)⁵.

From a preliminary analysis, and considering the different stakeholders that are part of the institutional framework (government, implementing agency, municipality, internal audit, external audit, social control and oversight bodies), the existing governance model and established procedures allows ANAC to exercise its authority.

In this regard, ANAC is now responsible for issuing a prior visa of procurement processes, taking into consideration the legitimacy of the tendering and awarding process in what concerns transparency.

² <http://www.oecd.org/corruption/ethics/procurement-principles.htm>

³ <http://www.oecd.org/daf/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm>

⁴ The draft *OECD Recommendation of the Council on Public Procurement* was opened to public consultation until 30 September 2014 at: www.oecd.org/gov/ethics/draft-recommendation-on-public-procurement.htm.

⁵ Expo 2015 SpA is a public corporation instituted by Decree of the Prime Minister of October 22, 2008 as currently amended. Its purpose is the planning, organization and management of the event "Expo Milano 2015". Ownership is divided among the Ministry of the Economy and Finance (40%), the Region of Lombardy (20%), the Municipality of Milan (20%), the Province of Milan (10%) and the Chamber of Commerce for Industry, Agriculture and Handicrafts of Milan (10%).



For that purpose the UOS has developed detailed checklists and control mechanisms that are applied individually to the tender documents and awarding procedure.

With the establishment of the UOS several rules, procedures and control mechanisms were set as to monitor and exercise “a priori” control of the procurement processes (Linee Guida ANAC 17.07.2014).

The establishment of ex-ante control mechanisms, although not a common practice for Supreme Audit Institutions in OECD countries (only Chile, Italy and Portugal exercise it with regularity) seems adequate for the enforcement of additional integrity measures, necessary to be addressed in the current development stage of the project, and after the recent events.

In fact, this approach could prove useful mainly in specific contexts, such as EXPO 2015, that have already been affected by instances of corruption which have not only contaminated existing tenders but also threaten to undermine future contracting procedures. Indeed, to be effective, ex-ante controls of documents concerning the award and performance of public contracts for works, services and supplies of goods, by an entity separate from the contracting authority, cannot cover all public tenders but must focus on individual, specific cases with a “high risk of corruption”. For these reasons, using this control system in specific cases, as per article 19 of Law Decree 90/2014, by establishing a UOS within ANAC, must be viewed in itself as responding to multiple public-interest objectives: it enables the creation of an innovative system of ex-ante third-party controls on the legality of tender documents, with particular regard to Italian laws and regulations on transparency; it strengthens and safeguards the probity and transparency of the award procedures used; it could potentially function as a way to dissuade future instances of corruption, given the explicit checks on the propriety of each procedural step in the tenders; it helps to restore confidence among operators in the relevant market about the transparency and probity of award procedures and the subsequent management of tenders.

However, it is worth noting that the ex-ante control of documents concerning award procedures and the performance of public contracts for works, services and supplies of goods, by a party separate from the contracting authority, could exacerbate the time it takes to complete tenders. The entities responsible for assessing risk must ensure that the ex-ante control clearly identifies the best ways to ensure control effectiveness, without having an excessive effect on the swiftness and efficiency of the administration of the tender. The establishment of a threshold by ANAC for the exercise of the prior control mechanism is a good step forward to balance the efficiency of the process. We recommend that the threshold level should be periodically assessed vis-a-vis the achieved results and the expectations of end users.

Existing transparency and integrity measures adopted by the EXPO

The EXPO developed several tools for communicating the transparency measures it adopted for the Exhibition. The most relevant ones are displaying in the event’s website and there is a special section dedicated to transparency. This section contains several sub-sections: financial overview, the



contracts awarded, legal notes, governance, commissioner and delegates and sustainability, each of them with additional sub-sections.

The transparency section is announced at the very bottom of the webpage and it is necessary to scroll down the entire home page to get there.

Further to the transparency section, the EXPO is advertising ongoing procurement procedures and inviting potential suppliers to present bids in a separated section, immediately visible from the home page in the top banner⁶. This practice is aligned with the OECD principles.

Preliminary remarks and recommendations

The following remarks and recommendations derive from applying the OECD principles to the analysis of the documentation on control methodologies and practices.

The OECD's experience essentially shows that the implementation of OECD principles has brought positive results in terms of the transparency and integrity of contracting procedures.

1. Publication and communication:

Given the recent events and in order to promote the work ANAC is producing and advertising in its own website, we suggest that a new placement should be found for the transparency part, for instance by creating a new link in the top banner. Additionally, new links should be developed to present in a better manner the oversight role ANAC is performing. For the time being it was not easy to go directly to this assignment in the EXPO's website and there is a clear asymmetry of importance when compared to the visibility of UOS in ANAC's website. More evident link and information display will allow the visitor of the event's website to have an immediate perception of the transparency component for the EXPO.

Clearly, the introduction in the meantime of these (and other) accountability measures will gradually bring about convergence in the pursuit of the goals of the UOS's supervisory activities. They will help to ensure greater transparency of the "reinforced" safeguards relating to award procedures, contractual documents and the consequent proper staging of the EXPO, thereby improving stakeholder confidence.

The process begun with the Open EXPO platform – which the Authority is using to assess areas of cooperation to make procedures and controls more accountable – is another positive step.

2. Procurement process:

In line with the OECD principles, the EXPO would further benefit from the full use of the e-Procurement platform that is utilising⁷.

⁶ <http://www.expo2015.org/en/opportunities-for-businesses/take-part-to-tenders/competitive-tenders-in-progress>



It is the OECD experience that the use of e-Procurement assures a proper and adequate visibility of the procurement process for the interested stakeholders, whilst improving the image of the contracting authority in terms of anti-corruption. For the moment, the procedures are being carried both in the e-Platform and in paper format. Under an agreement with the Lombardy Region's "Arca Lombardia" system, the EXPO company is not using the e-procurement platform for all procedures. Given the short time to completion and inauguration of the EXPO 2015, we suggest that maximum effort should be placed to assure that the e-Procurement platform is used for a maximum number possible of new procedures.

In light of the existing objective limitations, it is however laudable that *all* existing contracting procedures are published in the transparency section of the EXPO site, and that those managed through the e-procurement platform are marked with a dedicated link to the system.

3. Possible areas for improvement:

a. Linee Guida ANAC – 17.07.2014

The *Linee Guida* (Guidelines) govern the supervisory and control activities performed by the President of ANAC and the UOS for the ex-ante verification of the legitimacy of documents pertaining to the award and performance of contracts for works, services and supplies of goods for the realisation of projects and activities connected to the staging of the major event Expo Milano 2015. The *Linee Guida* focus especially on compliance with transparency procedures set out in Law no. 190 of 6 November 2012, and on compliance with the relevant aspects of the company Expo 2015's observance of legality agreements entered into with the Prefecture of Milan.

In this perspective, the Linee Guida includes a list of procurement acts and activities related to the Expo Milano 2015 which should be provided by EXPO 2015 to be reviewed *ex ante* by ANAC.

The documentation listed for the various phases of the contracting procedures appears to cover the performance of ex-ante controls comprehensively. Information on sub-contracting procedures could also be requested if it is thought that they may be useful for the purposes of preventing and combating corruption.

According to the OECD principles on how to reduce collusion in public tenders, sub-contracting is an important element in the overall assessment of a procurement process, given its importance and the need to establish a solid and coherent transparent supply structures and could

⁷ EXPO is using the Arca Lombardia (Purchasing entity of the Lombardia Region) Sintel e-Procurement platform http://www.arca.regione.lombardia.it/cs/Satellite?c=Page&childpagename=DG_CRA%2FPAGE%2FCRABandiSintelLayout&cid=1213479876340&p=1213479876340&pagename=DG_CRAWrapper



potentially be taken into consideration, if deemed helpful, for the purposes of anti-corruption controls.⁸

b. Raccomandazioni ex art. 19 comma 7, DL n. 90

The recommendations submitted in accordance with the powers referred to in article 19(7) of Law Decree 90/2014 contain instructions for the contracting authority EXPO 2015 S.p.A on the proper management of tendering procedures connected to the staging of the event.

Section 1 deals with bidding documentation. Letter a) recommends limiting the use of the best offer (“offerta economicamente più vantaggiosa”) in case of awards of standardised goods and services.

In general, this rule could make it harder to achieve the best price for equivalent levels of quality. However, considering the specific context, it is worth underlining that this was a deliberate decision that, despite its limitations, was made specifically for the EXPO as a result of existing or potential instances of corruption, considering the discretionary nature of the awards. This is a central point of the strategy of controls adopted by ANAC for the EXPO, so it should be seen as a necessary decision for achieving associated contingent goals. It is, however, important to note the exceptional nature of the circumstances that led ANAC to this decision, and the need to preserve the principle of competition in tenders, whereby it is in the interest of the contracting authority and of society in general that the public administration procures goods and services at the lowest possible price, assuming equivalent levels of quality.

Letter d) recommends avoiding granting the awarding committee too much discretion in terms of awards on the basis of multiple criteria. The OECD Recommendation and Guidelines for Fighting Bid Rigging recognise that collusion can be favoured if the precise weighting criteria that the award commission will use to assess the different awarding factors are disclosed in advance of the tender.⁹

⁸ Sub-contracting is a way used by colluded bidders to redistribute the illegal gains from the cartel. Where possible within the limits of the UOS *ex ante* control, it would be useful to include in the review bid proposals of subcontracting from the winning bidder to competing bidders. Such proposals, if found to be suspicious and not properly justified by the proponent, could be brought to the attention of the Autorità Garante della Concorrenza e del Mercato (AGCM) for further investigation, in light of the MoU recently entered into by ANAC and AGCM (<http://www.agcm.it/component/content/article/8-comunicati-stampa/7342-protocollo-dintesa-anac-agcm-contro-la-corrruzione-firmato-da-cantone-e-pitruzzella-nuovi-criteri-per-il-rating-di-legalita-alle-imprese-.html>). In order for UOS to detect suspicious cases of sub-contracting, it should consider the following factor: (i) if the sub-contractor was an actual or potential competitor for the main contract; (ii) if sub-contracting has legitimate justifications; and (iii) if the contracting authority has imposed sub-contracting disclosure requirements to participating bidders.

⁹ <http://www.oecd.org/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm>



As with the previous point, though, in order to limit the scope for discretion and the associated potential threats of corruption, this measure must be considered to apply within the exceptional context of the controls for Expo 2015 designed to ensure the legality of tender documents, with particular reference to transparency laws and regulations.

The last part of Section 1 refers to elements that should be included in the terms of reference. The same OECD Guidelines recommend that bidders should sign a Certificate of Independent Bid Determination (CIBD). CIBDs require bidders to disclose all material facts about any communications that they have had with competitors pertaining to the invitation to tender. In order to discourage non-genuine, fraudulent or collusive bids, and thereby eliminate the inefficiency and extra cost to procurement, procurement officials may wish to require a statement or attestation by each bidder that the bid it has submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded.

Section 4 deals with sub-contracting. The OECD Principles recommend imposing disclosure requirements on bidders to make it more difficult for them to use sub-contracting as a mechanism to implement a collusive agreement.

The information set out in section 4 of the recommendations on anti-corruption controls, in combination with the rules set out in Italy's Public Contracting Code, mainly coincide with those tested and recommended by the OECD on anti-collusive agreements¹⁰ and can therefore be considered beneficial for the specific purposes in question.

c. Checklist Bando

The checklist is widely used and is endorsed by the OECD in its recommendations and guidelines on collusion in contract procedures, and in the toolkit for applying the public procurement principles. Using such a checklist can only be viewed favourably in terms of combating corruption. The current checklist focusses on discretionary award criteria (“punteggi discrezionali”) and to participation requirements which might be too stringent (“requisiti di ammissione di ordine generale ovvero di carattere economico-finanziaria e/o tecnico-professionale stringenti”).

Even though the current checklists only cover the broad lines of some of the aspects investigated as part of the controls, extra items from the OECD checklists could be added to the checklists

¹⁰ According to OECD principles, if sub-contracting is to be allowed, the intention to sub-contract should be stated at the outset and not after the award. Restrictions on sub-contracting should be outlined in the public call for tender and respected in the contractual framework. Bidders should be legally required to provide certain disclosure requirements in their bid submissions. For example they should: i) advise the contracting authority of their intention to sub-contract, ii) clearly identify the firms to which they are sub-contracting, and iii) explain why sub-contracting is necessary for the proper performance of the contract. Section 4 could make these criteria explicit.



used for EXPO if, for specific procedures, there was a desire to investigate possible instances of collusion as well.¹¹

d. Checklist Aggiudicazione

Similar considerations can be made with reference to ANAC award checklist. The current version makes some references to red flags for collusion (see, for example, Q5 on coordinated bids or Q10 on personal links between bidders). The checklist, however, could be expanded and enriched with reference to other red flags for detecting bid rigging cases that are included in the OECD Principles.¹²

¹¹ For example, the checklist used by ANAC in its *ex ante* review could also include references to the following factors (i) whether the contracting authority did a proper market study before going for tender, (ii) whether there are features in the tender that might increase participation costs and/or reduce participation of potential bidders, (iii) if the technical specifications are favouring a certain supplier or creating a lock-in situation, (iv) whether the tender favours communications between bidders, and (v) how participation requirements and awarding criteria are defined.

¹² These may include references to: (i) opportunities that bidders have had to communicate with each other; (ii) relationships among bidders (joint bidding and sub-contracting); (iii) suspicious bidding patterns and/or pricing patterns; (iv) unusual behaviour by bidders; and (v) clues in documents submitted by different bidders.