

THE IMPACT OF THE LAW DECREE "DECRETO SOSTEGNI BIS" (DL N. 73/2021) ON RAW MATERIALS PRICE CONTRACTS AND PUBLIC TENDERS

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The gradual alleviation of the COVID-19 emergency brought about the gradual resumption of business activities and the recovery of various sectors, which had been inactive for a long period. This has resulted in a boom in demand and exponential increases in the prices of certain materials, including steel. Such economic conjuncture led not only to a shortage of critical raw materials but also to an increase of serious imbalances in contractual relations—also in the construction sector—due to the considerable increases in fixed costs.

In such situations, Article 1664 of the Italian Civil Code has always been the typical regulatory remedy. This provides a general price revision for increases or decreases of more than one tenth of the agreed price. In view of the urgency of the situation, a new special procedure was recently introduced in art. 1-*septies* (Urgent provisions regarding revision of prices of materials in public contracts), Law Decree no. 73/2021 (e.g., "*Decreto Sostegni-Bis*"), converted into Law no. 106/2021, still to be implemented with the ministerial decree referred to in the first paragraph.

The new provision envisaged by "Decreto Sostegni-bis" is in line with the various government intervention contained in such regulations aiming at supporting businesses in various sectors. Broadly, art. 1-*septies* provides for a price review in public contracts based on the changed price on materials through compensation measures by the contracting authority. Such mechanisms are based on clearer and stricter criteria than those set out under Article 1664 of the Italian Civil Code, which should be less arbitrary and thus provide a clear advantage for contractors.

However, there are still significant concerns, which could undermine the application of the new emergency regulation.

ARTICLE 1664 OF THE ITALIAN CIVIL CODE AND THE "ORDINARY" PRICE REVISION PROCEDURE

Article 1664, paragraph 1, of the Italian Civil Code provides that the contractor or the client may request a revision of the contract price, should unforeseeable circumstances result in increases or decreases in the cost of materials or labor, in excess of one-tenth of the total agreed price. This provision aims to mitigate inflationary phenomena leading to cost overruns. The reference to the "one-tenth of the total price" is usually measured not against the percentage change in the price of materials per se, but against the actual impact on the overall contractual cost.

Article 1664 of the Italian Civil Code can be waived. This means that the parties may establish a different threshold for increases, or exclude from revision the cost increase of certain services. Moreover, the revision should be calculated definitively only upon completion of the work or service. Consequently, the contractor would not have a full right to the payment of advances during the course of the contract, leading to negative effects also from a cash standpoint.

On the whole, said provision is not always easily and promptly enforceable. As a result, during the present emergency period, it did not allow for full protection of the weaker party in tender contracts, failing to re-establish the contractual balance.

ARTICLE 1-SEPTIES OF “DECRETO SOSTEGNI BIS”—THE NEW PRICE REVISION BY COMPENSATION AND THE STATE FUND OF €100 MILLION

The new provision envisages a special compensation procedure, which can also derogate from the Public Contracts Code, typically restrictive and complex for most enterprises. The changes in prices, as recorded by the minister of infrastructure and transport with the specific decree referred to in the first paragraph, shall be applied to the quantities of materials used in the works carried out and accounted for by the works manager from 1 January 2021 until 30 June 2021. Such decree, which should have been adopted by 30 October 2021, shall record the percentage changes, upward or downward, greater than 8%, occurring during the first six months of 2021 in the individual prices of the most significant construction materials.

Within 15 days of publication of the above decree in the official journal, contractors may submit a specific request for compensation to the contracting authority. Each contracting authority will provide the requested compensation, in the manner indicated, primarily with its own resources and within the limits of 50% of resources set aside for contingencies in the economic framework. This in addition to the amounts pertaining to contractual commitments already undertaken, as well as to any further sums involved. In the event these funds are not sufficient, the contracting authority may make up the difference by requesting access to the specific fund established by the minister of infrastructure and transport, with a budget of €100 million for 2021.

As envisaged in the recent ministerial decree signed on 30 September 2021, the budget of such fund is currently divided in €34 million for small businesses, €33 million for medium-sized businesses, €33 million for large businesses. There does not seem to be a priority order of distribution within each of the three categories. In fact, as provided for in the above decree, each company participates in the distribution of the resources allocated “exclusively on the basis of its own qualification” (as a small, medium-sized, or large business).

Despite the detailed regulations, as briefly summarized above, there are still several open points and uncertain issues, which may affect the effectiveness of the protection afforded by the new emergency legislation.

ISSUES OF INTERPRETATION AND OPEN POINTS

The scope of the regulation seems fairly limited. It appears to include only the public works sector (thus excluding private contracts). But it also cast doubts, at the present time, on all those contracts that do not strictly fall within the category of tender contracts (e.g., “*contratti d'appalto*”). These would include, for instance, particular supply contracts where there is no figure as that of the “works manager”, specifically mentioned in the third paragraph of article 1-*septies* of Law Decree no. 73/2021.

It remains equally uncertain whether said regulation can be applied to foreign companies. However, also in line with EU legislation on freedom of movement and competition, all EU contractors should be included in the scope, as long as the public contracts in question are in place with Italian contracting authorities during the applicable term (e.g., as of 23 July 2021) that is the date of approval of the conversion law.

It is likely that the new Article 1-*septies* of Law Decree no. 73/2021, also insofar as it aims at dealing with transitional “exceptional” emergencies, can be qualified as mandatory. This would be a first distinction with Article 1664 of the Italian Civil Code, which, as mentioned, can be waived. Consequently, it may be argued that the new compensation procedure also applies to those contracts that expressly exclude price revision adjustments or which, to varying degrees, derogate from the civil law provisions.

It could also be argued whether Article 1664 of the Italian Civil Code can be enforced in conjunction with Article 1-*septies* of Law Decree no. 73/2021. Certainly, the reference to increases or decreases “exceeding 10% in total if related to more than one year”, as per paragraph 3, would seem to implicitly include the provisions of Article 1664 of the Italian Civil Code. If that is the case, the two remedies could not be enforced together.

Another significant difference may be the subject of the percentage variation. According to a literal interpretation of the regulation, Article 1-*septies* of Law Decree 73/2021, paragraph 1, envisages that the minister of infrastructure and transport records the percentage variations in the individual prices of the most significant construction materials. However, it does not mention the actual impact of such variations on the contract as a whole. Article 1664 of the Italian Civil Code, on the other hand, should correctly include variations against the impact on the overall cost of the contract, and not only increases or decreases in certain individual materials.

As for the latter, Article 1-*septies* of Law Decree 73/2021 does not specify the kind of materials, but generally refers to “the most significant construction materials”. It is likely that steel and other materials from the steel sector that are widely used may fall within the definition. Hopefully, the ministerial decree, to be adopted as per paragraph 1, will shed light on certain uncertainties and also include a precise list of the materials concerned.

Lastly, there are still other operational issues that remain unclear, as the identification of the party which will be required to carry out and/or present the “calculations” for the offsets. The regulation provides that such calculations are carried out by the contracting authority when the revision is downward (e.g., to its own benefit). However, there is no mention of the case of upward revision. This would suggest, perhaps, that such duty may be shared, to some extent, between the contracting authority and the contractor.

POSSIBLE DIFFERENCE IN TREATMENT—CONTRACTS IN THE PRIVATE SECTOR AND OTHER TYPES OF CONTRACT

There were some critics, particularly from trade associations, highlighting the lack of similar regulation in the private contracting sector. This is also in order to allow the continuation of the regulatory interventions related to the “110% Superbonus”, currently expiring on 30 June 2022. Moreover, it has been underlined the need to extend the scope of application of Article 1-*septies* of Law Decree 73/2021 to technology supply contracts, or to adopt analogous regulation, on the model of that provided by the article in question. This would allow to deal with the exceptional price increases registered in that sector. On this point, the new compensation procedure, being “exceptional”, would not be subject to an interpretation by analogy.

On the whole, despite that the *ratio legis* underlying the introduction of such special regulation seems substantially similar to that of Article 1664 of the Italian Civil Code, there are still significant operational issues that remain uncertain and regulatory loopholes, first of all on the private or public nature of the relationship.

Hopefully the lawmaker, first with said ministerial decree and, possibly, with further measures, will clarify and address some of the critical issues regarding interpretation and application of Article 1-*septies* of Law Decree 73/2021.

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