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Centralization vs. Bundling: The Victory of an Italian David against an Italian Goliath

Gustavo Piga¹

Abstract

By drawing on the data and evidence related to a recent annulment, following the complaint of a small local SME, in an Italian administrative court of a large, limited-lots, tender published by the Italian largest Central Purchasing Body, we review the evidence for aggregation and bundling strategies of public procurement tenders in the light of the negative impact they generate on SME participation. We conclude by suggesting that an optimal strategy of centralization, which has several benefits, to survive requires limiting its bundling temptation.

Keywords

centralization; bundling; sme; lots; central purchasing body; procurement tenders

1. Introduction

SMEs access to public procurement tenders generates relevant challenges over at least four dimensions:

- a) The contract object
- b) The financial requirements
- c) The technical requirements
- d) The bureaucratic process.

E-procurement is helping in alleviating problems arising from d). This paper focuses its attention on a) (lot size) which tends to drag also to b) and c) as they are correlated with the contract object estimated value, by looking at a very relevant judicial episode in the Italian public procurement market.

In a recent tendering of integrated surveillance services² at sites granted for use, on whatever basis, to Public Administrations, Consip S.p.a., the Italian Central Purchasing Body for goods and services, performed a territorial lot sub-division (13 regional lots) that was challenged in court by a small firm (“Mondialpol”) that could not participate (due to the lot size and the related minimum turnover requirements) to the competition itself in one of the lots.

As the small firm won, in both stages of the administrative judgement (appealed unsuccessfully by Consip and its unique shareholder, the Italian Ministry of Economy and Finance), and the tender was finally annulled, setting a precedent for future bundled procedures in Italy, it is worth reviewing the issues that were raised in the litigation in light of the twin objectives set forth by national law and European directives, aimed at promoting the largest participation by Small and Medium-Size

¹ I wish to thank Luis Valadares Tavares for helpful comments.

² Call for tender published on October 15, 2015.

Enterprises (“SMEs”) while pushing centralization, and within the typical need to contain public spending.

The subject of this paper is currently at the centre of a European debate regarding the best practices in the matter of public procurement. The dilemma faced by the decision-maker is well summarized at the outset in the Recital (59) of the new European regulations on the matter (emphasis added):

“There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting authorities involved or by volume and value over time. *However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs.*”

Beyond the dilemma concerning the debate at issue here, what is made evident and relevant in the Recital is that aggregation and centralization are two markedly distinct terms. Indeed, if, on the one hand, the Recital illustrates that, to reach aggregation in public procurement (so as to generate economies of scale), centralization appears to be a necessary condition, on the other hand the opposite is not necessarily the case, i.e. centralization does not need to be inevitably tied to the aggregation of tenders in ever bigger lots. Indeed, based both on tendering operating practices and relevant economic theories, there are various factors that would justify an increased centralized procurement without leaning towards an aggregation of demand; in other words, it could for example make sense to continue the trend towards more centralization with, however, particularly small lots (hence without aggregation of demand). This centralization could certainly benefit the citizen and the taxpayer more than if several (small) contracting authorities were responsible for the different tenders (i.e. without centralization). Some of these advantages include: a reduction in the costs of publishing calls for tender, the centralization of administrative disputes under one single administrative entity with wide legal authority and thus capable of facing suppliers in court who are represented by highly effective legal teams and also economies of scale in personnel - mentioned above in the Directive - which lead to more qualified tender specifications, which in turn reduce costs, disputes and waste of time. These several features can all be achieved also in the case of Consip, without therefore speaking necessarily of aggregation.

This lack of identity between the concepts of centralization and aggregation was confirmed from the inception of the program in the late XX century, within the Italian Public Administration's purchasing efficiency plan. The Ministry's decree, D.M. 24 February 2000, following the budget law, art. 26, December 23, 1999 clarified that the plan is aimed “realizing economies of scale on purchasing volumes, optimize demand and standardize consumption, simplifying the tendering procedures, reducing procurement lead time and the quality standards, promote the diffusion and the use of advanced instruments like e-procurement, and obtain results in terms of reduction of expenditure”.

As demonstrated by economic theory, policy recommendations and available empirical evidence – as we will discuss later - all these objectives *may* but do not necessarily *need* to rely on the aggregation of demand (a term never mentioned in the above original wording) at the level of the relevant centralizing authority. Even the more recent art. 9 of the Law Decree 66/2014, which sets forth directives for the rationalization of public spending, refers to “the identification of spending values that are significant for the purchasing of goods and services with reference to optimal dimensions, even on a territorial basis, for the aggregation and centralization of demand.” The decree thus emphasizes that it is indeed the context, often in territorial terms, that make optimal a

certain degree of aggregation, rather than aggregation being an objective per se, to be achieved through an ever growing size of tendering lots.

Confusing centralization and aggregation would also go against European Recommendations like the one published by the European Commission: “The Public Procurement Directives allow contracts to be awarded in the form of separate lots. The sub-division of public purchases into lots clearly facilitates access by SMEs, both quantitatively (the size of the lots may better correspond to the productive capacity of the SME) and qualitatively (the content of the lots may correspond more closely to the specialised sector of the SME). Furthermore, sub-dividing contracts into lots and thereby further opening the way for SMEs to participate, broadens competition, which is beneficial for the contracting authorities provided that this is appropriate and feasible in the light of the respective works, supplies and services concerned. Against this background, contracting authorities should keep in mind that, while they are allowed to limit the number of lots tenderers can bid for, they must not use this possibility in a way which would impair the conditions for fair competition. In addition, making it possible to tender *for an unlimited number of lots* has the advantage that it does not discourage general contractors from participating and the growth of enterprises” (our emphasis)³.

These introductory observations clearly show that, if implemented in a reasonable manner, the mechanism of purchases within a scheme of centralization can be deemed compatible with the principle of participation in public procurement by relevant economic stakeholders, especially the smaller enterprises, through the lack of recourse to aggregation.

What is needed to understand the issues at stake it thus not so much a legal analysis of how the concept of centralization evolved, in Italy or elsewhere, but, rather, an economic assessment of how such an innovative and interesting organizational form, centralization, has been applied and what has been the ensuing impact on market competition through the unfolding of individual public tenders, particularly with reference to if and how aggregation has been developing with respect to the specific territorial area affected.

In this context, the opinion of the Administrative Court in Italy (TAR Lazio), regarding the specific tender we analyse, seems completely valid when it states that the issue at hand is “the assessment whether the subdivision of the procurement, which affects the entire national territory, in 13 lots guarantees an optimal division of the (Italian, NoA) territory. Considering that safeguarding competition ensures a proper functioning of the market, such optimal territorial division is defined as that where competition can be stimulated most effectively to the advantage not just of the market, where enterprises can compete fully and freely, but also of the contracting authority and hence of the public in general, both in terms of the quality of services rendered by the best contractor and of the prices to be paid to the latter.”

Therefore, the task for this paper is to evaluate the state of progress in Italy of this operational management of the centralization mechanism, verify if it occurred by means of an increased aggregation of contracts, and if it seems to be confirmed that an unreasonable level of aggregation - in terms of EU objectives and public spending containment – was developed, or instead it should be deemed as optimal. Only after carrying out this context analysis we will have suitable tools to confirm or dismiss the validity of the complaint of the firm that initiated the complaint and led to the annulment of the Consip’s tender and therefore, also of the validity of the sentencing by the Italian administrative courts.

³ Brussels, 25.6.2008 SEC(2008) 2193, COMMISSION STAFF WORKING DOCUMENT, EUROPEAN CODE OF BEST PRACTICES FACILITATING ACCESS BY SMEs TO PUBLIC PROCUREMENT CONTRACTS.
https://www.ecec.net/fileadmin/pdf/law/2/sme_code_of_best_practices_en1.pdf

2. The context

Undoubtedly, Italy does not reflect European best practices in its handling of its small enterprises when involved in public procurement. In the graph below, thanks to an effective synthetic indicator, we can examine the difficulties that Small and Medium-Size Enterprises encounter everywhere within the European Union in securing public contracts.⁴ Such assessment can be carried out through a simple comparison between the percentage of total gross value added (GVA) that Micro, Small and Medium Enterprises (MSMEs) produce in the “real economy” and the share of public procurement they won in order to fulfil that portion of added value stemming from public “procurement” (see Graphic below), which is decidedly lower: if MSMEs generate 58% of European national income each year, in public procurement that share shrinks to 29%.

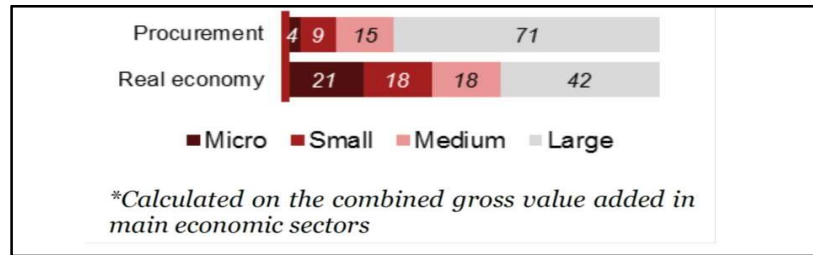


Figure 1 – Difference between the share of SMEs in public procurement (average 2009-2011) and their role in the economy (EU-27)*

We can safely interpret the difference between these two data points, “29” (58-29) as a discrimination index against MSMEs in public procurement, even if we could attribute part of it to other factors. Italy’s position within this European index is certainly discouraging as it points to a peculiar national anomaly compared to the rest of the European Union.

⁴ Graphic from “SMEs’ access to public procurement markets and aggregation of demand in the EU”, a study commissioned by the European Commission in February 2014.

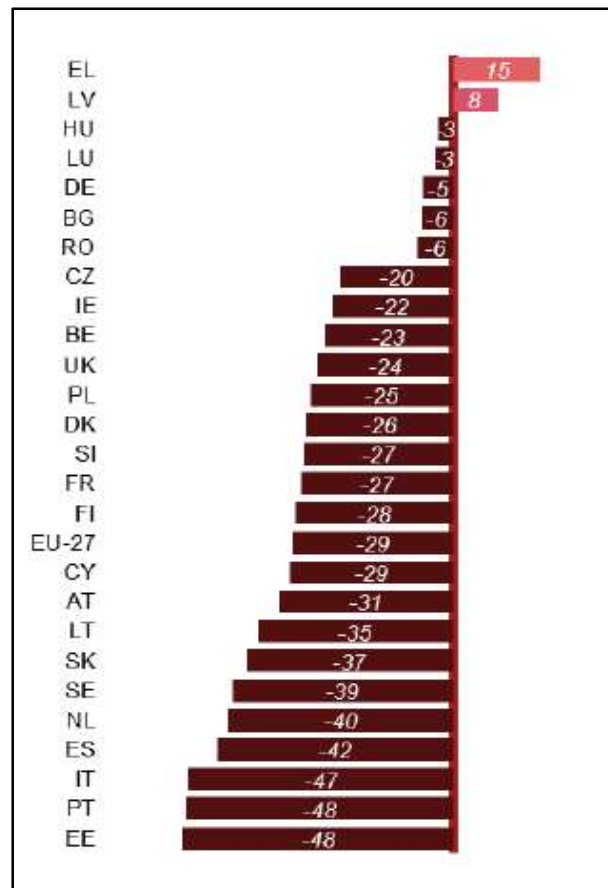


Figure 2 – Difference between the share of SMEs in public procurement and their role in the economy by Member State (average 2009-2011)

Indeed, where the European differential factor is 29%, in Italy it goes up to 47%! Italy ranks third from the bottom, just after the Republic of Estonia and Portugal in terms of the difference between share of awards of public procurement contracts to MSMEs and their respective share of the real economy. Such data point should undoubtedly be ascribed to internal anomalies within the country when it comes to the participation of MSMEs in public procurement tenders.

The cited study, commissioned by the European Commission, seems to also provide a possible decisive explanation for such a result, since, based on its own empirical evidence, it ascribes the drop in the share of contracts awarded to SMEs to centralized purchasing and larger contract values.⁵

Italian public procurement policy appears problematic compared with the rest of the European Union also when examining the official tables released by the Ministry of Economic Development based on the European Commission's data, in terms of the indicators of attention to SMEs, as stimulated by the European Small Business Act. While over the five-year period between 2009-2014 Italy's performance improved on some dimensions relative to its attention to SMEs, the most worrisome data point in the figure below (see highlighted part) refers to the evident drop when it comes to the indicator of attention to MSMEs in public procurement ("appalti pubblici e aiuti di stato") in Italy, whereas France, Germany and the United Kingdom show improvement.

⁵ "Centralized purchasing has a considerable negative effect on SME access (on a *ceteris paribus* basis)". Ibid, p. 63.

Table 1 - Growth rates of SBA indicators

SBA Criteria	EU 27	France	Germany	Italy	UK
Entrepreneurship	0,8	1,0	1,5	-2,8	1,2
Second Chance	0,2	0,6	-1,3	-1,1	-0,4
Think Small First	2,0	2,6	2,9	1,6	2,0
State aid and public procurement	-0,7	0,1	3,0	-10,2	1,3
Finance	-0,8	-2,3	0,7	-4,6	-1,2
Single Market	2,6	4,9	1,4	7,2	1,6
Skills and innovation	1,0	0,8	1,0	5,6	0,9
Environment	1,0	1,0	0,6	-1,1	3,0
Internationalisation	1,3	-1,2	2,0	1,1	0,8

Source: Elaborated based on European Commission data

Based on these *prima facie* evidence, it seems evident that, to verify more accurately what occurred in Italy in this first turn of the century, we need to look at a more specific indicator. The evolution of the average lot size in tenders in these past few years, when centralization was promoted through a series of reforms meant to reduce the discretion and buying power of small contracting authorities, is often chosen by the Italian authority supervising public procurement, ANAC as a key indicator to gauge the extent of problems suffered by SMEs in this field.

We rely, in this respect, on the 2015 Annual Report of the National Anti-Corruption Authority where, referring to the below Figure 6.5 it is mentioned that “it demonstrates how in the 5-year period between 2011-2015 the average lot value for type of contract has seen a considerable increase, compared to 2011, in the average amount related to *services* and supplies (+85.0% and +50.5%) and a very slight increase, almost in a sinusoidal trajectory, in the average amount related to works (+7.1%). These data appear quite consistent with the evidence gathered in the last few years, which shows how a reduction in award procedures is usually linked to larger value amounts per tender, mainly due to the fact that calls for tender are issued by centralized purchasing bodies and large scale contracting authorities. Like in recent past, the value increase per tender does not seem to correlate to a significant increase in the number of lots. Tendering procedures organized by contracting authorities, therefore, cover lots that tend to have on average a higher value, reaching in 2015 the highest mean value of the last five years. *It seems, thus, that this year too we can justifiably claim that the structure of demand is not particularly advantageous to the participation of Small and Medium-Size Enterprises (SMEs) in the market of public procurement.*” In relation to this debate, we should only add that the phenomenon pointed out by ANAC (Italian National Anti-Corruption Authority) appears to be particularly serious in the service sector (purple line), to which belongs the applicant of the case at hand, Mondialpol.

A similar trend is confirmed by ANAC’s most recent report: in the 5 years 2013-2017, the average size of lots for goods rose by 101% since 2013, and by 33.4% only in the last year. As for services, the numbers are 52,3% and 12,6%. The explanation provided by ANAC: “a greater base value of tenders, especially because of the procurement coming from central purchasing bodies or large procurers.” (p. 132, Annual report 2017, ANAC).

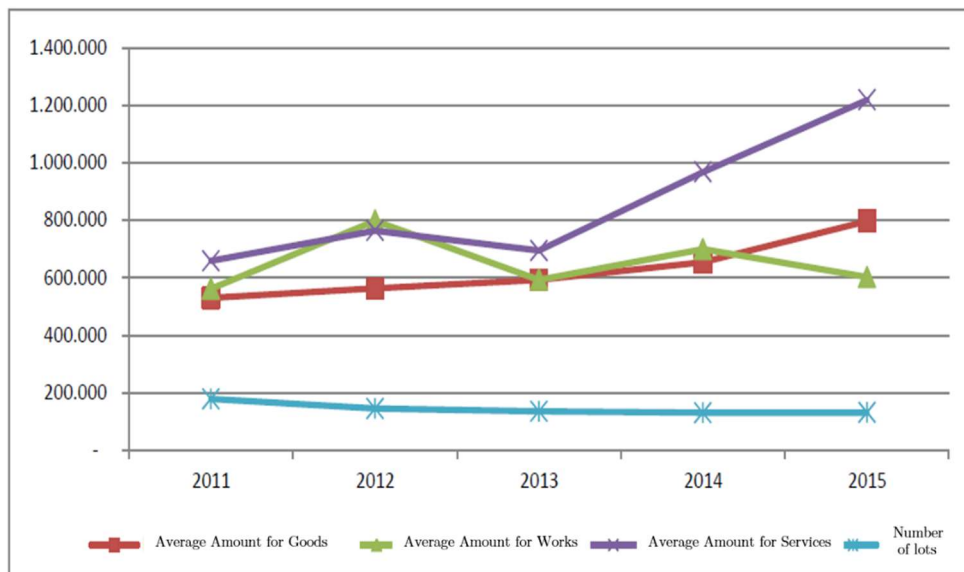


Figure 3 - Evolution of the total number of lots and their average amount by type of contract (procedures equal to or greater than 40,000 euros, ordinary and special sectors, 2011-2015 (Source: ANAC)

This section thus illustrates with ample policy details and data, how in the world of public procurement in Italy, along with the phenomenon of centralization, in itself potentially beneficial, a mechanism of demand aggregation has developed, which has necessarily impacted on the capacity to access of SMEs to public procurement and their probability of success in winning tenders. Obviously, a similar situation could be considered *unreasonable* only if alternative tendering strategies existed which did not undermine neither the objectives established by the law, nor centralized procurement or a wider participation of MSMEs.

Especially thanks to the specific case at hand, the one of surveillance services at issue in this paper, we can argue that the answer is likely to be affirmative: such strategies do exist and can be actively pursued without affecting any of the objectives mentioned above; these refer to decisions of lower aggregation and smaller - and therefore more numerous - lots.

3. Lot Subdivision in the procurement tender published on October 15, 2015.

Based on the proceedings relative to the tender discussed in the introduction, the first data to emerge, the most direct, objective and unquestionable at least, is the fact that for the small firm, Mondialpol, that complained against the Consip tender in front of the Administrative Court, it was impossible to take part in the Consip tendering as an individual entity, because of a lack of sufficient revenues (turnover), specifically in relation to the Consip's chosen size of the lot. As appropriately observed by Consip during the proceedings, Mondialpol could have gained access to the tender if the size of the lot under consideration had been reduced by two thirds. Beyond any other consideration to be discussed in the next pages, this first fact – the impossibility for one player to participate - represents an objective and undisputable loss for the Public Administration, since it reduces the competitive game both in terms of expected quality and expected contracting price.

Interestingly, Mondialpol asked the (only) 2 large firms that were finally able to participate to join them in a consortium and received a written negative reply by one of them. The fact that Mondialpol could not form a temporary grouping with another enterprise, despite its willingness to do so, serves only to confirm what was discussed above; however, it should be noted that an agreement between two enterprises to participate jointly in a tender does not, in principle, provide the same opportunity as the one coming from submitting an individual bid. If Mondialpol, for instance, had had a more

competitive cost structure than the other enterprise with which it were to join in a consortium, the overall offer of the temporary grouping would have inevitably had higher costs than the potential offer Mondialpol could have submitted if participating as a single entity, thus preventing the citizen/taxpayer to get the best value deal – in terms of quality/price ratio – available on the market.

Due to the way it was structured, Consip's call for tender, thus, reduces *prima facie* the best expected value of the contract simply by the fact of negating access to a particular offer that could have been submitted and evaluated by the tendering commission. It is significant to note that this advantage would have not been lost only in the event that Mondialpol had won the tender but also in the case it did not, since its access to the tender would have forced competing enterprises to become even more aggressive in their offering to the contracting authority in terms of costs and quality.

Beyond the issue of whether it would have been appropriate for SMEs to participate in the procurement under discussion, it is important to verify whether the expected costs from excluding the individual participation of such an enterprise exceed the expected advantages of such exclusion, taking into consideration the objectives set forth by the relevant national and European regulation.

Evidently, to justify the choice of such large-scale lots for the tender under discussion, Consip should have given as reason the possibility of deriving advantages from a set of other different strategical factors, which would have not materialized had the lots been so reduced so as to allow for Mondialpol's participation. As stated above, it must be however clear that these advantages could not result from some typical benefits of a larger level of centralization - such as the quality of the call for tender or the better litigation capacity of Consip - because these would have been available even in the alternative case of smaller lots yet still centralized under Consip.

Consip indeed identifies "demand risk" as one of the potential additional costs linked with a strategy of reducing the number of lots (and therefore its avoidance as one of the additional benefits of larger lots). According to Consip's in its case defense, "lots that are "excessively reduced in value" risk facing a demand that is too dependent on the occurrence of a single order (if a large order is submitted, the lot is sold out, vice-versa the contracted supplier does not work or does so only on small contracts that are not well remunerated)".

It should be first of all noted that the "potential" lot at issue, the one of such value that the small firm Mondialpol could have participated, amounts to a total value that is far from insignificant (3 million euro) and, thus, it would have been "higher" than the values of those tenders that the single contracting authorities would have resorted to in the absence of Consip's centralized procurement (as one can verify by looking also at the autonomous tenders in the sector of surveillance services published by ANAC).

That said, this criticism by Consip, on account of a so-called demand risk, reveals most of all Consip's inability (or unwillingness) to analyze the demand generated in the specific region and then to adapt to it by tailoring the size of the relevant (smaller) lots in such a way as to avoid and prevent the potential demand risk.

A similar argument could be made for the construction of those geographical lots for which demand would have exceeded the maximum amount of the lot itself because of the existence of some large administration. In this case, specific lots could have been conceived for such administrations, obviously anyway smaller than the one that was built and eventually annulled. Put it another way, the demand risk could be reduced to zero by Consip's (high indeed) established competence and its finely detailed knowledge of the dispersed nature of demand in the relevant territorial sector, at a much more granular level than the choice that was made of the lot size in the tender at issue.

Going back to the data submitted in Court by Consip, fully aware that this does not represent the only valid alternative scheme, there did exist the possibility of structuring the tender instead than with only one regional lot of almost 11 Mn euro, with a lot exclusively for the largest territorial purchaser A (correctly presenting the argument based on a demand risk), amounting to 4.2 mn a year and to which Mondialpol could not have gained access, another lot of 2.2 mn a year (again correctly presenting the argument based on a demand risk) exclusively for the second largest procurer B, in which Mondialpol could have instead participated and where the remaining 4.350 million, based on the size of lot 13, could have been divided in two or more lots to meet the aforementioned extremely “high number of minor orders”. In such a way Consip would have given Mondialpol (and other small and medium-size enterprises!) the true opportunity to compete and to reduce expected costs. This would have all been to the advantage of competition without modifying any of the overall dimensions mentioned by the Italian rationalization plan. The “single contracts” mentioned above for the 2 large contractors A and B would have benefited from the quality of Consip’s tender, inherent in its superior capacity of drafting the procurement specifications and of ensuring the optimal legal assistance at the stage of litigation, hence reducing transaction costs while shortening the publication phase of the tender and the timing and precision of the contract. This would have also freed up resources for the two local buyers A and B, which would otherwise have been tied up in drafting an individual tender on surveillance, and which could have instead dedicated time to achieving their own internal strategic objectives, taking full advantage of the centralization via Consip.

Besides, as an added advantage, it would have avoided the paradoxical outcome that saw only two groups of contractors participate in the tender for lot 13, which again confirms that a similar aggregation of demand, in the context of centralization, hinders free competition.

Yet Consip, in its defense, found further potential risks in a strategy that relies on a larger number of lots. It claims in fact that a growing number of lots could lend a hand to collusive bidding and non-competitive allocation, whereas a small number of lots, compared to the number of big players, would generate competition among the latter.

Such a conclusion seems quite paradoxical though; the market we are analysing of surveillance services does not comprise only large enterprises but rather it is known that “35% is controlled by multiple small and medium-size enterprises,” as reminded by Consip itself. The aforementioned rule of a number of lots lower than potential participants, known by many economists and suggested initially by the Italian Antitrust authority in its examination of Consip tenders⁶, is only applicable when the tender sees the exclusive participation of large companies, which, in the absence of competing small and medium-size enterprises, tend to form cartels, the more so the larger the number of lots.⁷ Yet, if smaller lots were to be designed, the market would be mainly made up of small and medium-size enterprises and in that case there would be, as is well known among economists, the added advantage (besides a larger participation) of making a cartel formation impossible because the access of competitive small and medium-size enterprises to the bidding would force larger companies to reduce their prices accordingly, thereby also reducing the profits deriving from a monopolistic cartel formation, an outcome which would clearly be to the advantage of citizens and taxpayers.

We can further add that the risk of cartel formation would also be significantly reduced by the participation of more *outsiders* that can bid individually (and not in groupings with potential members of cartels). While such principle holds general relevance, it is particularly significant when

⁶<http://www.agcm.it/component/domino/download/C12563290035806C/5E274DA065844B61C1256CD1003E2E20.html?a=AS251.pdf>

⁷ See Bos and Harrington, <http://assets.wharton.upenn.edu/~harrij/pdf/rje10.pdf>.

dealing with the surveillance sector at hand, since it should not be forgotten that in Italy the latter still operates under the residual impact of an oligopolistic market due to the limited number of prefectural licenses and their territorial principle.

A last point needs a separate and detailed empirical confirmation.

Consip stresses that there is a risk that successful bidders for small contracts on small lots may view them as not very profitable due to little demand. In this case, a large company could decide not to bid, leaving only small enterprises to fill the demand. Even if this were to be the case, in the economic literature available on the matter, we can find empirical evidence that this would still entail significant benefits for the contracting authority.

In Japan, for instance, it was investigated what happens when small tenders are reserved for small businesses, excluding *de jure* larger enterprises.⁸ A similar operation led to a greater participation of large enterprises in large tenders, reducing costs for large work orders by about 1%. With regard to small tenders where more small businesses than large ones participate, the overall number of bidders increased: each large enterprise not participating would open the space for 1.56 additional small businesses, thus also leading to a reduction in cost of about 0.22%. This program attracted small businesses and increased their participation by about 40%, creating an overall advantage in the cost incurred by the contracting authorities. A similar end-effect could result *de facto* from Consip's transition toward tenders that are better differentiated on the basis of size, whereby larger enterprises would participate in large procurement tenders, making space for more small business alone or almost alone to participate in small tenders (for small lots). If we take into consideration the impact on its market, Consip's lot subdivision does not, therefore, appear reasonable.

Unless the economies of scale generated through aggregation are so significant that they can make up for the loss of all the indisputable advantages, as proven above, of a fully competitive environment, which could be created by allowing individual access to Mondialpol and other potential small and medium-size enterprises by means of a large number of centralized lots procured by Consip.

It is then inevitable that we address one final issue, often raised in the discussions about the topic, the one of how to find a fair balance between the principle of maximum participation and the need to promote the aggregation of demand through mechanisms of centralized purchasing by the Public Administration, so as to ensure the appropriate level of services, the consistency of the offer and the reduction of unit prices relative to the economies of scale generated by the aggregation process.

However, it is not at all clear to what extent such fair balance should be pursued: maybe to the point that only one enterprise can participate, for the sole purpose of maximizing the economies of scale? or maybe with a tender with just one large-sized lot for the whole country instead of 13 regional lots? Or with the minimum number of lots such that only two enterprises are able to participate, as in the case of lot 13? Solving such dilemma may prove not only difficult but also misplaced.

Indeed, it is certain that the best strategy cannot *always* be one that leads to the so-called "economies of scale" via large-scale lots. Indeed, it is common knowledge that such condition, even when available, is not in itself enough to generate expenditure savings for the contracting authority: where economies of scale do in fact materialize in the absence of competition (either because of existing cartels or because of a lack of competing businesses), any advantage that may arise from

⁸ Small business set-asides in procurement auctions: An empirical analysis, Jun Nakabayashi.

the size of the tender does not actually benefit the contracting authority or the taxpayer, but rather the supplier, who is indeed the one to gain the most profit.

As far as it concerns for this debate, it is even more crucial to observe that there are sectors where the economies of scale are weak or non-existent and thus where the number of the lots does not impact in any way on costs and unit prices; in these instances, other factors dominate the debate, such as a larger participation via smaller lots.

The service sector, in opposition to manufacturing, has often been deemed free of significant economies of scale. When it comes to services, in order to expand production, there is always the need for more personnel and rarely can the same person perform better when the size of the service grows. As it pertains to surveillance specifically, in order to control a given territorial space and ensure the desired degree of safety, one person will always be needed, no matter if the tender is of a certain size or 10 times that size, with additional territorial areas to cover. Indeed, in the case of the specific annulled tender, when demanding a certain turnover amount following the award of a lot in the call for tender, Consip specifically requested that a “bidder who intends to participate in the tender of more than one lot meet the participation requirements ... for at least an amount equal to the sum of what is required for the bidding on a single lot”. This clearly demonstrates that even the centralized contracting authority does not believe that by being contracted for several lots, an enterprise may become more profitable on single lots, hence alleviating the execution risk.

It is useful to point out that Consip in its tender rules of the annulled tender spells out the reasons for not splitting the contract in functional lots: “the key aspect of the category of products with regard to the present tender is the integrated supply of services for the purposes of implementing an *anti-crime security plan* designed by the supplier, which provides the appropriate amount of human, technological and physical defences in a coordinated fashion. The subdivision of the above mentioned services in functional lots would have compromised the *primary objective of containing the crime risk*, which, as stated, requires an integrated supply of services, with no fragmentation.” (emphasis added).

Notwithstanding considerations as to whether it is appropriate to split the tender in functional lots, it should be emphasized that, in any case, the alleged reason given for such a decision cannot justify the size of the individual lots (or the territorial area they cover), since when the single contractor operates at a larger distance from the physical location where the service is required (in the case of a larger-sized lot) one does not see how there can be any real advantage in terms of crime risk containment. On the contrary, the fact that licenses for security services are granted on a provincial basis, matching those issued by provincial prefectures, seems to identify in the provincial dimension (smaller than the regional ones chosen by Consip) the best territorial area for services aimed primarily at containing the crime risk.

If economies of scale are, thus, not common in the sector under discussion, the decision to exclude from the tender enterprises such as Mondialpol, preventing them from bidding individually, appears to be based on totally unreasonable motivations. Thereby, the centralized public procurement authority is indeed prevented, because of its own choice, from taking advantage of a potentially better quality/price ratio, justifiably the primary aim of a rationalization strategy for the public sector, at least within a category of services such as surveillance. A centralization strategy based on a larger number of lots would have guaranteed better such results.

4. Conclusion

After losing its first-degree defense, Consip and the Italian Ministry of the Economy appealed the decision to the Council of State (“Consiglio di Stato”. Here too, they succumbed. It is worth quoting some passages that underly the decision that confirmed the annulment of the Consip tender.

Consip accordingly has no right to “freely and arbitrarily choose how to subdivide the tender... any choice of the public administration, even the lot subdivision of a public contract, can be challenged in an administrative court ... aggregation and centralization of purchases should be closely monitored to avoid an excessive concentration of purchasing power and collusion, and to preserve transparency and the possibility of access to the market by SMEs”.

Once this is said, it remains to be seen how to avoid that such strategic issues are solved “too late”, at the pathological level, in a court, impairing the potential for a procurement cycle to function properly without delays and transaction costs due to avoidable litigation.

In the first degree sentencing one can find a revolutionary suggestion by the TAR Italian Court, likely to affect Central Purchasing Bodies in the peninsula for years to come and maximize the chances that SMEs are duly taken into account in CPB’s tenders: it is necessary to evaluate if the subdivision of the tender has “allowed to define the *optimal territorial context*, that is, the context in which competition ... can thrive better with the ensuing benefit, beside the one for the market... for the public procurer and thus for citizens, both in terms of quality of service ... and prices”. (emphasis added).

One might hope that in the future such considerations will be taken into account ahead of time so as to avoid judicial dissent. One must stress that the solution does not necessarily preclude an optimal organization of public procurement at the national level to give up on centralization; rather, it requires centralization to be focused on these dimensions that are naturally advantageous, unlike aggregation. The Directives do help in many ways, including their focus, for example, on the introduction of the criterion “personal and proximity services”. As mentioned by Luis Tavares while reading this article, “I believe that there has been a systematic mistake in public procurement denying a general consensus of Management Sciences, assuming that bigger is always better! Obviously if we need some home rehabilitation we do not consider as a qualified firm a big construction company!”.

One final point. The economic analysis offered in this paper focuses exclusively on the short term advantages, in the European market of public procurement, resulting from a centralizing strategy that can provide more access for SMEs, avoiding those unreasonable restrictions that limit competition, like aggregation of purchases where there is no need of it. However, the economic literature has shown that most of the benefit resulting from a more open participation of micro and small firms comes mainly in the long run, both in the local and international private markets where the SME will successfully gain from the experience it has gained in the implementation of public contracts, and also in the public market where the contracting authority will benefit from the higher quality and ever increasing number of bids submitted also by the grown SMEs. These advantages, not mentioned in our paper, make the case for SME-oriented strategies in public procurement (like avoiding unnecessary aggregation and bundling) even more relevant.