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Temporary Joint Ventures in Public Procurement: Execution Shares, Subcontracting, and Bid Congruity

The systematic framework established by the Council of State (Judgment no. 6702/2026) across qualification in public services, self-employed work, and bid sustainability review

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Current Legal Framework as of 1 September 2026: The Council of State (*Consiglio di Stato*) consolidates the governing principles applicable to Temporary Joint Ventures of Undertakings (*Raggruppamenti Temporanei di Imprese*, RTI) in public service and supply contracts under Legislative Decree no. 36/2023, coordinating qualification and execution shares, independent contracts for work or services, subjective corporate modifications, and the sub-proceeding for abnormally low tenders.

ABSTRACT

This in-depth analysis examines the legal regime governing **Temporary Joint Ventures of Undertakings (RTI)** in public service and supply procurement in light of the principles codified in Legislative Decree no. 36 of 31 March 2023 (the Italian Public Contracts Code) and the landmark ruling of the Council of State (*Consiglio di Stato*), Judgment no. 6702 of 19 August 2026. Adopting a systematic perspective, the study investigates the overcoming of mandatory symmetrical correspondence between qualification quotas, internal participation shares, and contract execution percentages in service and supply tenders pursuant to Article 68, highlighting the public-law safeguard fulfilled by **joint and several liability** under Article 68(9). It further examines the criteria demarcating **public subcontracting under Article 119** from independent contracts for work or services (*contratti d'opera*) concluded with self-employed professionals under Article 2222 of the Italian Civil Code, the substantive conditions for subjective modifications and the strict duty to state reasons resting on the contracting authority when refusing the withdrawal or expulsion of a member firm under Article 97, the directory and non-peremptory nature of deadlines in **abnormally low tender verification under Article 110** guided by the principle of the result, and the balance between economic bid secrecy and effective judicial protection during court-ordered technical reassessments.

Key Takeaways

- **Absence of symmetrical correspondence in services:** Article 68 of Legislative Decree no. 36/2023 does not require symmetrical correspondence between qualification quotas and execution shares in public service and supply contracts; instead, the default rule of cumulative fulfilment of requirements by the joint venture as a whole applies.
- **Joint and several liability as a public safeguard:** The statutory regime of joint and several liability under Article 68(9) neutralises default risks and fully protects the contracting authority.
- **Self-employed work versus subcontracting:** Services rendered by self-employed practitioners lacking an autonomous business organisation constitute an independent contract for work (*contratto d'opera*) under Article 2222 of the Italian Civil Code rather than subcontracting under Article 119.
- **Abnormally low tender review and principle of the result:** Procedural time limits for assessing bid congruity under Article 110 are directory rather than peremptory, while cost explanations submitted during review may never alter the substantive technical tender.

RESEARCH DOSSIER

JURISDICTION
Italy (Civil Law)

SUBJECT AREA
Administrative Law & Public Procurement

SCOPE
Italian Civil Law System

Legal Principle / Editorial Headnote

GUIDING PRINCIPLE • COUNCIL OF STATE JUDGMENT NO. 6702/2026

In public service and supply contracts, the statutory framework of Legislative Decree no. 36 of 2023 does not mandate symmetrical correspondence between the qualification requirements held by each individual member of a temporary joint venture of undertakings and their respective participation or execution shares in the contractual performance; rather, the default rule of cumulative possession of requirements by the joint venture as an integrated whole governs, reinforced by the statutory guarantee of joint and several liability binding all associated members pursuant to Article 68(9); specialised tasks entrusted to independent practitioners devoid of an autonomous business organisation constitute contracts for work or services (contratti d'opera) under Article 2222 of the Italian Civil Code integrated into the contractor's enterprise and do not

amount to public subcontracting under Article 119; procedural time limits within the sub-proceeding for the verification of abnormally low tenders are directory in nature and governed by the principle of the result, without prejudice to the strict prohibition against introducing substantive modifications to the technical tender through economic cost justifications.

01. INTRODUCTION: THE SYSTEMATIC EVOLUTION OF TEMPORARY JOINT VENTURES OF UNDERTAKINGS

The institution of **temporary joint ventures of undertakings** (*raggruppamenti temporanei di imprese*, RTI) stands among the foundational pillars of European Union and Italian public procurement law, designed to **broaden competitive participation** and enable **small and medium-sized enterprises (SMEs)** to bid for **public contracts of substantial economic value** and technological complexity through structured cooperation and the pooling of resources. Within the architecture of **Legislative Decree no. 36 of 31 March 2023** (the Italian Public Contracts Code), the rules governing temporary aggregations of economic operators have been comprehensively reshaped in the light of the overarching principles of the **administrative result** (Article 1), **mutual trust** (Article 2), and **effective market access** (Article 3).

Recent administrative case law has addressed **interpretive questions of primary systemic importance** concerning how temporary joint ventures operate in public service and supply tenders. In its **Judgment of 19 August 2026, no. 6702, the Council of State (*Consiglio di Stato*)**[1] laid down definitive coordinates on **temporary joint ventures and execution shares**, clarifying the scope of Article 68 of Legislative Decree no. 36/2023 and conclusively overcoming the **residual formalistic approaches** inherited from the former Legislative Decree no. 50/2016.

A close reading of the judgment reveals how the legal structure of temporary joint ventures is inextricably intertwined with other core institutions of public contracts law: the functional demarcation between **public subcontracting under Article 119** and **self-employed work or professional services under Article 2222 of the Italian Civil Code**, the conditions governing the replacement or withdrawal of a participating member firm (*mandante*) pursuant to Article 97 of Legislative Decree no. 36/2023, the procedural sequence of abnormally low tender verification under Article 110, and the preservation of equal treatment among tenderers in managing procurement stages following court-ordered readmissions.

The objective of this in-depth study is to provide a systematic and operational reconstruction of the rules currently in force, examining the interplay between the **organisational autonomy of economic operators**, the **supervisory prerogatives of the contracting authority**, and the protection of the public interest in **timely contract awards** and **high-quality performance of contractual obligations**.

Temporary aggregation among economic operators represents not merely an instrument for strengthening financial standing and technical-organisational capacity, but also a **privileged channel for promoting effective competition** across the European single market. The underlying rationale of the EU procurement directives (starting from Directive 2014/24/EU), transposed into Article 68 of Legislative Decree no. 36/2023, seeks to prevent public contracts from remaining the exclusive preserve of large, vertically integrated corporate groups, thereby facilitating participation by smaller undertakings through the **flexible aggregation of special selection requirements**.

Striking a sustainable balance between pro-competitive openness and the public interest in reliable contract execution nevertheless sparked prolonged scholarly and judicial debate, centred on whether each member of a joint venture must hold a qualification share strictly proportionate to the portion of contractual performance materially assumed in the tender. The enactment of the **2023 Public Contracts Code** marked a decisive turning point, redefining the relationship between participation rules and execution rules and mandating an interpretation oriented toward administrative efficiency and the economic substance of the tender.

02. ARTICLE 68 OF LEGISLATIVE DECREE NO. 36/2023 AND THE OVERCOMING OF SYMMETRICAL CORRESPONDENCE

2.1 — Cumulative Possession of Qualification Requirements in Services and Supplies

One of the most historically contentious issues in Italian public procurement law concerns the relationship between the qualification requirements held by individual undertakings participating in a temporary joint venture and the shares of contractual performance that each member undertakes to execute. Under the former 2016 Code, administrative case law had long been divided between decisions postulating a rigid **triadic symmetry** (linking qualification quotas, **internal consortium participation shares**, and actual execution shares) and those upholding the **internal organisational autonomy of the joint venture**.

In its landmark decision of **25 March 2022, no. 2, the Plenary Assembly (*Adunanza Plenaria*) of the Council of State (*Consiglio di Stato*)**[2] established that public service and supply contracts are not governed by any general principle of mandatory symmetrical correspondence between qualification quotas and execution shares, unless the tender specifications (*lex specialis*) expressly prescribe a specific proportion on pain of exclusion. With the entry into force of **Legislative Decree no. 36/2023**, that principle achieved **definitive statutory codification**.

In Judgment no. 6702/2026, the Council of State (*Consiglio di Stato*) emphasises that Article 68(11) of Legislative Decree no. 36/2023 confines the rule of mandatory correspondence exclusively to **public works contracts** by cross-referring to Annex II.12 (Article 30), whereas **public service and supply contracts** are governed by the default rule of **cumulative possession of selection requirements** by the joint venture considered as a unitary whole. Because the **provision of services** is ontologically unitary and indivisible in nature, technical and financial capacity requirements need only be satisfied by the grouping in the aggregate, subject solely to verifying that the member materially performing a regulated activity holds any **special subjective statutory authorisations or licences** required by law for that specific task.

2.2 — Joint and Several Liability under Article 68(9) as a Safeguard of Reliability

The public-law rationale justifying organisational flexibility in the relationship between **temporary joint ventures and execution shares** lies in the statutory regime of **joint and several liability** governed by Article 68(9) of Legislative Decree no. 36/2023. All economic operators associated within the temporary joint venture are jointly and severally liable toward the contracting authority for the entire contractual performance put out to tender.

Italy's highest administrative court underscores that joint and several liability operates as a robust **patrimonial and operational safeguard**, neutralising any risk of circumventing the principle of contractor reliability. The contracting authority faces no exposure to default by a minority member lacking a specific fractional qualification, since both the lead firm (*mandataria*) and all participating member firms (*mandanti*) answer without distinction for the **due and complete performance of the entire work or service**. Consequently, imposing unstated restrictions not grounded in the call for tenders would infringe the **principle of the exhaustive statutory nature of exclusion grounds under Article 10 of the Code**.

The divergence in legal treatment between public works contracts on the one hand and public service and supply contracts on the other reflects the distinct **ontological structure of the underlying contractual obligations**. In public works, classifying construction activities by value tiers and **SOA qualification categories** (general and specialised works) presupposes a formal certification system designed to safeguard the physical execution of each discrete technical building operation. Conversely, in service and supply procurement, the public contract typically exhibits a **functionally unitary and non-severable character**, wherein the contributions of the individual associated undertakings merge into an integrated outcome enjoyed as a single whole by the public administration.

As authoritative administrative case law has consistently observed, demanding that each member firm (*mandante*) in a service tender hold a percentage of specific turnover or prior analogous contracts mathematically identical to the share of the service it intends to perform would erect an **unjustified barrier to market entry**, contrary to Article 3 of the Code and Article 57 of Directive 2014/24/EU. The sole insurmountable threshold remains possession of professional suitability requirements or statutory licences (enrolment in professional registers, official rolls, or health authorisations) whenever the specific activity is reserved by law to duly licensed entities.

Viewed from this perspective, the duty to state **execution shares in the tender** pursuant to Article 68(2) fulfils a purely organisational and transparency-oriented function vis-à-vis the contracting authority, enabling the administration to know how tasks will be internally allocated during the performance stage, without allowing quantitative discrepancies vis-à-vis internal consortium shares to trigger exclusion of the joint venture from the tendering procedure.

03. THE DEMARCATION BETWEEN SUBCONTRACTING UNDER ARTICLE 119 AND CONTRACTS FOR WORK UNDER ARTICLE 2222 OF THE CIVIL CODE

3.1 — Self-Employed Work and the Absence of an Autonomous Business Organisation

One of the most sensitive practical questions in performing public contracts awarded to temporary joint ventures concerns the proper legal classification of **external collaborations** engaged by tenderers. In the dispute decided by Judgment no. 6702/2026, the runner-up tenderer challenged the admissibility of the successful bidder's tender, arguing that entrusting specific specialised support activities (namely, telephone-based legal and psychological assistance services) to independent practitioners and self-employed consultants amounted to **disguised or unauthorised subcontracting** prohibited under Article 119 of Legislative Decree no. 36/2023.

The Council of State (*Consiglio di Stato*) firmly rejected that ground of appeal, formulating a rigorous criterion to demarcate public subcontracting from independent professional contracts for work or services. The decisive distinguishing factor lies in the presence or absence of an **autonomous business organisation**: where the service provider is a **self-employed worker** or an individual professional lacking a **structured business enterprise** and salaried staff of their own, the engagement qualifies as an **independent contract for work or services (*contratto d'opera*)**

under Article 2222 of the Italian Civil Code or a **contract for intellectual professional services** under Article 2230 of the Civil Code — civil-law institutions ontologically distinct from public procurement subcontracting.

> *Services rendered to the contractor by a self-employed practitioner devoid of an entrepreneurial organisation constitute an independent contract for work under Article 2222 of the Italian Civil Code rather than public subcontracting, requiring neither prior administrative authorisation nor inclusion within statutory outsourcing thresholds.*

3.2 — Functional Integration into the Contractor's Productive Organisation

The judgment clarifies that an independent practitioner operates by integrating functionally into the **productive and managerial organisation of the successful contractor**, which retains **unitary direction over the service**, supplies premises and IT equipment, and remains directly accountable to the public administration for the final contractual outcome. Public subcontracting, by contrast, presupposes transferring an autonomous portion of the public contract to a third-party undertaking equipped with its own capital assets, workforce, and entrepreneurial structure.

This clarification carries fundamental systemic significance across all complex, skill-intensive public service contracts (healthcare, social welfare services, engineering consultancy, information technology, and vocational training), confirming that engaging specialised professionals under self-employment contracts does not breach statutory subcontracting limits, but rather represents a normal mode of contract performance protected by freedom of enterprise.

Accurate legal classification of the contractual relationships linking the main contractor to external collaborators is critical to preventing challenges alleging breach of subcontracting caps. Article 119 of Legislative Decree no. 36/2023 defines subcontracting as the contract whereby the successful tenderer entrusts to third parties the performance of part of the services or works forming the subject matter of the public contract. The legal concept of subcontracting therefore presupposes that the third-party performer is an economic operator organised as an enterprise, deploying its own equipment and personnel and bearing entrepreneurial risk over that specific operational segment.

Conversely, whenever the awardee engages individual practitioners or self-employed workers lacking an independent entrepreneurial structure, the relationship falls squarely within the civil-law model of a **manual or intellectual contract for work or services (*contratto d'opera*) under Articles 2222 and 2230 of the Italian Civil Code**. In such cases, the collaborator merely contributes personal, specialised expertise within the framework and under the coordination of the principal contractor, who remains sole holder of the business organisation and **solely liable for the overall productive output**.

Judgment no. 6702/2026 persuasively explains that equating such individual professional engagements with public subcontracting would paralyse the entire complex-services sector, imposing prior-authorisation and notification burdens incompatible with the ordinary **flexibility of professional work**. Accordingly, engaging self-employed practitioners does not require the **prior authorisation of the contracting authority** mandated for subcontracting, without prejudice to the strict duty to account transparently for the corresponding remuneration costs during abnormally low tender verification.

04. SUBJECTIVE MODIFICATIONS OF THE JOINT VENTURE AND WITHDRAWAL OF A MEMBER FIRM UNDER ARTICLE 97

4.1 — Conditions for Member Withdrawal and the Strict Duty to State Reasons for Refusal

The principle of **subjective stability among participants in public procurement procedures** coexists with the need to permit **changes to the subjective composition of temporary joint ventures** whenever one member incurs an exclusion ground or loses a general or special qualification requirement. Codifying the principles settled by **Plenary Assembly (*Adunanza Plenaria*) Judgment no. 2/2020**[3], Article 97 of Legislative Decree no. 36/2023 allows a temporary joint venture to replace or remove a member lacking requirements without suffering automatic exclusion from the tender.

In its recent Judgment of 19 August 2026, no. 6693[4], the Council of State (*Consiglio di Stato*) established a rule of **far-reaching operational impact for contracting authorities**: any refusal by a contracting authority to grant an application for the removal or replacement of a member firm (*mandante*) — affected, for instance, by social-security contribution irregularities attested in its DURC certificate or by pending tax liabilities — must be **supported by specific and rigorous reasoning**. The administration must concretely demonstrate that the excluded member's contribution was essential, non-fungible, and decisive in shaping the technical tender, and that its departure would entail a substantive alteration incapable of being absorbed by the remaining members of the joint venture. A refusal resting on conclusory or formulaic assertions is vitiated by misuse of administrative discretion for failure to state adequate reasons and requires reopening the preliminary investigation.

4.2 — Framework Agreements and Sizing of SOA Qualification Requirements under Fallback Clauses

The outer boundaries of subjective modification within a temporary joint venture emerge sharply in **multi-operator framework agreement procedures**. In its Judgment of 19 August 2026, no. 6688[5], the Council of State (*Consiglio di Stato*) held that where the tender specifications (*lex specialis*) include a **fallback or step-in clause** allowing call-off contracts up to 100% of the total tender value to be awarded to a single economic operator (should contract execution with the other ranked operators fail to materialise), SOA qualification requirements must cover the entire value of the lot.

In that scenario, any qualification shortfall affecting a member firm (*mandante*), even if minimal in percentage terms, cannot be cured through a *downward reorganisation* of the joint venture under Article 97 of the Code where the grouping failed to declare the deficiency promptly and did not carry out the member's withdrawal prior to the close of the admission stage, thereby confirming the mandatory character of special qualification requirements set by the tender rules to safeguard full contract execution.

The legal regime of Article 97 of Legislative Decree no. 36/2023 strikes a calibrated balance between the **principle of subjective immutability of tenderers** and the **principles of preservation of legal acts** and effective competition. The provision permits modifying the composition of a temporary joint venture upon the supervening loss or absence of general eligibility requirements under Articles 94 and 95 or special selection requirements, allowing the non-compliant member to be removed and its performance share reallocated among the remaining undertakings or transferred to a qualified replacement operator.

As recent case law underscores (notably Council of State Judgment no. 6693/2026), the contracting authority's power to assess a proposed subjective modification does not confer unfettered exclusionary discretion. A contracting authority seeking to reject a request to remove a member firm bears the burden of **setting out specific objective grounds**

showing why the **member's exit** would alter the substance of the original technical tender. Absent rigorous proof regarding the **non-fungibility of the skills** or operational assets contributed by the departing member, the refusal is unlawful for defective fact-finding and breach of the pro-participation principle (*favor partecipationis*).

Conversely, in tenders structured as framework agreements (Council of State Judgment no. 6688/2026), the admissibility of a downward subjective modification encounters an impassable limit in call-for-tender clauses requiring **full qualification across the entire lot value**: if the joint venture fails to give timely notice of a member firm's insufficient qualification, a belated reorganisation cannot be deployed to circumvent an original qualification deficit, thereby safeguarding procedural transparency and **equal treatment among tenderers (*par condicio*)**.

05. THE SUB-PROCEEDING FOR VERIFYING ABNORMALLY LOW TENDERS IN JOINT VENTURES

5.1 — Directory Nature of the Time Limit under Article 110 and the Principle of the Result

Verifying the congruity and sustainability of suspected abnormally low tenders constitutes one of the most delicate and complex stages of public procurement, particularly where the tender is submitted by a **multi-party consortium or joint venture**. Article 110(2) of Legislative Decree no. 36/2023 provides that the contracting authority shall request in writing **explanations concerning the proposed price or costs**, granting a deadline not exceeding fifteen days.

In Judgment no. 6702/2026, the Council of State (*Consiglio di Stato*) clarifies that the time limit for completing abnormally low tender verification is **purely directory and acceleratory in nature**. In the absence of an express statutory sanction of forfeiture or time-bar (*decadenza*) enacted by the legislature, exceeding that timeframe or temporarily suspending the sub-proceeding does not invalidate the subsequent contract award. That interpretation is dictated by the **principle of the result under Article 1**, which requires the administration to reach contract award by ascertaining in substance the overall seriousness and reliability of the tender without sacrificing the public interest to purely formalistic procedural deadlines.

5.2 — Cost Justifications versus Tender Immutability and Social Clauses

A critical juncture in the interplay between **temporary joint ventures and execution shares** concerns the boundary between impermissible modification of the technical tender and legitimate itemisation of cost components during abnormally low tender review. Judgment no. 6702/2026 reaffirms that representations submitted during the **adversarial cost-verification dialogue** serve the sole purpose of **explaining internal enterprise cost allocation**, and may never be construed as a covert reallocation of execution shares or performance responsibilities between the lead firm (*mandataria*) and participating member firms (*mandanti*).

At the same time, in labour-intensive service contracts, abnormally low tender review intersects directly with compliance with **workforce absorption social clauses** and the admissibility of discounts on labour costs. As confirmed by the Council of State (*Consiglio di Stato*) in Judgments no. 6615 of 14 August 2026[6] and no. 5732 of 18 June 2026[7], as well as by the Regional Administrative Court (*TAR*) for Lazio, Rome, in Judgment no. 1560 of 28 January 2026[8], economic sustainability must be verified concretely: labour costs under Article 41(14) of Legislative Decree no. 36/2023 may be discounted below benchmark tables only where the economic operator demonstrates genuine, documented corporate organisational efficiency, without infringing mandatory minimum statutory and collective-bargaining wage levels.

The sub-proceeding for abnormally low tender verification governed by Article 110 of Legislative Decree no. 36/2023 is structured not as a punitive or inquisitorial fault-finding exercise, but as a **comprehensive assessment of financial sustainability and technical feasibility** of the submitted bid. The contracting authority's primary task is to ascertain whether the tender, viewed holistically, is reliable and ensures proper contract performance while preserving an **adequate profit margin** for the economic operator.

Within that framework, the directory nature of procedural time limits reflects the logic of the **principle of the result under Article 1**: the public interest in awarding the contract to the most economically advantageous and sustainable tender prevails over rigid adherence to **intra-procedural deadlines** devoid of express statutory forfeiture effect. Consequently, the contracting authority may lawfully grant reasonable extensions or suspend the inquiry in order to obtain thorough cost clarifications without thereby tainting the lawfulness of the final contract award.

A further aspect of central importance concerns coordinating cost justifications with social clauses aimed at **safeguarding employment continuity** (Article 57 of the Code). As clarified by the Council of State in Judgment no. 6615/2026, an economic operator bidding as a temporary joint venture must demonstrate both the concrete feasibility of absorbing outgoing staff and full consistency of hourly labour rates with **minimum wage levels established by applicable sector-wide collective bargaining agreements**, ruling out any discount that erodes non-derogable workers' rights or **occupational health and safety standards**.

06. SECRECY OF TENDERS AND RE-EXERCISE OF PROCUREMENT POWER FOLLOWING JUDICIAL ANNULMENT

6.1 — Balancing Economic Secrecy and Court-Ordered Technical Reassessment

A procedural and administrative issue of exceptional importance addressed in Judgment no. 6702/2026 concerns the **principle of secrecy of economic tenders** and the strict **chronological separation between evaluating technical tenders and opening financial envelopes**. On the facts of the case, a previously excluded tenderer had been readmitted pursuant to an interim order of the Regional Administrative Court (*TAR*) after the evaluation committee had already opened and disclosed the financial bids of the competing tenderers; the committee then proceeded to evaluate the readmitted competitor's technical tender.

The successful tenderer objected that the entire procedure was afflicted by radical nullity (voidness *ab initio*) for breach of the prohibition against commingling technical and financial evaluations. The Council of State (*Consiglio di Stato*) dismissed the objection, holding that the principle of economic bid secrecy **is not absolute in character**, and must instead be balanced against the constitutional and European Union principles of **effective judicial protection**, good administration, and procedural economy. Where awareness of financial figures is the unavoidable consequence of complying with a **judicial decision**, reopening the technical evaluation phase does not vitiate the regularity of the tender, absent concrete proof that the evaluation committee was actually biased or improperly influenced.

6.2 — The Single-Stage Model of Immediately Effective Contract Award under Article 17

The entire dynamic governing the re-exercise of administrative power fits within the redesigned model of **contract award established by Article 17 of Legislative Decree no. 36/2023**. Consistent with the canons of systematic interpretation of tender specifications (*lex specialis*) (Council of State, Judgment of 14 May 2026, no. 4744)[9] and with the distinction between selection criteria and execution conditions governed by the principle of the result (Council of State, Judgment of 23 January 2026, no. 729)[10], any renewed administrative evaluation must safeguard equal treatment. As highlighted by the Council of State in its Judgment of 18 March 2026, no. 2529[11] and by the Regional

Administrative Court (*TAR*) for Lazio, Rome, in its Judgment of 28 December 2023, no. 7283[12], the 2023 Code abandons the former two-stage mechanism built upon a provisional, non-effective award followed by effectiveness conditional upon post-award verification checks.

Article 17(5) of Legislative Decree no. 36/2023 institutes a **unitary, single-stage proceeding**: verification that the highest-ranked bidder holds all required qualifications precedes adoption of the final contract award decision, which immediately produces full legal effect authorising execution of the public contract. Following judicial annulment and administrative re-exercise of procurement power, the new contract award decision comprehensively reshapes the underlying substantive legal positions, rendering pending challenges against the superseded prior measure moot or procedurally inadmissible for supervening lack of interest.

Managing procedural dynamics in the wake of interim judicial relief or annulment judgments issued by administrative courts raises delicate questions of coordination between the **principle of tender secrecy** and the **principle of effective judicial protection**. The rule separating technical evaluation from financial bid opening is designed to safeguard the **impartiality of the evaluation committee**, ensuring that qualitative scoring of technical proposals is not skewed by **prior knowledge of the price discounts** offered by competing bidders.

Where, however, the evaluation committee is required to repeat or supplement technical assessments in compliance with a court ruling after the financial envelopes have already been unsealed, bid secrecy must necessarily yield to permit the **re-exercise of administrative power** and restore the legal sphere of the unlawfully excluded competitor. Pursuant to the principles of administrative continuity and preservation of public acts, the committee's conduct enjoys a presumption of lawfulness and impartiality, placing upon any party challenging the resulting contract award the burden of pleading and proving concrete indicators of misuse of power or manifest evaluative irrationality.

This approach aligns seamlessly with the architecture of Article 17 of Legislative Decree no. 36/2023 (Council of State Judgment no. 2529/2026), which structures contract award as an **immediately and directly effective administrative act**, overcoming the delays of the former two-stage sequence and ensuring **swift conclusion of the public contract** in the public interest.

07. CONCLUSIONS AND OPERATIONAL GUIDELINES FOR ECONOMIC OPERATORS AND CONTRACTING AUTHORITIES

7.1 — Summary of Guiding Principles and Contractual Safeguards for Economic Operators

Participating in public tenders as a temporary grouping demands careful **advance planning on both the contractual and organisational planes**. Economic operators forming a temporary joint venture must draft **clear and transparent internal consortium agreements** capable of defining in detail the allocation of operational tasks and performance liabilities in full compliance with the tender specifications (*lex specialis*).

Specifically, in order to forestall bid challenges or exclusionary measures, associated undertakings should safeguard the following **core operational areas**:

The body of administrative case law consolidated throughout 2026 offers valuable strategic guidance for undertakings competing for public contracts in aggregated form. When structuring its bid, a temporary joint venture should take particular care to:

- **Clearly formalise execution shares:** Although public service contracts require no mathematical correspondence with qualification quotas, specifying the portions of the service assigned to each member remains a mandatory transparency safeguard under Article 68(2).
- **Distinguish independent contracts for work from subcontracts:** When engaging self-employed practitioners or intellectual service providers, document the absence of a complex business organisation so as to classify the engagement properly under Article 2222 of the Civil Code and avert allegations of unauthorised subcontracting.
- **Ensure timeliness in subjective modifications:** Should an exclusion ground or loss of qualification arise in respect of a member firm (*mandante*), promptly initiate formal dialogue with the contracting authority pursuant to Article 97 to effect the member's withdrawal before admission checks close.
- **Prepare analytical economic cost justifications:** During abnormally low tender verification under Article 110, submit a granular breakdown of cost items accurately reflecting the enterprise's real organisational structure without altering the original technical commitment.

7.2 — Best Practices for Contracting Authorities in Drafting Tender Specifications (*Lex Specialis*)

For contracting authorities, the guidance of the Council of State (*Consiglio di Stato*) calls for drafting procurement documents with care and strict adherence to the principles of **proportionality and non-aggravation of administrative procedures**. Contracting authorities must refrain from inserting into the tender specifications (*lex specialis*) **atypical exclusion clauses** purporting to impose mathematical symmetry in service tenders contrary to Article 68 of the Code, relying instead on joint and several liability as the primary public-law guarantee.

In conducting abnormally low tender verifications and assessing applications to withdraw or replace a member firm, both the Sole Project Manager (RUP) and evaluation committees are further required to set out **thorough, empirically grounded statements of reasons** capable of withstanding judicial review of legality before the administrative courts. Mindful implementation of the principles of the **administrative result and mutual trust** makes it possible to reconcile **rigorous selection standards with maximum market openness** to multi-party competition.

Doctrinal and judicial developments concerning **temporary joint ventures and execution shares** delineate a mature legal framework oriented toward the economic substance of contractual relationships. For economic operators competing as multi-member groupings, the organisational flexibility recognised by Article 68 goes hand in hand with precise duties of **good-faith cooperation, self-responsibility, and informational transparency** both when assembling the tender and when participating in adversarial bid-congruity review.

For contracting authorities, a clear grasp of the structural differences between public works contracts and public service contracts makes it possible to draft calls for tenders and tender rules free of redundant formalism and fully aligned with the principle of the result. Proper application of the procedural cure / clarification mechanism (*soccorso istruttorio*) under Article 101 (Council of State Judgment no. 1438/2026[13]) and qualifying subcontracting (*subappalto necessario*) under Article 119 (Council of State Judgment no. 3053/2026[14]) represents the soundest safeguard for preventing

procurement litigation, ensuring rapid contract awards, and delivering public works and services of the highest qualitative standard.

References & Authorities Cited

Statutory Provisions

- Italian Civil Code (Royal Decree no. 262 of 16 March 1942) • Articles 1362, 1363 (Interpretation of contracts), 2222 (Contract for work or services — *contratto d'opera*), 2230 (Provision of intellectual professional services)

- Legislative Decree no. 36 of 31 March 2023 (Italian Public Contracts Code) • Articles 1 (Principle of the result), 2 (Principle of mutual trust), 3 (Principle of market access), 10 (Exhaustive nature of exclusion grounds), 17 (Stages of contract award procedures), 41 (Design levels and labour cost benchmarks), 68 (Temporary joint ventures and ordinary consortia of economic operators), 97 (Exclusion grounds and subjective modifications in joint ventures), 100 (Special selection requirements), 101 (Procedural cure / clarification mechanism — *soccorso istruttorio*), 110 (Abnormally low tenders), 113 (Contract execution requirements), 119 (Subcontracting)

- Italian Code of Administrative Judicial Procedure (Legislative Decree no. 104 of 2 July 2010) • Articles 34 (Judgments on the merits), 35 (Procedural rulings), 120 (Special rules governing public procurement litigation)

Case Law Cited

1. **Council of State (*Consiglio di Stato*), Judgment of 19 August 2026, no. 6702** — In public service and supply contracts there is no mandatory symmetrical correspondence between qualification quotas and execution shares; tasks performed by self-employed practitioners constitute an independent contract for work (*contratto d'opera*) under Article 2222 of the Civil Code rather than subcontracting, and time limits in abnormally low tender verification are directory in nature.

2. **Council of State (*Consiglio di Stato*), Plenary Assembly (*Adunanza Plenaria*), Judgment of 25 March 2022, no. 2** — Absence of any mandatory symmetrical correspondence among qualification quotas, participation shares, and execution shares in public service and supply procurement.

3. **Council of State (*Consiglio di Stato*), Plenary Assembly (*Adunanza Plenaria*), Judgment of 27 May 2020, no. 2** — General principles governing subjective modifications of temporary joint ventures during tendering procedures and contract execution upon supervening loss of eligibility requirements.

4. **Council of State (*Consiglio di Stato*), Judgment of 19 August 2026, no. 6693** — Refusal by a contracting authority to permit the withdrawal or replacement of a member firm (*mandante*) in a temporary joint venture pursuant to Article 97 of Legislative Decree no. 36/2023 requires rigorous reasoning demonstrating a substantive alteration of the tender.

5. **Council of State (*Consiglio di Stato*), Judgment of 19 August 2026, no. 6688** — In multi-operator framework agreements containing a fallback clause allowing full performance to be entrusted to a single awardee, SOA qualification must cover 100% of the total tender base value.

6. **Council of State (*Consiglio di Stato*), Judgment of 14 August 2026, no. 6615** — Verification of abnormally low tenders in labour-intensive public services, workforce absorption social clauses, and holistic assessment of economic sustainability.

7. **Council of State (*Consiglio di Stato*), Judgment of 18 June 2026, no. 5732** — Rules governing computation of percentage discounts on labour costs pursuant to Article 41(14) of Legislative Decree no. 36/2023 and application across the overall tender base amount.

8. **Regional Administrative Court (*TAR*) for Lazio, Rome, Judgment of 28 January 2026, no. 1560** — Scope and limits of judicial review over a contracting authority's abnormally low tender evaluation, confined to cases of manifest unreasonableness or factual error.

9. **Council of State (*Consiglio di Stato*), Judgment of 14 May 2026, no. 4744** — Canons of systematic interpretation of tender specifications (*lex specialis*) pursuant to Articles 1362 and 1363 of the Civil Code and limits on award-enhancing reliance on third-party capacities (*avvalimento premiale*).

10. **Council of State (*Consiglio di Stato*), Judgment of 23 January 2026, no. 729** — The principle of the result cannot derogate from mandatory selection requirements for tender participation, preserving the distinction between legal eligibility and contract execution conditions.

11. **Council of State (*Consiglio di Stato*), Judgment of 18 March 2026, no. 2529** — The single-stage contract award proceeding under Article 17 of Legislative Decree no. 36/2023 and the procedural effects of administrative re-exercise of procurement power.

12. **Regional Administrative Court (*TAR*) for Lazio, Rome, Judgment of 28 December 2023, no. 7283** — Principles governing contractual and non-contractual liability in the performance of public works contracts.

13. **Council of State (*Consiglio di Stato*), Judgment of 12 February 2026, no. 1438** — Application of supplementary procedural cure (*soccorso istruttorio*) under Article 101 to remedy omitted filing of the European Single Procurement Document (ESPD / DGUE) in temporary joint ventures.

14. **Council of State (*Consiglio di Stato*), Judgment of 1 April 2026, no. 3053** — Subcontracting declarations in the ESPD / DGUE and operation of qualifying subcontracting (*subappalto necessario*) to safeguard the pro-participation principle (*favor partecipationis*) in temporary joint ventures. ↑

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