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Optional Subcontracting and Curative Assistance in the Public Contracts Code

The Council of State rules out tender disqualification for excess subcontracting shares declared in the ESPD and reaffirms the privileged evidentiary force of continuous social security clearance certificates

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Reading time 16 min

Current Legal Framework as of 3 November 2026: The joint examination of Articles 119 and 101 of Legislative Decree no. 36/2023 in light of Council of State (*Consiglio di Stato*) Judgment no. 6561/2026 consolidates the principle that internal subcontracting restrictions entail purely private-law contractual nullity and confirms the strictly binding evidentiary effect of a continuous social security clearance certificate (DURC) free of disqualifying annotations.

ABSTRACT

This contribution examines the legal regime governing **optional subcontracting and procedural cure mechanisms** (*soccorso istruttorio*) under the new Italian Public Contracts Code (Legislative Decree no. 36/2023), focusing on the landmark ruling of the Council of State (*Consiglio di Stato*), Judgment no. 6561 of 2026. Declaring an optional, non-qualifying subcontracting share in the European Single Procurement Document (ESPD) that exceeds the quantitative thresholds set by the tender rules gives rise solely to **internal contractual nullity** affecting the downstream private agreement rather than a ground for tender exclusion, and remains fully rectifiable through curative procedural assistance pursuant to Article 101 of Legislative Decree no. 36/2023. The study further contrasts this regime with **qualifying subcontracting** and analyses the binding evidentiary force of an uninterrupted **regular social security clearance certificate (DURC)**, which bars the contracting authority from conducting incidental assessments into individual delayed contribution payments.

Key Takeaways

- **Contractual nature of nullity:** the sanction of nullity (voidness *ab initio*) laid down in Article 119(1) of Legislative Decree no. 36/2023 applies exclusively to downstream private subcontracting agreements and does not entail the exclusion of a fully qualified tenderer from the procurement procedure.
- **Admissibility of curative procedural assistance:** an erroneous percentage declared in the ESPD for optional subcontracting does not affect essential elements of the tender and may be rectified under the procedural cure mechanism (*soccorso istruttorio*) pursuant to Article 101(1)(b).
- **Distinction from qualifying subcontracting:** unlike necessary (qualifying) subcontracting, optional subcontracting does not compensate for a lack of SOA qualification attestations and does not distort equal treatment among tenderers (*par condicio competitorum*).
- **Evidentiary force of continuous DURC certificates:** an uninterrupted sequence of regular social security clearance certificates binds the contracting authority and precludes statutory forfeiture or exclusion based on delayed contribution remittances.

CASE DOSSIER

JURISDICTION
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SUBJECT AREA
Administrative Law & Public Procurement

LEADING DECISION
Council of State (Consiglio di Stato), Judgment of 21 May 2026, no. 6561 — Declaring in the ESPD an optional subcontracting sha

Legal Principle / Editorial Headnote

In public procurement procedures governed by Legislative Decree no. 36 of 2023, the nullity (voidness ab initio) prescribed by Article 119(1) for breaching quantitative limits on subcontracting concerns exclusively downstream private-law agreements between the main contractor and the subcontractor, and does not operate as an exclusionary sanction disqualifying a tenderer who independently holds full qualification to perform the works; a declaration of optional subcontracting neither pertains to admission requirements nor constitutes an essential component of the technical or financial tender, with the consequence that indicating an excess share in the European Single Procurement Document (ESPD) is amenable to the curative procedural cure / clarification mechanism (soccorso istruttorio) under Article 101(1)(b). Likewise, the uninterrupted possession of regular social security clearance certificates (DURC) binds both the contracting authority and the administrative court, precluding the exclusion of an economic operator on grounds of alleged social security irregularities inferred merely from late contribution payments.

01. LEGAL FRAMEWORK OF OPTIONAL SUBCONTRACTING AND THE PROCEDURAL CURE MECHANISM

The evolution of public procurement law reflects a permanent dialectic between safeguarding entrepreneurial freedom of organisation and addressing the administration's need to verify the actual technical suitability of the entity performing the contractual obligation. Within the architecture established by Legislative Decree no. 36 of 31 March 2023, the operational coordination between **optional subcontracting and the procedural cure / clarification mechanism** (*soccorso istruttorio*) acquires central doctrinal significance, serving as the point of equilibrium between upholding equal treatment among tenderers (*par condicio competitorum*) and safeguarding the result-oriented principle

enshrined in Article 1 of the same Code. Administrative case law has progressively refined its interpretive categories by separating the initial verification of subjective admission requirements from the logically subsequent regulation of the contract execution phase. Against this backdrop, the nomophylactic ruling of the Council of State (*Consiglio di Stato*) marks a sharp departure from earlier formalistic interpretations, clarifying the exact boundaries within which a declaration submitted during the tender process may trigger a bidder's exclusion or, conversely, enable curative intervention by the contracting authority.

1.1 — The Scope of Article 119 of the Code and Quantitative Limits on Subcontracting

Article 119 of the Public Contracts Code comprehensively regulates the institution of subcontracting, incorporating the principles developed by the Court of Justice of the European Union (CJEU) aimed at preventing general and abstract percentage caps on outsourcing to third parties. **The statutory framework in force** strictly prohibits the assignment of the public contract as well as entrusting third parties with the entire performance of the contractual works or services, further stipulating that the predominant share of works falling within the main work category cannot be subcontracted out. This restriction is designed to prevent the successful tenderer from turning into a mere contractual intermediary devoid of genuine operational presence on the construction site. **Delimiting the subcontractable share** thus answers a twofold need: preserving the personal reliance (*intuitu personae*) placed in the awarded enterprise and ensuring transparency across the supply chain against unlawful infiltration or market distortions.

In administrative practice, quantifying the predominance threshold frequently sparks interpretive disputes over the literal meaning of the statutory prohibition. **The tender rules** routinely reproduce the wording of Article 119 while leaving to supplementary clarifications the numerical specification of the maximum permissible ceiling, quantified as strictly less than fifty per cent of the value of the works. Where a bidder states in the European Single Procurement Document (ESPD) its intention to outsource to third parties a fraction equal to exactly half of the main category, an apparent friction arises with the rule reserving majority execution to the main contractor. **Administrative litigation** typically erupts precisely when competing operators argue for the automatic disqualification of that participant, invoking an alleged breach of procedural self-restraint by the contracting authority and the mandatory nature of the participation conditions set forth in the tender specifications.

Higher administrative courts have nonetheless observed that neither primary legislation nor the governing tender rules (*lex specialis*) attach instantaneous statutory forfeiture or exclusion from the selection procedure to the mere numerical exceeding of that percentage cap. **A formalistic approach** inferring the invalidity of the entire tender from the percentage declared at the bidding stage overlooks the true legal nature of subcontracting, which pertains to the executive organisation of the contract rather than to the static verification of whether the bidder possesses the economic and technical capacities required by the call for tenders. **The contracting authority** cannot classify a discrepancy relevant solely to future contractual performance as a defect in admission requirements; instead, it must assess the overall compliance of the bid and confirm that the economic operator holds the necessary qualifications in its own right to perform the public contract.

1.2 — How the Distinction Between Predominant Direct Execution and Subcontractable Shares Operates

Properly understanding the selection mechanism requires clarifying how the structural distinction between direct performance of works and shares of performance amenable to subcontracting operates in practice. **The overarching principle** inferable from the legal system mandates that the successful tenderer retain primary management of the worksite, preventing the contribution of subcontractors from becoming hegemonic over the awarded contractor's own

organisational structure. Yet the concept of predominance does not constitute a threshold condition for the admissibility of the tender application; rather, it acts as a regulatory parameter shaping the subsequent contractual relationship. The Council of State (*Consiglio di Stato*)[1] confirmed that a bidder's declaration indicating a fifty per cent share of works within the main category does not amount to a substantive breach of participation requirements, since no automatic exclusionary mechanism is prescribed either by statute or by the tender specifications.

On a practical and procedural plane, **counsel for the economic operator** must draw a clear line between the binding normative force of the call for tenders and mere clarifications issued by the sole project manager. Where the *lex specialis* merely cross-references statutory limits without prescribing forfeiture on pain of exclusion, an administrative clarification specifying the exact numerical threshold of subcontractable works performs a purely illustrative function explaining the contracting authority's interpretive stance. **Any quantitative excess** stated in the ESPD does not denote an invalid contractual offer, but rather represents a statement of organisational intent devoid of immediate harmful effect, whose downward adjustment may lawfully take place prior to final contract award without inflicting any prejudice (*vulnus*) upon competing bidders.

Within this institutional framework, **the burden of proof in litigation** resting upon a challenger contesting admission proves particularly stringent, requiring demonstration of an actual breach of qualification rules or an incurable alteration of the technical and financial tender. Whenever an economic operator independently holds sufficient SOA qualification attestations to execute the entire public contract on its own, indicating an optional subcontracting share cannot be converted into an unwritten ground for exclusion. **The public procurement system** prioritises administrative continuity and substantive competition, rejecting paralysing interpretations that would sacrifice the most economically advantageous tender on the altar of minor percentage deviations readily amenable to lawful realignment.

02. CONTRACTUAL NULLITY OF THE AGREEMENT AND ACTIVATION OF CURATIVE PROCEDURAL ASSISTANCE

2.1 — The Contractual Nature of Nullity and the Explanatory Report to Legislative Decree no. 36/2023

Accurately classifying the defect affecting a subcontracting declaration that deviates from maximum percentage ceilings requires examining the deliberate systematic choice made by the 2023 legislature. **Article 119(1)** expressly provides that breaching the prohibition against entrusting third parties with the entire performance of contractual obligations or the predominant share of the main category results in the nullity (voidness *ab initio*) of the corresponding agreement. As clarified by the Explanatory Report drafted by the Special Commission of the Council of State (*Consiglio di Stato*), this provision was specifically enacted to remedy a theoretical imprecision contained in the former Article 105 of Legislative Decree no. 50/2016, confining nullity strictly to the assignment contract and the private-law arrangements entered into between the main contractor and the subcontractor. **The contractual defect** thus leaves the call for tenders, the application for participation, and the main public contract entirely unscathed, operating solely on the private-law plane between the contracting parties.

The operative effect of the restrictive clause naturally unfolds during the execution phase of the administrative relationship, which is governed by the prior authorisation regime set out in Article 119(4). **At the contract performance stage**, should the successful tenderer request authorisation to subcontract a share exceeding statutory ceilings, the contracting authority must refuse consent for the excess portion, with the consequence that the main contractor remains legally bound to perform the residual works directly. **Any excess private stipulation** is wholly devoid of legal effect vis-à-vis the public administration, yet such ineffectiveness does not reach back into the selection

procedure as a ground for exclusion. Consequently, the contracting authority lacks any power to disqualify a bidder whose tender is independently and fully performable through the corporate resources directly held by that enterprise.

> The sanction of nullity laid down in Article 119 of the Code strikes solely the downstream private-law bond between the main contractor and the subcontractor, ruling out any exclusionary repercussions on the tender procedure and allowing full recourse to the procedural cure mechanism to realign the bidding declaration with permissible thresholds.

From a procedural standpoint, the declaration entered in the ESPD does not partake of the nature of an essential element of the technical or financial proposal, in keeping with the settled principles governing the procedural cure mechanism and the financial tender. **An essential element of the tender** is identifiable solely in those structural components that define the performance characteristics of the works or the configuration of the financial consideration, upon which competitive comparison among bidders rests. **The internal allocation** of work percentages to be delegated to third parties, within the boundaries permitted by law, neither alters the overall value of the bid nor affects the score awardable by the evaluation committee, constituting a mere organisational option open to rectification without any infringement of administrative transparency.

2.2 — Necessary Subcontracting and the Prohibition on Subsequent Modification of the Tender

The protective scope of the procedural cure / clarification mechanism (*soccorso istruttorio*) encounters a sharp conceptual boundary when contrasted with the distinct institution of qualifying (or necessary) subcontracting, as highlighted in the scholarly analyses devoted to the procedural cure mechanism in necessary subcontracting and the limits of procedural cure assistance and necessary subcontracting. Unlike optional subcontracting, where the bidder already possesses in its own right all qualification certificates required to perform the entire contract, necessary subcontracting serves the exceptional purpose of compensating for an economic operator's subjective lack of qualification in severable categories subject to mandatory qualification. The Council of State (*Consiglio di Stato*)[2] reiterated that where an enterprise lacks the qualification requirement prescribed by the *lex specialis* and has expressly denied in its ESPD any intention to subcontract the necessary share, that omitted or negative declaration cannot be remedied through the procedural cure mechanism under Article 101 of Legislative Decree no. 36/2023.

In such a specific scenario, permitting retroactive regularisation would directly contravene the principle of bidder self-responsibility and distort equal treatment among competitors. As demonstrated in the study examining negative subcontracting declarations and the procedural cure mechanism, an omitted or contrary expression of intent cannot be downgraded to a mere clerical slip or drafting oversight. **Integrative procedural cure assistance** cannot be turned into an entitlement to create *ex novo* participation requirements or expressions of contractual intent that were absent upon expiry of the submission deadline, as doing so would allow an economic operator to acquire standing to bid belatedly and circumvent the certainty of competitive selection rules.

Conversely, in the case of optional subcontracting, the bidder's declaration does not perform any integrative function regarding participation requirements. **An economic operator already qualified** for the entire tender classification possesses full technical suitability from the very outset of the procedure, meaning that reducing the declared subcontracting share from fifty per cent to forty-nine per cent amounts to a purely clarifying or curative rectification of a redundant statement. **Litigation counsel** representing the successful tenderer must therefore emphasise this substantive

distinction in order to defeat opposing attempts to equate the adjustment of an executive share with an impermissible post-deadline modification of participation requirements.

2.3 — Scope of Application and Departure from Restrictive Precedents

The systematic reconstruction endorsed by the Council of State marks a deliberate departure from the stricter judicial rulings developed under the former statutory regime. Specifically, when the Council of State (*Consiglio di Stato*)[3] upheld the exclusion of a bidder that had declared a fifty per cent subcontracting share against a maximum ceiling of 49.99%, it grounded its decision on the express self-binding clause contained in the letter of invitation issued under Article 105 of Legislative Decree no. 50/2016. In that specific dispute, the contracting authority had explicitly framed the exclusion clause as an insurmountable procedural safeguard, strictly binding the administration to a literal enforcement of the *lex specialis*.

The present legal framework exhibits a fundamentally different scope of application, as that restrictive line of authority cannot operate in the absence of an express and unequivocal exclusionary sanction. **Where the tender rules** do not prescribe forfeiture for exceeding the optional subcontracting cap, but merely refer to the statutory limits laid down in Article 119 of the new Code, the administration cannot introduce exclusionary clauses by way of interpretation. **The principle of exhaustiveness (strict legality)** of exclusion grounds, codified in Article 10 of Legislative Decree no. 36/2023, bars decision-makers from converting a protective private-law nullity or an executive ceiling into an automatic ground for disqualification from the competitive procedure.

From the perspective of litigation strategy, **defence counsel** must plead the unlawfulness of any exclusion order predicated upon breaching the optional subcontracting ceiling where the call for tenders contains no express prohibition sanctioned by disqualification. **Activating curative procedural assistance** under Article 101(1)(b) constitutes a binding legal duty for the contracting authority, enabling the successful tenderer to rectify its quantitative declaration without altering the substantive content of its bid. In this manner, the legal order upholds the principle of broadest participation (*favor participationis*), preventing pretextual documentary formalism from frustrating the selection of the best tender for the public contracting authority.

03. SOCIAL SECURITY COMPLIANCE AND THE BINDING FORCE OF A CONTINUOUS DURC

3.1 — Serious Social Security Violations and Disqualifying Thresholds Under Annex II.10

Verifying the professional integrity and reliability of an economic operator represents an indispensable cornerstone in the award of public contracts, finding specific expression in the fulfilment of social security and welfare contribution obligations. **The Public Contracts Code** governs this matter in Articles 94(6) and 95(2), drawing a clear distinction between finally established violations, which trigger mandatory and automatic exclusion of the bidder, and non-finally established infringements, which are entrusted to the discretionary assessment of the contracting authority. Both provisions expressly cross-reference Annex II.10 to the Code, whose Articles 1 and 3 define the concept of a serious social security violation by anchoring it exclusively to breaches that legally bar the issuance of a Single Contribution Regularity Certificate (DURC) governed by the Ministerial Decree of 30 January 2015. **This statutory standardisation** pursues the objective of streamlining and harmonising checks conducted by contracting authorities, shielding procurement procedures from fragmented and uncertain assessments.

The Single Contribution Regularity Certificate (DURC) thus stands as a statutory instrument of public legal certainty whose evidentiary force binds both administrative action by the contracting authority and judicial review. The Council

of State (*Consiglio di Stato*)[1] held that the uninterrupted possession of regular DURC certificates across the entire relevant timeframe — running continuously from the launch of the call for tenders through bid submission up to contract award — rules out at the root the existence of any serious social security violation, preventing the contracting authority from substituting its own appraisal for the institutional determinations reserved to social security bodies. **An unbroken chain** of official certificates attesting to the enterprise's compliance conclusively satisfies the verification of general participation requirements.

The factual configuration under review differs markedly from cases of post-deadline regularisation addressed by settled case law on unpaid contribution debts existing upon expiry of the tender deadline. In those earlier disputes, the economic operator lacked valid social security coverage when the submission deadline expired and sought to cure its contribution debt retroactively by relying upon an invitation to regularise issued by the National Social Security Institute (INPS). **By contrast, in the dispute adjudicated** by the supreme administrative court, the enterprise continuously held valid four-month regular DURC certificates, without any refusal or formal finding of irregularity ever having been issued by the competent social security institutions. **The principle of continuity** in the possession of general participation requirements was therefore fully honoured, inasmuch as the bidder's social security standing never suffered any formal or substantive interruption.

3.2 — Remedies Available to the Economic Operator Against Allegations of Late Payment

In public procurement litigation, unsuccessful bidders frequently seek to undermine the validity of a competitor's social security certificate by pointing to material delays with which the successful tenderer remitted periodic contributions to the Construction Workers' Welfare Fund (*Cassa Edile*) or social security agencies. **The opposing argument** routinely assumes that a payment made past the monthly due date established by national collective bargaining agreements — even though it never prevented the issuance of a clean DURC — constitutes a substantive breach capable of justifying retroactive disqualification. **Such a contention** proves legally unfounded: the contracting authority is not vested with investigative powers to audit individual accounting and financial remittances made by bidders, and must confine its verification to the official records issued through the unified social security portal.

With respect to judicial remedies and procedural safeguards, **a competing bidder** wishing to challenge the truthfulness or lawfulness of a favourable DURC issued to the successful tenderer bears the burden of formally challenging that social security certificate before the competent ordinary civil court, or else submitting an express motion for incidental review before the administrative court. **The claimant's burden of proof** requires pleading specific legal defects vitiating the determination of the certifying agency, and cannot rest solely upon late remittances where such delay is not classified as disqualifying under the applicable sector-specific regulations. Absent a formal request for disapplication or incidental review, official certificates issued by social security bodies retain full and binding evidentiary force.

For counsel representing the successful tenderer, **litigation strategy** dictates raising a plea of inadmissibility against challenges grounded in alleged accounting anomalies unreflected in the DURC, asserting that both the contracting authority and the administrative court lack jurisdiction to audit social security collection management of their own motion. **The stability of contract awards** serves the overriding public interest in the swift execution of public works, which would be severely jeopardised if competing bidders were permitted to turn administrative judicial review into a parallel tax or social security audit, circumventing the formal legal certainty conferred by official certificates issued by the competent public bodies.

04. SUMMARY OF JUDICIAL FINDINGS AND OPERATIONAL IMPLICATIONS FOR PUBLIC PROCUREMENT LITIGATION

The ruling of the Council of State (*Consiglio di Stato*) establishes an essential point of equilibrium in the application of **optional subcontracting and the procedural cure / clarification mechanism** (*soccorso istruttorio*), dismantling automatic exclusionary traps that clash with the pro-competitive rationale of Legislative Decree no. 36 of 2023. From a defensive and procedural standpoint, clear and immediately actionable operational guidelines emerge for administrative law practitioners and corporate bidding departments alike.

First, declaring a subcontracting percentage above the statutory or tender ceiling does not expose an economic operator to the risk of statutory forfeiture (*decadenza*) or exclusion, provided that the participating enterprise independently holds full qualification to perform the works or services directly. Whenever the contracting authority initiates the curative procedural assistance sub-proceeding under Article 101(1)(b), the successful tenderer may validly scale back its subcontracting declaration within the permissible threshold, neutralising at the outset any challenges brought by runner-up competitors in the ranking.

Second, strictly confining the legal concept of a serious social security violation to breaches that bar the issuance of a DURC reinforces the legitimate expectations of enterprises holding uninterrupted regular clearance certificates. Remittances executed shortly before or slightly past monthly due dates do not justify any exclusionary order by the contracting authority, affording an insurmountable procedural shield against tactical challenges predicated upon minor accounting delays already absorbed within ordinary social security administration.

References & Authorities Cited

Statutory Provisions

- Legislative Decree no. 36 of 31 March 2023 — Public Contracts Code (Articles 94, 95, 101, 119, and Annex II.10).
- Legislative Decree no. 50 of 18 April 2016 — Former Public Contracts Code (Article 105).

Case Law Cited

1. **Council of State (*Consiglio di Stato*), Judgment of 21 May 2026, no. 6561** — Declaring in the ESPD an optional subcontracting share exceeding the tender ceilings does not trigger exclusion from the tender procedure, entailing instead mere partial contractual nullity of the future derivative subcontract, fully rectifiable through the procedural cure mechanism under Article 101 of Legislative Decree no. 36/2023; social security compliance is conclusively attested by a valid continuous DURC and precludes exclusion for cured accounting delays. Outcome: appeal upheld, first-instance judgment reversed, original petition dismissed. Para.: 14, 15, 17.

2. **Council of State (*Consiglio di Stato*), Judgment of 7 January 2026, no. 99** — Necessary (qualifying) subcontracting requires a timely declaration of recourse to qualified third-party subcontractors in the tender documents and is not amenable to curative procedural assistance where the bidder originally lacks the mandatory qualification. Outcome: appeal dismissed. Para.: 4.1, 4.3.

3. **Council of State (*Consiglio di Stato*), Judgment of 24 May 2024, no. 4659** — In procurement procedures governed by Legislative Decree no. 50/2016, a clause in the letter of invitation establishing an express self-binding quantitative cap on subcontracting (specifically 49.99%) precludes admission of a bidder who declared a 50% share in the ESPD, pursuant to a strict literal reading of the governing tender rules (*lex specialis*). Outcome: appeal dismissed. Para.: 10.1, 11.1.

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