



Newsletter - December 2017

**ENERSHIFT CALL FOR EPC TENDER IS CLOSING 18 DECEMBER 2017**

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**◆ CONCESSION OF SERVICES AND EPC CONTRACT: A LEGAL MODEL THAT WORKS**



*In-depth study by “Studio Legance Avvocati Associati”*  
The EnerSHIFT tender is the first national example of the use of an EPC contract for the energy refurbishment of public social housing.

In particular, the EnerSHIFT call for proposals is based on the model of the Service Concession as governed by the national Code of Public Contracts (Legislative Decree no. 50/2016): this model, in light of deep legal analyzes carried out for the purpose, revealed to be the most consistent to an EPC contract, intended as an instrument for the realization of energy efficiency as envisaged by the national Legislative Decree n.102/2014, which implements the European Directive n. 2012/27/UE.

Pursuant to art. 2 c. 1 lett. n) of the abovementioned legislative decree, the EPC contract is the "*contractual agreement between the beneficiary or whoever exercises the power of negotiation and the provider of an energy efficiency improvement measure, verified and monitored throughout the duration of the contract, where the investments (works, supplies or services) made are paid according to the level of energy efficiency improvement established by contract or other agreed energy performance criteria, such as financial savings*".

On the other side, the Service Concession is the contract for pecuniary interest by virtue of which one or more Contracting Authorities entrust one or more economic operators the provision and management of services, recognizing as a fee only the right to manage the services covered by the contract or this right accompanied by a price, with the assumption of the operational risk linked to the management of the services by the concession holder (Article 3, paragraph 1, letter vv, Legislative Decree no. 50/2016).

This provided, in light of the EPC definition mentioned above the Service Concession turns to be the most appropriate model for integrating the essential characteristics of this contract.

The Concession, in itself, differs from the Public Procurement of Services due to the fact that **the fee for providing the services consists solely in the right to functionally manage and exploit the service economically**. In this sense, the Service Concession **has a structure compatible with the assignment to the private partner of operational risk**, understood as the possibility of not being able to recover the investments made or the costs incurred for the realization of the intervention.

The attribution of this risk to the private partner complies also with the EPC institute since, as mentioned before, in this type of contract the fee for investments is made according to the level of improvement of the energy efficiency that the ESCo will be able to achieve.

In addition, unlike the Public Procurement, **the Concession of Services allows the Contracting Authority not to predetermine the services to be carried out**, thus making the awarding procedure more efficient and further reducing the burden and the risk for the Administration. In fact, according to the National Code of Public Contracts, Procurement Contracts imply the need for the Contracting Authority to define in advance the works to be based on the tender, this meaning the burden to prepare an energy efficiency project of high technical complexity. Furthermore, since this type of contract removes the need for

the contractor's payment to be subjected to the achievement of energy efficiency targets, it exposes the administration to the risk of not being able to recover the capital invested through the energy savings.

In the end, a further advantage provided by the Concession model is that **the investment, being in charge to the private party, does not weigh on the administration budget.** This is a key issue about public finance constraints: in fact, the investments made by assigning the operational risk to the private party can be accounted for off-balance sheet according to the terms and conditions established in the "Manual on Government deficit and debt" drawn up by EUROSTAT. This means that the cost of the energy intervention does not increase the public debt/deficit.

All these considerations led to tailor the EnerSHIFT call for tenders on the model of the Service Concession, **giving life to a project that is certainly innovative from a juridical point of view** and, at the same time, compliant with the complex and multi-level regulatory framework.

## Highlights



Coming soon The National Fund for Energy Efficiency



Energy efficiency and anti-seismic are more connected

## **PRESENTATION EVENTS OF THE ENERSHIFT CALL: NEWS FROM THE MAIN STAKEHOLDERS**

The innovative model for energy efficiency proposed by EnerSHIFT has been the protagonist during many events and conferences on energy efficiency at national and European level; occasions in which the EnerSHIFT EPC call for tender, which is to close in the coming days, has

been presented and promoted to the main stakeholders and operators of the sector.

In particular, after the Utility Week in Amsterdam (October 2017), EnerSHIFT was presented at the 2017 edition of “**Key Energy**” (the Energy and Sustainable Mobility Exhibition held in Rimini simultaneously with Ecomondo) in the context of the conference "Living Technologies: between efficient building and earthquake prevention" organized by ENEA in order to spread the use of innovative tools for building efficiency; then, EnerSHIFT participated to the international conference organized by ABI (**Italian Banking Association**) in collaboration with the European Commission, the Ministry of Development Economic, ENEA and the UN Environmental Finance Initiative dedicated to the theme of “**Financing energy efficiency**”.

Lastly, on 20<sup>th</sup> November the project was presented at the “**Genoa Smart Week**” fair, an international event organized by the Municipality of Genoa to promote a "vision" for the transformation of urban areas into smart cities. Here, EnerSHIFT was promoted as pilot action during the conference "BUSINESS MODELS & SOLUTIONS for the development of the Smart City", where the concrete application of innovative models for spreading large-scale "smart" urban transformation initiatives was discussed.

As general feedback from the participation of EnerSHIFT to these wide kind of events, it turned out that **the Liguria Region's experience on EPC contracts is effectively contributing to expanding the range of viable solutions by Public Administrations that want to implement large-scale energy redevelopment projects**, helping them to overcome critical issues and barriers that currently hinder the implementation of energy efficiency initiatives in the Italian public sphere.

Indeed, at national level the “hot” topic about the most suitable juridical models for the public assignment of EPC contracts (Concession, PPP or Public Procurement?) is still intensely ongoing.

Within this framework, the EnerSHIFT call for tender has emerged as one of the most interesting application cases where the definition of juridical-economic model providing the awarding of a public EPC contract in the public sector according to the latest laws (national Code of Public Contracts, EPEC guidelines...) guarantees, at the same time, the financial sustainability of the energy requalification project; this, mainly thanks to the efforts provided by the project partners to unlock and exploit private financing through innovative financial instruments

Lastly, the participation to these events was an interesting occasion to be informed about important **updates** coming from the main stakeholders at institutional level: among others, the new opportunities opened by the Italian national framework to create **synergies between Energy Efficiency and Anti-seismic interventions**, now being possible to access at joint funding instruments, the forthcoming publication of the updated version of the national “Guidelines for EPC contract in the public sector” to be soon released by ENEA and, breaking news, the activation within the end of 2017 of the long-awaited “**National Fund for Energy Efficiency**” by the Italian Ministry of Economic Development: this is expected to provide a guarantee fund for ESCOs which should play the role of a flywheel for the Italian Energy Efficiency market.

Visit EnerSHIFT website



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Autorizzo il trattamento dei miei dati personali ai sensi del Decreto Legislativo 30 giugno 2003, n. 196

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