



Training Seminar for First Level Controllers

Bari, 3 December 2019

PUBLIC PROCUREMENT

Davide Marcianò - Joint Secretariat / Managing Authority

Public Procurement...dangerous ways...

Public procurement rules aim at ensuring that the purchase of services, goods and works follows transparent procedures and that fair conditions of competition for suppliers are provided.

WHAT TO DO??

Public procurement law is a complex matter and many findings during financial controls in IPA CBC- financed programmes and projects are related to procurement errors.

Procurement in IPA...a complex legal framework

IPA CBC Programmes public procurement legal context is based not only on EU rules (and the *acquis communautaire*) and Member States rules, but also on the relevant rules and practice of the external aid of the European Union and non-UE States. A complex legal framework composed by EU rules, national rules (EU Members and non EU Countries), programme rules and soft law rules (i.e. guidelines).

- Financial regulation (1046/2018 «OMNIBUS»; ex 966/2012 abrogated)
- Delegated Regulation 1268/2012 (Rules of application of 966/2012)
- Directives (i.e. Directive 2014/24/EU)
- National Legislations (i.e. D. Lgs. 50/2016)
- Guidelines (i.e. PRAG, ANAC Guidelines, ect..)
- Tenders, Calls (*Lex Specialis*)



Which hierarchy???

Procurement in IPA...a complex legal framework

- Financial regulation (1046/2018 «OMNIBUS»; 966/2012 **repealed**)
- Delegated Regulation 1268/2012 (Rules of application of 966/2012)
- Directives (i.e. Directive 2014/24/EU)
- National Legislations (i.e. D. Lgs. 50/2016)
- Guidelines (i.e. PRAG, ANAC Guidelines, ect..)
- Tenders, Calls (*Lex Specialis* of each single call)

Procurement in IPA

A quick reminder on the territorial scope of the procurement rules...



These procurement rules apply in the whole Programme Area, both on the EU Member States and on the IPA II beneficiary / beneficiaries territory

Procurement in IPA...General Principles

Reg. UE 447/2014 (IPA Implementing Regulation)

Article 45

Procurement

1. For the award of **service, supply and work contracts**, by beneficiaries the procurement procedures shall follow the provisions of **Chapter 3 of Title IV of Part Two of Regulation (EU, Euratom) No 966/2012** and of **Chapter 3 of Title II of Part Two of Delegated Regulation (EU) No 1268/2012** which apply in the whole programme area, both on the Member State and on the IPA II beneficiary/ies' territory.
2. For the award of service, supply and work contracts by the managing authority under the specific budget allocation for technical assistance operations, the procurement procedures applied by the managing authority may either be those referred to in paragraph 1 or those of its national law.

General Principles on Procurement

Title V of Part One of Regulation (EU, Euratom) No 966/2012

Article 102

• §1. All public contracts financed in whole or in part by the budget shall respect the principles of **transparency, proportionality, equal treatment** and **non-discrimination**.

- ✓ publicity of proposed procurement contracts;
- ✓ design of technical specifications;
- ✓ choice of procurement procedure;
- ✓ qualification and selection of candidates and tenderers in award of contracts.



General Principles on Procurement

From its origins, one of the main objectives of the EU has been to create a common market that eliminates barriers to trade in goods and services between EU member states. Creating a common procurement market means removing any barriers to trade arising from the procurement context.



- ✓ **Competition;**
- ✓ **Equal treatment and non-discrimination;**
- ✓ **Transparency;**
- ✓ **Economy and Efficiency;**
- ✓ **Value for money;**
- ✓ **Probity or Integrity.**

For any purchase, the beneficiary shall make sure that these principles are applied and that this is documented, in proportion to the value of the purchase.

General Principles...Subjects

Who is obliged to apply these rules?...only the public bodies?...only the public bodies and the bodies governed by public law?....

In the Programme, public bodies, bodies governed by public law and non-profit private organisations are eligible. Public bodies and bodies governed by public law must apply the public procurement rules.

In receiving a public subsidy, private non-profit organisations are using public funding, therefore it is necessary that they apply an extra care.

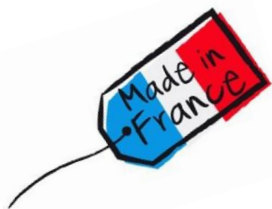


**All public procurement rules and principles set by the IPA
Public Procurement rules apply also to private partners.**

General Principles...the Rule of Origin

Article 8 of Regulation (EU) No 236/2014.

The rule of nationality states that *“the beneficiaries of grants comply with the eligibility rules for public procurement foreseen in the respective regulations for different cooperation programmes...”* – meaning that grants are made to final beneficiaries according to programme rules and territorial eligibility for applicants usually specified in the programme documents, such as calls for proposal at programme level.



General Principles...the Rule of Origin

Article 8 of Regulation (EU) No 236/2014.

All supplies purchased under a procurement contract, or in accordance with a grant contract, financed under the EU budget or the EDF shall originate from an eligible country as per the corresponding Instrument. However, according to the CIR, when the value of the supplies to be purchased is below € 100.000,00 per purchase, the supplies may originate from any country and not compulsorily from eligible countries (see art. 8 paragraph 4 of Regulation (EU) No 236/2014).

This derogation will practically mean that a relatively small share of purchases will apply the origin rule. In case when the rule is applied the tenderers are required to state the origin of their supplies in their tenders and provide certificates of origin as applicable with the delivery of supplies.

Exclusion criteria applicable for participation in procedures



Article 106 Reg. (UE) 966/2012 – Financial Regulation

Candidates, tenderers or applicants will be excluded from participation in procurement procedures if:

- a) they are **bankrupt** or being wound up, are having their affairs administered by the courts, have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- b) they, or persons having powers of representation, decision making or control over them, have been convicted of an **offence concerning their professional conduct** by a judgment of a competent authority of a Member State which has the force of *res judicata*; (i.e. against which no appeal is possible);
- c) they have been guilty of **grave professional misconduct** proven by any means which the Contracting Authority can justify, including by decisions of the European Investment Bank and international organisations;



Exclusion criteria applicable for participation in procedures



- d) they are **not in compliance with their obligations** relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the Contracting Authority or those of the country where the contract is to be performed;
- e) they, or persons having powers of representation, decision making or control over them, have been the subject of a judgment which has the force of res judicata for **fraud, corruption, involvement in a criminal organisation, money laundering or any other illegal activity**, where such an illegal activity is detrimental to the EU's financial interests;
- f) they are currently subject to an administrative penalty referred to in Article 109(1) of the Financial Regulation.

Candidates or tenderers shall certify that they are not in one of the situations listed above. However, the contracting authority may refrain from requiring such certification for very low value contracts.

Exclusion criteria applicable during the procedure



Article 107 Reg. (UE) 966/2012 – Financial Regulation

Contracts may not be awarded to candidates, applicants or tenderers who, during the procurement or grant award procedure:

- a) are subject to a **conflict of interest**; (cfr. Art. 42 D.Lgs. 50/2016)*
- b) are **guilty of misrepresentation** in supplying the information required by the Contracting Authority as a condition of participation in the contract procedure or fail to supply this information;*
- c) find themselves in one of the **exclusion situations** for this procurement or grant award procedure.*

Procurement Procedures

Whatever the rules are, steps are always the same:

- ✓ Definition of requirements
- ✓ Preparation of 'tender documentation'
- ✓ Publication of tender / invitations
- ✓ Evaluation
- ✓ Contracting
- ✓ Implementation



Procurement Procedures

Art. 127 Reg. UE 1268/2012 (Art. 104 Financial Regulation)

Contracts shall be awarded by call for tender, using the open, restricted or competitive negotiated procedure.

OPEN



All economic operators may submit a tender.

RESTRICTED



All economic operators may ask to participate but only candidates satisfying the selection criteria and invited simultaneously and in writing by the contracting authority may submit a tender.

COMPETITIVE
NEGOTIATED



The contracting authority shall consult tenderers of its choice who satisfy the selection criteria and negotiate the terms of the contract with one or more of them.

Thresholds and tendering procedures

FINANCIAL THRESHOLDS AND RELATED TENDERING PROCEDURES

Nature of Procurement	Financial thresholds and related Procedures (amount in EUR and excluding VAT)			
SERVICES	$\geq \text{€ } 300.000$ - International restricted tender procedure or - International open tender procedure	$< \text{€ } 300.000$ but $> \text{€ } 20.000$ Frameworks contracts or Competitive negotiated procedure		$\leq \text{€ } 20.000$ Single tender For service and supply contracts payments for amounts less than or equal to EUR 2.500 in respect of item of expenditure may consist simply in payment against invoices without prior acceptance of a tender
SUPPLIES	$\geq \text{€ } 300.000$ International open tender procedure	$< \text{€ } 300.000$ but $\geq \text{€ } 100.000$ Local open tender procedure	$< \text{€ } 100.000$ but $> \text{€ } 20.000$ Competitive negotiated procedure	
WORKS	$\geq \text{€ } 5.000.000$ - International open tender procedure or - International restricted tender procedure	$< \text{€ } 5.000.000$ but $\geq \text{€ } 300.000$ Local open tender procedure	$< \text{€ } 300.000$ but $> \text{€ } 20.000$ Competitive negotiated procedure	

Thresholds and tendering procedures

According to the table, the following principles are in force:

- ✓ the given thresholds are based on the maximum budget for the contract (including any co-financing);
- ✓ where the contracts are divided in more lots, the value of each lot is taken into account when calculating the overall thresholds;
- ✓ contracts must not be split artificially and to evade intentionally the procurement thresholds.



Open procedure

Applicable for supply, service and works contract. The procedure follows one step process where open invitation for submission of tenders is issued either on national and international level.

Depending on whether it is a local or international open procedure the contract notice is to be published in all appropriate media, in particular on the project beneficiary's website (in its role of Contracting authority) and in the national press of the country where the action is being carried out, in case of local and international open; in the international press, in case of international open. In addition to that all contract notices for contracts above 300.000 EUR must be published in the Official Journal of the European Union and on the EuropeAid web site.



Restricted procedure

The **restricted procedure** applies only in case of service and works contracts and is in a way similar to open procedure in supply and works. The procedure follows two step process. In the first step a public invitation for submission of express of interest is issued. In the second step the initial offers are reviewed and a short-list of candidates is formed. The short-listed candidates are invited to submit full proposal.



Competitive negotiated procedure

The **competitive negotiated procedure** applies to service, supply and works contracts. Under the competitive negotiated procedure, the Contracting authority invites candidates of its choice to submit tenders. At least 3 competent candidates should be invited. The procedure could be implemented using simplified tender documents in case of service and supply procedures. At the end of the procedure the Contracting Authority selects the tender which offers the best value for money in case of service tenders and the cheapest technically compliant offer in case of supplies or works tenders.



Single tender

The **orders on the basis of single tender** apply to service, supply and works contracts. Under the single tender procedure the Contracting authority in principle invites one candidate to submit offer. Offers are normally submitted using simplified tender documents. At the end of the procedure the Contracting Authority checks whether the single offer corresponds to the requirements in case of services or is technically compliant in case of supply and works tenders. The programme has opted for a rule where a minimum number of 3 candidates should be invited in the case of single tender procedure.



PRAG – Procurement Guidelines

A useful practical tool (but **not** a source of EU law with the consequence that are not binding rules) in management of public procurement are the so called **PRAG Procurement and Grants for European Union external actions – a Practical Guide**. Document providing guidance and formats for procurement procedures, including IPA pre-accession funds. The manual is based on the EU Financial Regulation and the Common Rules and Procedures for the Implementation of the Union's instruments for External Action (Council Regulation 236/2014).

https://ec.europa.eu/europeaid/funding/about-funding-and-procedures/procedures-and-practical-guide-prag_en



Affidamenti in house – Articoli 5 e 192 D.Lgs.50/2016

L'**affidamento in house** è la fattispecie in cui un soggetto tenuto all'obbligo di evidenza pubblica, derogando al principio generale dell'obbligo di indire una gara pubblica, provvede in proprio all'esecuzione delle prestazioni, affidando l'esecuzione dell'appalto ad altra entità giuridica senza gara.

Analoga fattispecie all'affidamento in house è l'**Accordo tra Pubbliche Amministrazioni** disciplinato dall'art. 15 della Legge 241/1990 e richiamato dall'art. 5 del Codice degli Appalti. La Delibera ANAC N. 567 del 31/05/2017 ne circoscrive i limiti:

- ✓ realizzazione di un interesse pubblico;
- ✓ reale divisione di compiti e responsabilità;
- ✓ ristoro delle spese sostenute, con esclusione di un vero e proprio corrispettivo;
- ✓ non interferenza con il perseguimento dei principali obiettivi delle norme comunitarie in tema di appalti pubblici

Affidamenti in house – Articoli 5 e 192 D.Lgs.50/2016

Requisiti

- a) l'amministrazione aggiudicatrice o l'ente aggiudicatore esercita sulla persona giuridica di cui trattasi un controllo analogo a quello esercitato sui propri servizi;
- b) oltre l'80 per cento delle attività della persona giuridica controllata è effettuata nello svolgimento dei compiti ad essa affidati dall'amministrazione aggiudicatrice controllante o da altre persone giuridiche controllate dall'amministrazione aggiudicatrice o da un ente aggiudicatore di cui trattasi;
- c) nella persona giuridica controllata non vi è alcuna partecipazione diretta di capitali privati, ad eccezione di forme di partecipazione di capitali privati le quali non comportano controllo o potere di veto previste dalla legislazione nazionale, in conformità dei trattati, che non esercitano un'influenza determinante sulla persona giuridica controllata.

Most common procurement errors

- ✓ Insufficient publication of procurement procedure (e.g. direct award without any prior notification, notification only on national or regional instead of EU-level);
- ✓ Imprecise definition of the subject-matter of the contract to be awarded
 - o Excessively short deadlines for the submission of tenders;
- ✓ Mix-up of selection and award criteria;
- ✓ Use of discriminatory or dissuasive selection or award criteria;



Most common procurement errors



- ✓ Unlawful splitting of contracts;
- ✓ Use of wrong procurement procedure;
- ✓ Unlawful application of exemption rules;
- ✓ Unlawful negotiation during award procedure;
- ✓ Modification of a tender or criteria during evaluation;
- ✓ Unlawful substantial contract modification or purchase of additional works, services or supplies.

The Check List on Procurement for FLC

CONTENTS

- ✓ General data - Tender Documentation
- ✓ Publication
- ✓ Adopted tender procedure
- ✓ Procedure for opening tenders
- ✓ tender evaluation procedure
- ✓ Award procedure
- ✓ Signature of the Contract
- ✓ Tender documentation storage
- ✓ Contract performance
- ✓ Negotiated procedure for additional works / services / supplies



The Check List on Procurement for FLC

Title of the procurement - if applicable			
Name of contractor - if applicable			
The value of the procured, works, goods or services is above the EU threshold.	yes		no
The type of tender - if applicable	works	services	supply
The procurement procedure chosen (open, restricted, negotiated, direct contracting, etc.)			
Total value of the tender (specified in the publication)			
Total value of the tender (specified in the contract)			
Date of the signature of the contract			
Date of project start			
Date specified in the contract of delivering of works/goods/services			
Total amount paid to the contractor			
The media chosen for publication and the date of publication - if applicable			

The Check List on Procurement for FLC

Criteria –Real cost [according to national and - if applicable - programme, regional and internal public procurement rules (cfr. article 45 of the IPA II Commission Implementing Regulation No. 447/2014; Chapter 3 of Title IV of Part Two of Regulation (EU, Euratom) No 966/2012 and of Chapter 3 of Title II of Part Two of Delegated Regulation (EU) No 1268/2012) and - above the EU threshold for public procurement - national implementations of Directives No. 2014/24/EU and 2014/25/EU as of 18 April 2016].	Accepted			Comments	Index No.
	Yes	Not (fully)	N.A.		
1. Tender Documentation verify that the tender documentation includes: a) criteria for selection and award	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
1. Tender Documentation verify that the tender documentation includes: b) an evaluation grid	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
1. Tender Documentation verify that the tender documentation includes: c) the possibility or not of variants	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		

The Check List on Procurement for FLC

1. Tender Documentation verify that the tender documentation includes: d) the possibility of subcontracting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
2. Publication a) as for the publication of the notice, were the obligations of the current legislation on information and advertising complied with?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
2. Publication b) Are the deadlines set for the submission of tenders in line with existing procurement rules?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
2. Publication c) Does the published notice contain the evaluation criteria to be used in the selection of bids submitted?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		

The Check List on Procurement for FLC

3. Adopted tender procedure a) Is the tendering procedure adopted in line with existing procurement rules? Explain the tender procedure used	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
3. Adopted tender procedure b) Have all the requirements of current public procurement law been met for using the procedure used?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
3. Adopted tender procedure c) In the event that an open procedure was not used, did the motivations for the chosen operation be specified?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		

The Check List on Procurement for FLC

4. Procedure for opening tenders a) Did all bids received have been registered and registered? Verify that the date and time of receipt of the bids are in line with the terms set out in the notice of invitation to tender	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
4. Procedure for opening tenders b) Was the opening procedure performed on the date specified in the notice?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
4. Procedure for opening tenders c) Is the opening procedure duly formalized in one or more minutes?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
4. Procedure for opening tenders d) Review the opening note on the following topics: - number of tenders submitted - retreats - non-compliance and reasoning - price quotation registration	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		

The Check List on Procurement for FLC

5. tender evaluation procedure a) Is there any documentation attesting the evaluation of the submitted offers?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
5. tender evaluation procedure b) Does Appointment and Evaluation Commission have been appointed and composed in accordance with existing procurement rules? Verify the composition of the Evaluation Commission (members, bodies represented, experience and roles)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
5. tender evaluation procedure c) Are the members of the Evaluation Commission independent with respect to the tender applicants?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
5. tender evaluation procedure d) Did the evaluation of the offers be formalized in specific minutes from which the scores were assigned?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
5. tender evaluation procedure e) Have all the submitted offers been evaluated?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
5. tender evaluation procedure f) Are the criteria used for the selection in accordance with the criteria set out in the notice of invitation to tender and the applicable public procurement rules? (specifications - get copies of the relevant section on specifications)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		

The Check List on Procurement for FLC

6. Award procedure a) Has the contracting authority approved the results of the evaluation phase with due regard?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
6. Award procedure b) Are the outcomes of the selection of tenders, including any exclusionary reasons, communicated in accordance with the terms of the current procurement law?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
6. Award procedure c) Are the results of the award procedure published in accordance with the provisions of current legislation on information and advertising?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
6. Award procedure d) Have claims been filed? If so, examine the content of the single complaint and the answer given by the contracting authority	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

The Check List on Procurement for FLC

7. Signature of the Contract a) Verify the presence of a legal binding document between the contracting Authority and the contractor	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
7. Signature of the Contract b) Is the content of the contract consistent with the provisions contained in the notice/tender notice?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
7. Signature of the Contract c) Is the contract concluded in accordance with the terms of the law and after the controls required by the relevant rules?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
8. Tender documentation storage a) Is the documentation relating to the tendering procedure properly stored up by the contracting authority?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

The Check List on Procurement for FLC

9. Contract performance a) When the contract was executed, the amount paid to the contractor was equal or less than the amount specified in the contract?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
9. Contract performance b) Has the competent Authority carried out the relevant conformity/test checks?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
9. Contract performance c) Did the competent authority and/or the contractor introduce changes to the contract (e.g. changes to the quantities / physical objects / services specified in the contract)? If so, fill in the following "Modifications" tab and check the variation discipline	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
9. Contract performance d) Did the contractor comply with the contractual obligations? If not, did the competent authority activate the terms of the contract on penalties?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

The Check List on Procurement for FLC

10. Negotiated procedure for additional works / services / supplies (if any) a) additional works / services / supplies have been made necessary by unforeseeable circumstances?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
10. Negotiated procedure for additional works / services / supplies (if any) b) Was the motivation for such unforeseeable documented circumstances?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
10. Negotiated procedure for additional works / services / supplies (if any) c) If the justification is convincing, such unforeseeable circumstances are the result of omissions or negligence on the part of the contracting authority?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

The Check List on Procurement for FLC

<p>10. Negotiated procedure for additional works / services / supplies (if any)</p> <p>d) The aggregate value of contracts awarded for additional works / services / supplies exceeds 50% of the value of the main contract?</p> <p>If so, fill in the following data:</p> <ul style="list-style-type: none">▪ titles of the additional contracts;▪ date of the additional contracts;▪ total amount specified in the additional contract;▪ date of delivery of works/supplies/services specified in the additional contracts;▪ duly justification of additional contracts	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
---	--------------------------	--------------------------	--------------------------	--	--

The Check List on Procurement for FLC

Option for FLC to add risk-based verification (if necessary)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		
GENERAL CONCLUSION ON PROCUREMENT PROCEDURE General comments, recommendations, points to follow-up					

The Check List on Procurement for FLC

Modifications Tab

Contract Modifications	1 st Modification	2 nd Modification
	Date and Value (€)	Date and Value (€)
extra-contractual additional works / services / supplies that have been executed (not included in the original contract)		
Works / services / contractual supplies that have not been executed:		

Any further questions?



Contacts

- ❑ Davide Marcianò
- ❑ Legal Officer - Joint Secretariat
- ❑ d.marciano.js@regione.puglia.it
- ❑ www.italy-albania-montenegro.eu

Contacts

All documents are available at:



www.italy-albania-montenegro.eu

Join our community at:



www.facebook.com/italy.albania.montenegro

Joint Secretariat:



js@italy-albania-montenegro.eu



+39 0805406545