

CONVENTION INTERNAZIONALE SUGLI APPALTI PUBBLICI

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Roma Eventi

Centro Conferenze Fontana di Trevi
Piazza della Pilotta, 4 - Roma

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Good morning, ladies and gentlemen.

My name is Claudio CONTESSA.

I am a Judge and President of Section of the Italian Council of State, a national judiciary that performs important tasks in public procurement matters, primarily in the public procurement phase.

For many years, I have had the opportunity to deal with public procurement matters

- both in the drafting of national legislation;
- and in the administrative implementation phase;
- and, finally, in the decision-making phase of judicial disputes in this area.

My presentation will address measures to encourage professionalism and increase discretion in public procurement management.

The perspective will be that of an operator under Italian law (and therefore of a major EU member State).

The starting point for understanding the (not always linear) relationship between public procurement and the '*logic of results*' is that for many decades, in the Italian and European experience, the issues of *efficiency* and *effectiveness* in public spending policies:

- were known and studied,
- but, simply, they were not considered as fundamental objectives of public policies.

A great Roman philosopher (Lucius Annaeus Seneca) taught us that there is no favorable wind for a sailor who doesn't know where he wants to go.

Similarly, we shouldn't be surprised that, for a long time, measures to encourage professionalism in public procurement were not widespread: those measures were simply not considered an objective, nor a priority.

In fact, if we had asked the simple question "*what is the purpose of a public procurement?*" over time, the answer would have varied over time (and it would not always have been obvious).

In the early 1900s, it was believed that a public procurement was essentially a matter of public accounting (and therefore it was consistent to expect formal compliance with rigorous spending procedures first and foremost).

In the 1980s and 1990s (not only in Europe, but in most western Countries), it was believed that public procurement was essentially a matter of competition law and that its purpose was essentially to ensure full competitive equality between private companies.

During this historical period, it was believed that a high degree of transparency and competition in public tenders was in itself sufficient to allow public entities to achieve maximum efficiency and full achievement of public spending objectives.

In reality, the experience of subsequent years has demonstrated:

- that competition (while a fundamental tool for achieving public objectives) cannot be considered an objective in itself;
- that competition and efficiency in the private sector do not always produce their full beneficial effects in the public sector.

Reflecting briefly on the Italian experience, we note that, between 2010 and 2020, it was believed that public procurement policies should be primarily aimed at repressing and combating corruption.

This, too, is certainly a fundamental objective, but not necessarily geared towards the '*logic of results*'.

As for EU legislation, we note that the 2014 regulatory package does not establish any specific rules to encourage professionalism and increase the discretion of public operators in the procurement sector (with the issue of the '*logic of result*').

Simply put, this issue (which is well-known at the European level) is effectively left to the discretion of national legislators.

There are probably two reasons why EU legislation has not yet considered directly addressing the objectives of *discretion and performance* in public procurement:

- 1) the first is the traditional tendency of the EU legislator to focus public procurement law on competition issues;
- 2) the second is the traditional tendency of EU legislation to consider organizational issues as a sort of domain reserved to the Member States.

Remaining for a moment on the EU law approach,
we must recognize that, in recent years,
the European Union has used public procurement:

- not only to achieve competitive objectives
- but also to achieve additional objectives
(e.g., social, environmental, and equal opportunities).

However, the EU leaves Member States entirely free
to identify the operational tools with which to pursue
these objectives.

Well, turning briefly to the Italian experience of recent years, we note that the legislator and the national courts

- while continuing to recognize the importance of competition in public procurement
- have increasingly emphasized the importance of the *"logic of result"*.

In a fundamental ruling in 2024, the Italian Constitutional Court emphasized that, from now on, the entire field of public law must be based on the principle of *"result-driven administration"*.

Well, there is a deep awareness that these objectives must be pursued first and foremost in the public procurement sector (a sector of great strategic importance, which alone accounts for approximately 15% of GDP in the main EU27 countries).

Therefore, it is especially in the public procurement sector that we must embrace the challenge of results, discretion and the professionalization of operators.

In this regard, it is important to emphasize that *the new Italian Public Contracts Code (2023)*:

- not only establishes the *principles of results and trust* between public administrations and economic operators as the basic principles of the matter;
- but even states, *in its first article*, the principle of results as the fundamental rule of the matter.

But beyond the statements of principle, numerous provisions of the Code (2023) are aimed at granting *greater discretion* to public operators and *strengthening their professionalism* (precisely, in the '*logic of result*' I have repeatedly emphasized).

For the sake of brevity, I will limit myself here to recalling just a few examples:

1/3) First of all, I note that the new 'Code' imposes a system of 'qualification of contracting authorities' (a system according to which each contracting authority will be able to announce and manage only those tenders for which it demonstrates - on the basis of a system of specific indicators - that it is adequately qualified).

2/3) Furthermore, the new Code strengthens the role of the Sole Responsible for the entire contract lifecycle: this key figure has all the monitoring and control tools to make the most appropriate decisions in the various phases of the contract.

Similarly, the Code aims to ensure that the Sole Responsible is adequately trained and professionalized.

3/3) Finally, the new Code introduces a complex system of economic incentives and disincentives for public employees (for example, for the exercise of technical functions), in order to connect more closely than in the past the aspects of *autonomy, performance and individual responsibility* of the public officials.

I conclude.

Strengthening discretion and the “logic of result” in public procurement has become an essential aspect in this fundamental sector of the public economy.

The role of sector regulations in this regard is certainly fundamental.

However, the objective of placing the ‘*logic of result*’ at the heart of public policies requires, first and foremost, a sensitive training and cultural effort.

THANK YOU