

Conclusion of Contracts of Public Transactions Through the Negotiation Procedure

إبرام عقود الصفقات العمومية عن طريق إجراء التفاوض

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الملخص:

كرس التشريع الجديد للصفقات العمومية الطابع الاستثنائي لإجراء التفاوض، حيث حصر حالاته وقسمه إلى شكلين رئيسيين: التفاوض المباشر والتفاوض بعد الاستشارة، وبموجب نص المادتين 41 و42 من هذا التشريع، لا يمكن للمصالح المتعاقدة اللجوء إلى هذا الإجراء إلا في الحالات المحددة حصراً، وأضاف التشريع حالة جديدة تنحى للمصالح المتعاقدة اعتماد التفاوض المباشر، بالإضافة إلى إدراج مفاهيم جديدة وحذف بعض المفاهيم السابقة، وكل هذا من أجل تكريس الطابع الاستثنائي لهذا الإجراء.

الكلمات المفتاحية: إجراء التفاوض، الصفقات العمومية.

Abstract:

The new public procurement legislation has established the exceptional nature of the negotiation procedure, restricting its use to specific cases and dividing it into two main forms: direct negotiation and negotiation after consultation. According to Articles 41 and 42 of this legislation, contracting authorities may only resort to this procedure in strictly defined cases. The legislation has also introduced a new circumstance that allows contracting authorities to adopt direct negotiation, in addition to incorporating new concepts and eliminating some previous ones. All these measures aim to reinforce the exceptional character of this procedure.

Key words: Negotiation procedure, Public procurement.

Introduction

Contracting through the negotiation procedure in public procurement is regarded as an exceptional measure that permits the contracting authority to select its contractor while being exempt from the formal procedural requirements typical of other tendering methods. This unique feature has prompted comparative legal systems, including Algerian law, to rigorously regulate the specific circumstances under which this method may be employed and to establish clear rules and conditions governing its application.

Inviting contracting parties to negotiate constitutes the initial step that the contracting authority must follow by summoning experts in the relevant field. This step parallels the announcement process found in various tendering methods and aligns with the principle of free competition. Notably, the Algerian legislator employs the term “consent” (*tarāḍī*) in several laws and regulations concerning public procurement. In contrast, comparative legal systems use different terminology; for example, Egypt refers to it as a “direct agreement,” while France traditionally used the term *gré à gré* until the issuance of Decree 21-01-1976, which replaced it with *les marchés négociés* (negotiated contracts). Moreover, the French Public Procurement Code, as amended by Order N° 2018-1074 dated November 26, 2018, describes *tarāḍī* as a “procedure with negotiation” (*procédure avec négociation*)¹.

The Algerian legislator took a similar approach in the new Public Procurement Law (Law No. 23-12), replacing the term *tarāḍī* with “negotiation”.

This raises a fundamental question: To what extent has the Algerian legislator regulated the exceptional nature of negotiation in the new Public Procurement Law (Law No. 23-12)?

To address this research problem, both the descriptive and analytical methodologies have been adopted.

In view of this issue, the present scientific paper can be structured as follows:

1. Definition of Key Concepts

To introduce this study, it is essential to clarify certain key concepts. The first section explores the definition of public procurement, while the second focuses on defining contracting authorities, as outlined below:

1.1- Public Procurement

Article N° 2 of Algeria’s new Public Procurement Law N° 23-12 defines public procurement as follows: “Public procurement refers to written contracts concluded for consideration by the public purchaser, known as the contracting authority, with one or more economic operators, referred to as the contracting party, in order to meet the needs of the contracting authority in the areas of works, supplies, services, and studies, in accordance with the provisions of this law and the applicable legislation and regulations.”

From a judicial standpoint, the Algerian Council of State defined public procurement in one of its rulings as: “A public procurement contract is an agreement between the state and private entities concerning the execution of a project or the provision of services.”.

However, this definition has been criticized for being overly brief and lacking in completeness.

From a doctrinal perspective, legal scholars define public procurement as: "Administrative contracts concluded by the administration for the execution of its works and the supply of all resources required for its activities"².

The legal scholar André de Laubadère defines public procurement as: "The agreement of two wills to create an obligation; however, not every agreement constitutes a contract", He thus denies the contractual nature of unilateral administrative actions that exhibit a contractual appearance³.

Additionally, Professor Ammar Boudayef defines public procurement as: "Written contracts concluded in accordance with the applicable legislation by one of the entities mentioned in public procurement regulations with economic operators, under legally and regulatorily prescribed conditions, to meet the needs of the contracting authority in a specific domain—such as works, supply of goods, services, and studies—in exchange for a financial obligation borne by the contracting administration"⁴.

1.2- Contracting Authorities

Contracting authorities are regarded as the public purchaser, and the new Public Procurement Law defines these authorities through the scope of application outlined in Article N° 9, as follows:

1.2.1- The State Represented by Public Authorities and Administrations

The state is placed at the top of the list in Article N° 9 of Public Procurement Law N°, 23-12 as one of the public entities required to comply with public procurement legislation, given its status as a legal public entity under administrative law, The definition of the state varies depending on the legal discipline in question, In international law, it is considered an independent entity whose population resides permanently within a defined territory governed by an authority. In constitutional law, it is viewed as a system of governance. However, the focus here is on the concept of the state as defined under administrative and civil law.

In civil law, Article N° 49 includes a list of legal persons, stating: "The state, the province, the municipality, and public institutions of an administrative nature..." Furthermore, the Code of Civil and Administrative Procedure N°, 08-09 stipulates in Article 801 that administrative courts: "are competent to rule on actions for the annulment of administrative decisions, interpretative actions, and actions for reviewing the legality of decisions issued by the province, decentralized state services at the provincial level, the municipality, other municipal administrative services, and local public institutions of an administrative nature..."

Accordingly, the term "state" encompasses all entities tasked with implementing the general policy of the state, including the Presidency of the Republic, the General Secretariat of the Government, ministries, the Prime Ministry, and independent national bodies.

1.2.2- Local Authorities

Local authorities consist of the municipality and the province. According to Law N°. 11-10 on municipalities, the municipality is the fundamental territorial unit of the state within Algeria's administrative structure, It possesses legal personality and financial autonomy, Similarly, under Law N°, 12-07 on provinces, the province is a territorial entity of the state that also enjoys legal personality and financial independence, It functions as a decentralized administrative division of the state and serves as a framework for implementing public policies through cooperation and consultation between local authorities and the state.

1.2.3- Public Institutions Governed by Public Law

Article N° 4 of Law N°, 23-12 defines public institutions governed by public law as entities possessing legal personality and financial independence, established by the state or local authorities, These institutions may have an administrative, scientific, cultural, professional, health-related, or other nature, and they manage their accounts in accordance with public accounting regulations.

1.2.4- Public Institutions Governed by Commercial Law

Article N° 4 of Law N°, 23-12 defines public institutions governed by commercial law as entities with legal personality and financial independence, established by the state or local authorities, These institutions may take the form of a special management entity or may serve a scientific, technological, or other purpose, Their accounting is regulated by the financial accounting system set out in Law N°, 07-11.

1.2.5- Public Economic Enterprises

Article N° 4 of Law N°. 23-12 defines public economic enterprises as commercial companies in which the state or any other public law entity directly or indirectly holds a majority share of the capital.

2-Negotiation as an Exceptional Method with a Special Nature for Concluding Public Procurement Contracts:

Several doctrinal definitions have been proposed for consent, now referred to as negotiation, all of which agree on its characterization as an exceptional procedure, Negotiation has been defined as: "A method for directly concluding public procurement contracts between the administration and the contractor, whereby the administration is not bound by the formal procedures required for tendering. Instead, it has the discretion to select the party it considers to meet all the appropriate and necessary conditions⁵".

In the new Public Procurement Law, negotiation is defined as:

"Negotiation is a procedure for awarding a public procurement contract to a single economic operator without a formal call for competition. This procedure allows the contracting authority to negotiate prices and execution conditions⁶."

According to Article 40 of the new Public Procurement Law, the negotiation procedure takes two forms: direct negotiation and negotiation after consultation, A review of the public

procurement system reveals that the contracting authority may resort to negotiation in both its forms only after ensuring the fulfillment of two fundamental conditions (first), Moreover, this procedure exceptionally allows the administration to conduct direct negotiations with bidders (second), while ensuring that the process serves the public interest (third).

2.1- The Contracting Authority's Recourse to Negotiation After Ensuring the Fulfillment of Two Conditions

The contracting authority is exempt from conducting competition through the conventional tendering process. It has the flexibility to adopt any method it deems appropriate for inviting economic operators, soliciting bids, and awarding the contract to the bidder that best meets the financial and technical criteria. However, before resorting to this procedure, the contracting authority must ensure that two conditions are fulfilled, as outlined below:

- **Ensuring the Financial Threshold of the Contract:** The contracting authority must ensure that the value of the public procurement contract it intends to conclude exceeds the financial threshold established by Article 18 of the new Public Procurement Law⁷, If the contract value is equal to or below the threshold for awarding public procurement contracts, it falls under the consultation procedure, However, Article N° 20 of the same law exempts contracts concluded under the exclusive circumstances permitting direct negotiation from this consultation requirement.
- **Ensuring the Existence of One of the Exclusively Defined Cases for Negotiation:**
To safeguard the exceptional nature of the negotiation procedure and prevent its excessive use, the legislator has imposed strict limitations on the circumstances under which it may be applied in the new Public Procurement Law, these circumstances, whether involving direct negotiation or negotiation following consultation, will be thoroughly analyzed in the second section of this study.

2.2- Conducting Direct Negotiations with Bidders

As a general rule Article N° 54/1 of the new Public Procurement Law states: “No negotiation with bidders is permitted in the tendering procedure.” However, since negotiation is an exceptional contracting procedure, the contracting authority is allowed to negotiate both pricing and execution terms of the public procurement contract.

2.3- Aiming to Achieve the Public Interest Through the Negotiated Contracting Method

Following the solicitation of bids from economic operators and the selection of the most advantageous offer during the negotiation phase, the contract is directly awarded to the bidder deemed most capable of carrying out the project, When necessary, the contracting authority may verify the bidders' qualifications through any lawful means, including consultations with other contracting authorities, public service institutions, banks, or Algerian diplomatic missions abroad, Although the authority enjoys broad discretion in this process, it is nonetheless required to uphold the public interest and ensure the uninterrupted and efficient delivery of public services.

3- Establishing the Exceptional Nature of Negotiation by Restricting Its Cases

Negotiation, previously referred to as amicable settlement, has been acknowledged as a contracting method in public procurement since the enactment of Ordinance N° 67-90 Article N°61 of this ordinance outlined the situations in which contracts could be awarded through negotiation; however, it did not clarify the forms this procedure could take, nor did the preceding Article N° 60.

The same observation applies to Decree N° 82-145, which established negotiation as a general contracting method in Article N° 26 and provided a definition in Article N° 27, yet without detailing its forms. However, with the introduction of the amending Decree N° 84-51, Article N° 2—modifying the second paragraph of Article N° 27 of Decree N° 82-145—introduced a distinction between two forms of negotiation, stating:

"Negotiation may take the form of simple negotiation or negotiation after consultation...⁸".

Thus, while the legal framework governing public procurement has identified the various forms of negotiation, it has gone further by carefully specifying the precise circumstances under which each form may be employed—whether through direct negotiation or negotiation following consultation—as outlined below:

3.1- Exclusive Cases for Contracting Through Direct Negotiation

Direct negotiation constitutes an exception to the exception, whereby the contracting authority awards the contract to an economic operator solely based on its own evaluation of the operator's qualifications and capabilities, without any competitive process, the authority then negotiates key elements such as pricing, timelines, guarantees, and other critical terms. Public procurement regulations have clearly outlined the specific scenarios in which this form of simple negotiation may be applied, as detailed below:

3.1.1- Case of the Sole Monopoly Operator

The contracting authority may resort to this approach when the required services can only be performed by a single economic operator holding a monopoly. This exclusivity may stem from factors such as the protection of exclusive rights, technical considerations, or cultural and artistic reasons. See the first paragraph of Article N° 41 of Law N° 23-12.

Cultural and artistic services are those that can only be delivered by uniquely talented artists chosen for their specific expertise, or that involve the acquisition of movable cultural assets as defined by the relevant legislation, excluding archaeological assets. Furthermore, Competition Law (Ordinance N° 03-03) refers to monopolistic positions using the term "dominant position," which it defines as follows:

"A situation in which a company attains significant economic power in a given market, thereby hindering effective competition and allowing it to act independently of its competitors, customers, or suppliers to a considerable extent⁹".

In such instances, the monopoly must be genuine and substantiated, with no viable competitors, when the contracting authority faces this scenario, there is no advantage in

advertising or conducting competitive bidding procedures, as only one operator is able to meet the contract requirements and provide the necessary service.

3.1.2- Case of Promoting Labeled Startups

For the first time, the new public procurement legislation has included this scenario as one of the cases eligible for direct negotiation in Clause 2 of Article N° 41.

Accordingly, when promoting labeled startups—particularly those offering services in the fields of digitalization and innovation—provided their solutions are unique and innovative, contracting authorities may proceed with direct negotiation.

As per the relevant regulations, a "startup" is defined as any business operating under Algerian law that meets the legal requirements outlined in Chapter Four of Executive Decree N° 20-254, which establishes a national committee for awarding the "Startup" label, the "Innovative Project" label, and the "Business Incubator" label, along with defining the committee's tasks, composition, and operation¹⁰, the Algerian legislator has included this case as part of the economic recovery plan, which has placed priority on supporting this category of enterprises.

3.1.3- Case of Urgent and Justified Necessity

This is another situation that justifies the contracting authority bypassing competition and awarding the contract through direct negotiation. The concept of urgency is well-established in law and recognized across various fields and sectors.

For example, in litigation, there are urgent rulings that differ from those applied in regular cases, whether regarding procedural requirements, hearing schedules, the nature of rulings, appeal deadlines, and other aspects.

In accordance with Clause 3 of Article N° 41 of the new public procurement legislation, the contracting authority may resort to direct negotiation in urgent situations where there is a threat jeopardizing an investment or property of the authority, or an imminent danger affecting an asset or investment that has already materialized.

The new public procurement law introduces several new concepts to this scenario, including public order, emergency situations related to health crises, and natural or technological disasters.

It also removes the term "public security" while maintaining the condition that the contracting authority may only invoke this case when it cannot adapt to public procurement procedures, when the circumstances leading to the urgency could not have been foreseen, and when the urgency is not the result of delays caused by the authority itself.

3.1.4- Case of Urgent Supply with Special Conditions

Competition is excluded in cases of urgent supply necessary to meet the essential needs of the population¹¹.

This means that the contracting authority is facing a situation of critical importance within the supply sector, particularly for materials or products demanded by individuals. In

such cases, the authority is compelled to act swiftly to ensure the continuous and uninterrupted supply of a vital product for the population, such as wheat, oil, milk, or other widely consumed goods.

Adhering to the standard procurement procedures, including publication requirements, deadlines, and other formalities, could disrupt the market and cause delays in the supply of essential goods, which would negatively impact the population. Therefore, the contracting authority must be permitted to engage in direct negotiation.

An example of this urgent supply situation occurs when a specific region of the country is struck by an earthquake or floods, necessitating the contracting authority to secure the supply of essential consumer goods. In such circumstances, it is vital to expedite the delivery of these goods to the affected population.

The public administration applies exceptional procurement procedures, turning to a supplier or a group of suppliers to provide the required goods and products, ensuring that its responsibilities are met and public services are maintained.

The legislator has set two conditions that the contracting authority must meet when invoking this case, as outlined in Clause 4 of Article N° 41 of the new public procurement legislation.

First, the circumstances that gave rise to the urgency must have been unforeseeable by the contracting authority.

Second, the urgency must not be the result of delays or negligence on the part of the authority itself.

This implies that the contracting authority could not have reasonably anticipated the situation.

These conditions appear to have been established by the legislator to prevent any suspicious circumstances, fraudulent contracting practices, or abuse of exceptional provisions.

3.1.5- Case of an Urgent Project with National Priority and Importance

Competition is excluded in the case of a nationally significant project that possesses an urgent character.

Undoubtedly, the exceptional nature of such a project will have a broad positive impact across the entire national territory, given its classification as a matter of national importance.

In Clause 5 of Article N° 41 of the new public procurement legislation, the legislator specified that the urgency must arise from circumstances that were not foreseeable by the contracting authority and must not result from intentional delays on its part.

These two conditions act as safeguards to ensure that this method of contracting remains an exception, applied only in specific and justified cases, and in strict compliance with the stated requirements.

Furthermore, the contract must receive prior approval from the Council of Ministers if its value is equal to or exceeds ten billion Algerian dinars (10,000,000,000 DZD). If the

contract value falls below this threshold, prior approval is required during a government meeting.

It is important to note that this requirement for prior approval—either by the Council of Ministers or in a government meeting, depending on the contract amount—was introduced by Presidential Decree N° 12-23¹².

This measure is intended to alleviate the sole responsibility of the contracting authority by distributing accountability among the various parties involved in executing the contract.

It is clear that a contract for a project of such national significance, if carried out through the standard tendering process with its complex formalities, may fall short of achieving the intended objectives—particularly with regard to securing critical elements such as cost, execution timelines, workforce, and technical qualifications.

This is especially relevant given that such contracts are often awarded to foreign contractors, who possess the advanced technical and commercial expertise required for their execution.

3.1.6- When It Concerns the Promotion of Production and/or the National Production Tool

Contracting authorities resort to this case when the contract is aimed at promoting national production and supporting the national production apparatus. This provision was previously included in the now-repealed Presidential Decree N°10-236¹³.

The underlying rationale for its inclusion is to allow the relevant entity to conclude the contract within a reasonable timeframe, thereby contributing to the development and strengthening of national production and its associated tools.

Clause 6 of the new public procurement legislation stipulates that prior approval from the Council of Ministers is required if the contract value is equal to or exceeds ten billion Algerian dinars (10,000,000,000 DZD). For contracts valued below this threshold, prior approval must be obtained during a government meeting. This approval requirement was introduced for the first time under Law N° 12-23¹⁴.

3.1.7- Case of Service Execution by a National Public Institution

This case involves the exclusive right to perform a public service mission. The contracting authority may resort to this provision when a legislative or regulatory text grants a public institution—operating under commercial law—an exclusive right to carry out such a mission.

This also applies when the institution conducts all of its activities exclusively with the state, represented by public entities, government administrations, local authorities, and public institutions governed by public law¹⁵.

The priority granted in contracting to certain public institutions governed by commercial law stems from a legislative or regulatory provision. This priority allows specific

public industrial and commercial institutions, which provide public services within a defined sector, to enter into public contracts through direct negotiation.

3.2- Exclusive Cases for Contracting through Negotiation after Consultation

The negotiation after consultation method is a procurement approach that involves awarding contracts through limited competition among a group of specifically invited candidates. These candidates are invited to submit their offers through appropriate written communication channels¹⁶.

The new Public Procurement Law has strictly limited the instances in which contracting authorities may use the negotiation after consultation method, as outlined in Article N° 42. It identifies five specific cases in which this procedure is permitted, as follows:

3.2.1- When the Call for Tenders is Declared Unsuccessful for the Second Time

The new Public Procurement Law does not provide a definition for the concept of an unsuccessful call for tenders.

Therefore, reference may be made to Paragraph 2 of Article N° 40 of Presidential Decree No 15-247, which governs public procurement and public service delegations. According to this article, a call for tenders is considered unsuccessful if no bids are submitted, if none of the submitted bids comply with the contract's subject matter and the specifications after evaluation, or if the necessary funding for the contract cannot be secured.

The new Public Procurement Law does not explicitly define the concept of an unsuccessful call for tenders.

As a result, reference can be made to Paragraph 2 of Article N°40 of Presidential Decree N° 15-247, which governs public procurement and public service delegations. According to this provision, a call for tenders is deemed unsuccessful when no bids are submitted, when none of the submitted bids comply with the contract's subject and the specifications after evaluation, or when the required funding cannot be secured.

In this scenario, the contracting authority begins by applying the general rule of issuing a call for tenders and adhering to the required procedures.

However, if no bids are received from economic operators—meaning zero submissions—or if multiple bids are submitted but fail to meet the contract's subject and specifications, or if the necessary funding cannot be secured, the procedure is declared unsuccessful. As a result, the contracting authority proceeds to launch a new call for tenders.

If the same situation occurs again—where no bids are submitted, the received bids fail to meet the contract's subject and specifications, or the required funding cannot be secured—the procedure is once more declared unsuccessful. At this point, the contracting authority may resort to the negotiation after consultation method, as provided for in the first paragraph of Article 42 of the new Public Procurement Law.

In this case, the legislator permits the contracting authority to reuse the same specifications, with the exception of the bid bond requirement, the procurement procedure, and the obligation to publish the competition notice.

This approach is intended to streamline the contracting process, sparing the authority from the need to revise the specifications and resubmit them to the relevant procurement committee for approval. The consultation letter must clearly indicate the modifications concerning the bid bond, the procurement method, and the waiver of the publication requirement.

3.2.2- Case of Studies, Supplies, and Specialized Services That Do Not Align with the Call for Tenders Process

This case pertains to contracts involving studies, supplies, and services whose nature does not necessitate a public call for tenders, as outlined in Paragraph 2 of ArticleN° 42 of the new Public Procurement Law. The unique nature of such contracts may be attributed to their subject matter, the limited level of competition, or the confidential nature of the services involved.

When the contracting authority opts for negotiation after consultation under this provision, it must justify the deviation from the standard tendering procedure and demonstrate the specific characteristics of the contract related to studies, supplies, or services. It is important to emphasize that this provision does not apply to public works contracts, as the law explicitly restricts its scope to the procurement of supplies, studies, and services.

One ambiguity in Paragraph 2 of ArticleN° 42 lies in the phrase "limited level of competition," which closely resembles the previous case involving an unsuccessful call for tenders due to non-compliance of bids with the contract's subject and specifications. In both instances, the contracting authority initiates a call for tenders, evaluates the bids through the bid-opening and evaluation committee, and concludes that competition is lacking. This similarity raises an important question: What distinguishes these two cases?

An example of the confidential nature of services can be found in a joint ministerial decree issued by the Minister of Finance and the President of the National Authority for the Prevention and Fight Against Corruption, which outlines a list of study, supply, and service contracts exempt from the public tendering process¹⁷.

3.2.3- Case of Public Works Contracts Directly Related to Sovereign Public Institutions

This case, introduced by Presidential DecreeN° 08-338, applies exclusively to public works contracts, as clearly specified in the relevant provision. Furthermore, the contract must be directly related to sovereign public institutions of the state. In contrast, entities that are only indirectly affiliated with such sovereign institutions are not included within the scope of this provision¹⁸.

An analysis of Paragraph 3 of Article N° 42 of the new Public Procurement Law reveals that it does not explicitly define or clarify the concept of sovereign institutions, leaving the term broad and open to interpretation. This ambiguity raises an important question: Did the legislator intend to exempt entities such as the Ministry of Defense, or institutions under the Ministries of Finance, Foreign Affairs, or Justice, from the general requirement to award public contracts through a call for tenders—thus permitting them to use the exception of

negotiation after consultation? The answer to this remains uncertain pending the issuance of a ministerial decision by the Minister of Finance that provides a clear and detailed explanation of these terms.

3.2.4- Case of Awarded Contracts That Have Been Terminated and Whose Nature Is Incompatible with the Timelines of a New Call for Tenders

This case applies when a previously awarded contract is terminated, and the urgency or nature of the contract does not permit adherence to the timeframes required for launching a new call for tenders. Introduced under law N° 12-23, it is outlined in Paragraph 4 of Article N° 42 of the new Public Procurement Law.

This provision allows for the use of negotiation after consultation, provided that the contracting authority initially complied with the general tendering rules, selected a contractor in accordance with procurement regulations, signed the contract with the competent authority, and commenced execution. However, due to objective circumstances leading to the contract's termination, it becomes impractical to repeat the standard tendering process, including advertisement, bid submission, competitive evaluation, results announcement, appeals, and other related formalities.

In light of such practical constraints, the legislator has allowed the contracting authority to resort to negotiation after consultation. For instance, if a university had awarded a contract to supply scientific equipment for several laboratories—essential for both training and research—with a defined delivery schedule, and the contractor failed to meet their obligations, resulting in contract termination, the university could face pressing academic deadlines. Given its legal obligation to the supervisory authorities to provide the necessary educational and scientific infrastructure to ensure quality training, the new Public Procurement Law enables the contracting authority to use negotiation after consultation. This approach is justified by the urgency of the situation and the impracticality of initiating a new tendering procedure.

3.2.5- Case of Operations Conducted Within the Framework of Governmental Cooperation Strategies and Bilateral Relations Between Two States Involving Concessional Financing, Debt Conversion into Development Projects, or Grants

This case was introduced by Article 9 of Presidential Decree N° 08-338, which amended Article 38 of the repealed Presidential Decree N° 02-250.

The contracting authority resorts to this case when the operations fall within the framework of a governmental cooperation strategy or bilateral agreements involving concessional financing, debt conversion into development projects, or grants.

This scenario is addressed in paragraph five of the new Public Procurement Law. In such cases, the consultation process must be limited exclusively to institutions from the concerned state. Under these agreements, debts are converted into projects or investments as agreed upon by the two countries.

Consequently, the contracting authority is required to restrict the consultation to entities originating from the creditor country.

The inclusion of this case as a basis for negotiation is driven by the need to uphold and honor the state's international commitments. It represents a rational and well-founded approach, as negotiation after consultation provides a practical mechanism for alleviating the state's debt burden by converting financial obligations into developmental projects ¹⁹.

Conclusion

As a summary of the study titled "From Exceptional Direct Agreement to Negotiation in the Conclusion of Public Procurement Contracts: What is New?", it can be concluded that the new public procurement legislation has reinforced the exceptional nature of negotiated procedures and provided a clear, structured framework—much like its predecessor, Presidential Decree N° 15-247.

This approach is intended to ensure that contracting authorities adhere to the specific objectives for which these exceptional procedures were designed.

The study highlights the introduction of a new case under simplified negotiation, namely the promotion of labeled startups, in line with the country's economic recovery strategy. Moreover, the legislator has broadened the scope of urgent and justified necessity—one of the most critical cases for simplified negotiation—by including public order, health emergencies, natural disasters, and technological catastrophes, while removing the reference to public security.

Until the issuance of regulatory texts detailing the implementation mechanisms of the new legislation, the provisions under Presidential Decree No. 15-247 will continue to apply, provided they are not inconsistent with the provisions of the new Public Procurement Law (Law N° 23-12).

Until the relevant regulatory texts are issued, the following recommendations can be proposed:

- The legislator should have specified the estimated contract values, inclusive of all applicable taxes, that define the thresholds for public procurement contracts under Article 18 of Law No. 23-12.
- The concept of "unsuccessful tenders" should have been clearly defined in the new public procurement legislation (Law No. 23-12).
- It was necessary to identify and explicitly define the sovereign public institutions referred to in paragraph three of Article 42 of Law No. 23-12.
- Training sessions should be organized for all stakeholders involved in public procurement to ensure proper understanding and implementation of the new law.
- There is an urgent need for the issuance of regulatory texts that outline the mechanisms for implementing the new public procurement legislation.

Citation

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- 5- Mouhi Eddine Al-Qaisi, "Principles of General Administrative Law", Halabi Legal Publications, Beirut - Lebanon, 1999, p. 95.
- 6- See Article 40 of Law No. 23-12, dated 18 Muharram 1445 AH, corresponding to August 5, 2023, defining the general rules related to public procurement, Official Gazette of the People's Democratic Republic of Algeria, Issue 51, dated 19 Muharram 1445 AH, corresponding to August 6, 2023.
- 7- It is worth noting that Article 18 of the new Public Procurement Legislation does not explicitly specify the estimated amounts, including all taxes, that define the thresholds for concluding public procurement contracts. Therefore, the provisions of Article 13 of Presidential Decree No. 15-247 remain in force until new thresholds are defined through regulations.
- 8- See Article 2 of Decree No. 84-51, dated 23 Jumada al-Awwal 1404 AH (February 25, 1984), amending and supplementing Decree No. 82-145, which regulates contracts concluded by the public contractor, Official Gazette No. 9, dated 26 Jumada al-Awwal 1404 AH (February 28, 1984).
- 9- See paragraph (c) of Article 3 of Ordinance No. 03-03, dated 19 Jumada al-Awwal 1424 AH (July 19, 2003), related to competition, Official Gazette No. 43, dated 20 Jumada al-Awwal 1424 AH (July 20, 2003).
- 10- See Chapter 4 of Executive Decree No. 20-254, dated 27 Muharram 1442 AH (September 15, 2020), establishing a National Committee for Granting the "Startup" Label, "Innovative Project" Label, and "Business Incubator" Label, and defining its tasks, composition, and operation, Official Gazette No. 55, dated 03 Safar 1442 AH (September 21, 2020).
- 11- See item No. 3 of Article 49 of Presidential Decree No. 15-247, Op. Cit.
- 12- See Article 6 of law No. 12-23, dated 24 Safar 1433 AH (January 18, 2012), amending and supplementing Presidential Decree No. 10-236 (repealed), Official Gazette No. 4, dated 2 Rabi' al-Awwal 1433 AH (January 26, 2012).
- 13- See item No. 6 of Article 43 of Presidential Decree No. 10-236 (repealed), dated 28 Shawwal 1431 AH (October 7, 2010), concerning the regulation of public procurement, Official Gazette No. 58, dated 28 Shawwal 1431 AH (October 7, 2010).
- 14- See Article 6 of law No. 12-23, Op. Cit.
- 15- See the last item of Article 41 of Law No. 23-12, Op. Cit.
- 16- See the first paragraph of Article 40 of Law No. 23-12, Op. Cit.

17- See the joint ministerial decision between the Minister of Finance and the President of the National Authority for the Prevention and Fight Against Corruption, dated 11 Ramadan 1435 AH (July 9, 2014), defining the list of study, supply, and special service contracts that do not require a tender, Official Gazette No. 63, dated 28 Dhu al-Hijjah 1435 AH (October 22, 2014).

18- See item No. 3 of Article 42 of Law No. 23-12, Op. Cit.

19- See Article 1 of Presidential Decree No. 11-427, dated 16 Muharram 1433 AH (December 11, 2011), approving the agreement between the Government of the People's Democratic Republic of Algeria and the Government of the Italian Republic regarding the implementation modalities of debt conversion into development projects, signed in Algiers on July 12, 2011, Official Gazette No. 68, dated 19 Muharram 1433 AH (December 14, 2011).