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***Direct Negotiation and the Conclusion of Public Contracts under Law
23-12: An Exceptional Method of Contracting and the Limitations of
Competition Safeguards***

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Abstract:

Direct negotiation constitutes one of the mechanisms through which public procurement contracts may be concluded without a formal call for competition. These cases are expressly defined in Article 41 of Law No. 23-12, which authorizes the administration to negotiate directly with contracting operators and to select the most advantageous offer without following the procedures required under the call for tenders process. This method is considered exceptional in the conclusion of public contracts, as it grants the contracting authority broad discretionary powers and enables it to bypass all the procedures ordinarily mandated by public procurement law, whether in terms of contract conclusion, implementation, or oversight.

Keywords: Direct Negotiation; Public Contracts; Law 23-12; Call for Tenders; Safeguards and Oversight.

ملخص:

يعد التفاوض المباشر أحد الإجراءات التي يتم من خلالها إبرام الصفقات العمومية دون الدعوة الشكلية للمنافسة وقد حددت هذه الحالات في أحكام المادة 41 من القانون 12-23، أين يمكن للإدارة التفاوض مباشرة مع المتعاملين المتعاقدين وتختار العرض الأنسب، دون اتباع الإجراءات التي يتطلبها إجراء طلب العروض، وتعد هذه الطريقة الاستثنائية في إبرام الصفقات انطلاقاً من كونها تتمتع فيها المصلحة المتعاقدة بسلطات واسعة وتتجاوز من خلالها جميع الإجراءات التي يتطلبها قانون الصفقات العمومية سواء من حيث الإبرام والتنفيذ والرقابة.

كلمات مفتاحية: الصفقات العمومية، القانون 12-23، التفاوض المباشر، الصفقات العمومية، المنافسة.

1. INTRODUCTION

The invitation to tender constitutes the primary mechanism for concluding public procurement contracts, as stipulated in Article 39 of Law No. 23-12. Where the legislated conditions are met, contracting authorities are obliged to resort to this procedure. However, the legislator has provided an exception to this principle, granting contracting authorities the right to conclude public procurement contracts without a formal call for competition. In such cases, direct negotiation affords the contracting authority a degree of discretion in selecting the contracting operator. Nonetheless, this procedure is subject to a set of rules and safeguards imposed by the legislator to ensure its proper regulation.¹

This article proceeds from the assumption that urgent and necessary circumstances may justify the non-application of ordinary procedures in the conclusion of public procurement contracts, namely the invitation to tender. The authority vested in contracting entities by law inevitably entails a heightened responsibility. The article further analyzes the legal and practical challenges associated with the implementation of Article 40 of Law No. 23-12 on public procurement. It highlights the fact that members of tender committees are often subjected to criminal prosecution as a result of resorting to direct negotiation, despite the law expressly recognizing such cases within the very text of Article 40. The study aims to identify the specific situations in which the legislator permits the use of direct negotiation, to clarify the procedural requirements contracting authorities must observe in these exceptional circumstances, and to assess the adequacy of the safeguards introduced by Law No. 23-12 in curbing corruption in the public procurement system.

Methodologically, the article adopts a descriptive-analytical approach to delineate the circumstances under which the legislator authorizes contracting authorities to conclude agreements through direct negotiation. It also employs a comparative method to juxtapose the Algerian and Tunisian legal frameworks, particularly regarding the limited circumstances in which negotiation is permissible, as well as the procedures for concluding contracts under this mechanism.²

The article seeks to shed light on the procedural and practical obstacles that accompany the application of Article 40 of Law No. 23-12. It further aims to present recommendations and proposals addressing the issue of negotiation—a matter often clouded by ambiguity, which in many instances results in criminal proceedings.

Given that direct negotiation constitutes an exception to the principle of competition—since it allows contracting authorities to enter into contracts directly with chosen parties without following the invitation-to-tender process or issuing a formal call for competition—this raises a central research question:

To what extent does direct negotiation contribute to reinforcing the principle of competition in public procurement?

1- Bouzid Boudiaf, *Explanation of the Regulation of Public Contracts* (Algiers: Jisour Publishing and Distribution, 2014), 273.

2- Mal Mansour, *Public Contracts by Direct Negotiation* (Master's thesis, Faculty of Law and Political Science, University of Sousse, Tunisia, 2023), 52.

The article addresses this question through the following thematic axis:

1. The multiplicity of safeguards ensuring the exceptional nature of public procurement contracts concluded through direct negotiation

Article 40 of Law 23-12 on Public Procurement defines negotiation as “*A way to give a contract to one business without formally asking for bids. Negotiation can happen directly or after a consultation, which can be set up in writing in any way that works.*”

Accordingly, direct negotiation constitutes an exception to the general rule governing the conclusion of public procurement contracts. It is a procedural mechanism that allows the contracting authority to be exempt from the formal and substantive requirements imposed by the call for tenders. The Algerian legislator, through the various regulations and laws on public procurement, has clearly enumerated the circumstances under which recourse to *simple mutual agreement*—as it was previously termed—or *direct negotiation*—as designated under Law 23-12—is permissible. These cases are exhaustively listed in Article 41 of Law 23-12, which will be further clarified in the following sections.

1.1 Exhaustive Enumeration of Circumstances for Recourse to Direct Negotiated Procurement

An examination of all regulations and legal instruments governing public procurement, beginning with Legislative Decree 67-90 on Public Procurement and culminating in Law 23-12, reveals that the legislator has consistently sought to strictly define the circumstances in which public procurement contracts may be concluded by means of direct negotiation (or *simple mutual agreement*, as previously known). Such recourse is allowed on an exhaustive, rather than illustrative, basis. Although in these cases the legislator does not impose on the contracting authority the formal procedural requirements inherent to the principle of competition, it does restrict the possibility of employing exceptional procurement methods to specifically enumerated situations.

Pursuant to the wording of Article 41 of Law 23-12, the legislator has identified the following cases:

1.1.1 The Case of an Operator in a Monopoly Position:

The first paragraph of Article 41 provides for the situation where the contracting operator occupies a monopolistic position. It states: “*When only one economic operator with a monopoly can provide the services, or to protect exclusive rights, technical reasons, or cultural and artistic reasons.*” The services concerned by cultural and artistic considerations are to be specified by a joint decree issued by the competent minister and the Minister of Finance.

In fact, the monopolistic nature of the operator’s position is what justifies the contracting authority’s right to conclude contracts through direct negotiation, given that the contractor enjoys an exclusive position. This may result from its sole possession of the technological tools chosen by the contracting authority. In such circumstances, resorting to public advertisement or launching tendering procedures would be pointless, as only one contractor is capable of meeting the requirements. Large oil companies are the most common examples of such cases, since global corporations often monopolize the manufacture of much of their

equipment. Similarly, cultural and artistic considerations may also justify direct negotiation, provided that this is authorized by a joint decision of the relevant minister and the Minister of Finance.³

1.1.2- The Case of Promoting Labeled Startups

This case is addressed in the second paragraph of Article 41 of Law 23-12, which concerns the promotion of labeled startups as defined by the applicable legislation and regulations. These entities provide services in the fields of digitalization and innovation, provided that the solutions offered are unique and innovative.

Nevertheless, the wording of this paragraph remains ambiguous. The article does not clarify what is specifically meant by “labeled startups”: are they state-owned economic enterprises, or are they privately owned? If we assume that they are private entities, then in situations where several such startups exist, would the contracting authority be required to negotiate directly with all of them? This ambiguity and lack of clarity in the article render its practical application nearly impossible.⁴

1.1.3 The Case of Urgent Necessity

The case of urgent necessity is provided for in the third paragraph of the aforementioned Article 41, which states: *“In cases of urgency caused by a risk to an investment that is already there or is being realized in the field, or in cases of emergencies related to health crises, technological disasters, or natural disasters, where it is impossible to meet the deadlines for completing public procurement contracts, as long as the contracting authority could not have predicted the circumstances that led to the urgency and the urgency is not due to intentional delays on its part.”*

It follows that if any of these conditions are not met, the state of urgent necessity that allows the contracting authority to conclude a contract through direct negotiation no longer applies. A critique of the legislator in this regard is that the situations warranting recourse to urgent necessity are not clearly defined or exhaustively enumerated. Such specification is essential to preserve the exceptional nature of this procedure.

1.1.4 The Case of Emergency Procurement

This case falls within the broader category of urgency; however, it specifically concerns contracts related to the provision of essential goods for the population. In such practical situations, the contracting authority must act quickly to ensure the supply and distribution of basic necessities. Were it to follow the ordinary procedures, the timely provision of these essentials would be severely hindered.⁵

3- Boudiaf, op. cit., 276.

4- Baya Sabayhi, “Consolidating the Exceptional Character of Amicable Settlement as a Mechanism for Establishing Integrity and Transparency in Public Procurement Contracts,” paper presented at the National Conference on Rationalizing Public Expenditures and the Challenges of Reviving the National Economy through the Regulation of Public Contracts, organized by the Faculty of Law and Political Science, Ahmed Bouguerra University, Boumerdès, November 21–22, 2017, 5.

5- Arrah Aicha, “The Method of Direct Negotiation in Concluding Public Procurement Contracts: A Study in Light of Law No. 23-12 Defining the General Rules on Public Contracts,” *Journal of Algerian and Comparative Public Law* 9, no. 2 (2024): 96.

Therefore, the legislator has granted the authority the right to conclude contracts through direct negotiation in such cases. This provision is particularly relevant in circumstances involving natural disasters, where the state must act swiftly to adopt decisions and measures to meet the multiple needs of affected populations. However, the legislator stipulated two important conditions: that the emergency must not be the result of deliberate delays by the contracting authority, and that the circumstances giving rise to the disaster could not have been anticipated.

1.1.5 The Case of a Nationally Significant and Urgent Project

Paragraph five of Article 41, previously mentioned, outlines the circumstances under which direct negotiation may be employed in relation to projects of national significance. The provision is stated as follows: when the matter concerns a project of priority and national importance that carries an urgent character—on the condition that the circumstances necessitating such urgency were neither foreseeable by the contracting authority nor the result of deliberate procrastination on its part—recourse to this exceptional method of concluding contracts is subject to prior approval by the Council of Ministers if the contract amount equals or exceeds ten billion dinars (10,000,000,000 DZD), and to prior approval during a government meeting if the contract amount is less than the aforementioned threshold.

From the wording of this article, it may be inferred that projects expected to yield a positive national impact—although often involving substantial financial expenditures—are nevertheless permitted to be contracted through the procedure of direct negotiation. However, the legislator imposed two strict conditions in this case⁶:

- The circumstances giving rise to the urgency must not have been anticipated by the contracting authority.
- The urgency must not be the result of deliberate delaying maneuvers by the contracting authority.

Accordingly, if the value of the project to be executed or the goods to be procured equals or exceeds ten billion dinars, prior approval must be obtained at the level of the Council of Ministers; if the amount is lower, approval is granted during a government meeting.

Nevertheless, it is unreasonable that projects of such scale and with such immense allocated funds—particularly those associated with the programs of the President of the Republic—have resulted in the squandering of enormous sums of money, while their actual impact at the national level has been virtually negligible. The majority of these contracts have since become the subject of judicial proceedings, especially against ministers who awarded many of these projects, which ultimately proved detrimental to the national economy. This is largely due to the fact that such contracts were concluded through direct negotiation.

By contrast, Law No. 23-12 imposed strict obligations on smaller contracting authorities, requiring them to follow the complex and burdensome procedures of competitive tendering for contracts as low as twelve million dinars for works and supplies contracts, and six million dinars for studies and services contracts. Logically, the greater the financial value

6- Mansour, op. cit., 98.

of a project, the more rigorous and complex the procedures should be, in order to prevent corruption and safeguard public funds.

1.1.6 When the Objective is the Promotion of the National Public Production Apparatus

This situation is addressed in paragraph five of Article 49, which states: *“If the contract is worth ten billion dinars (10,000,000,000 DZD) or more and is about promoting production or the national production apparatus, the Council of Ministers must approve the use of this special method of signing contracts in advance. If the contract is worth less than that amount, the government must approve it in advance.”*⁷

According to this provision, the contracting authority may conclude agreements through direct negotiation if the purpose is to promote the national production apparatus, thereby saving time. However, the paragraph is formulated in broad and absolute terms, leaving considerable room for interpretation and discretion.

It is also notable that the substance of paragraph five does not differ significantly from paragraph four, since both require prior approval from the Council of Ministers if the project's value equals or exceeds ten billion dinars, and prior approval from the government if the value of the contract falls below that amount.

1.1.7 When a Legislative or Regulatory Provision Grants an Economic Public Enterprise an Exclusive Right to Perform a Public Service

This case is addressed in paragraph six of Article 41 of Law No. 23-12, which provides: *“When a law or regulation gives a public industrial or commercial business the only right to provide a public service, or when that business does all of its work with government agencies and other administrative bodies.”*

The text outlines two specific situations in which a contracting authority may resort to direct negotiation:

- When a legislative or regulatory provision grants an economic public enterprise (whether industrial or commercial in nature) priority and exclusivity in performing a public service.
- When an economic public enterprise (industrial or commercial) carries out all its activities exclusively with administrative public bodies or institutions of an administrative nature.

A key criticism of paragraph six of Article 41 is that it accords priority to economic public enterprises based solely on the existence of any legislative or regulatory provision. This approach undermines the principle of competition, which constitutes the general rule for concluding public procurement contracts, by granting undue privileges to these enterprises.⁸

1.2 Rules Governing the Conclusion of Public procurement Contracts through Direct Negotiation

While tendering procedures in their various forms are fundamentally governed by formal mechanisms and strictly regulated rules that contracting authorities must adhere to,

7- Liman Mohamed Al-Tamawi, *The General Principles of Administrative Contracts: A Comparative Study*, 5th ed. (Cairo: Dar al-Fikr al-‘Arabi, Ain Shams University Press, 1991), 136.

8- Watib Ben Nasser and Al-Awadi Hiba, “Exceptional Methods of Concluding Public Procurement Contracts under Presidential Decree No. 15-247,” *Journal of Law and Political Science* 8, no. 2 (2022): 121.

this does not imply that the conclusion of contracts through negotiation is left to the unrestricted discretion of the contracting authority. Rather, there exists a series of stages and procedural requirements that must be observed, beginning with the invitation of potential contractors, followed by the negotiation phase, and culminating in the conclusion of the contract.

1.2.1 Invitation to Contract

Although Law 23-12 does not prescribe precise procedures for concluding contracts through direct negotiation—given that negotiation constitutes an exceptional mechanism for selecting the contracting operator—the contracting authority may only resort to this method under defined conditions.

Accordingly, the invitation to contract constitutes the first step that the contracting authority must undertake. At this stage, the authority calls upon all qualified operators to participate in the contract under consideration. This process functions as the equivalent of the public announcement in tendering procedures and serves the principle of competition. Its purpose is to secure a sufficient number of bidders, thereby enabling the contracting authority to compare multiple offers and select the most advantageous one.

The invitation may be extended by the contracting authority either in written form—through formal written notices—or via personal summons and direct communication with potential contractors.

1.2.2 Negotiation of Prices and Deadlines

Once the contracting authority has collected the bids from previously invited participants, it proceeds to direct negotiations with the bidders. Negotiation, in this context, is a procedure conducted by the contracting authority with the party seeking to contract, either for the purpose of preparing the conclusion of the agreement or for resolving a dispute concerning a contractual clause or the modalities of its execution. Importantly, such negotiation does not entail any waiver of the authority's prerogatives, nor does it alter the substance of the contract, despite the inclusion of atypical provisions that may be imposed by the authority in the specific contract specifications.⁹

Although there are no codified procedural rules governing negotiations, a number of general principles exist to ensure the highest possible degree of transparency and fairness, and to guarantee publicity vis-à-vis the bidders with whom the contracting authority intends to negotiate. The key principles governing the negotiation process are as follows:

- Non-alteration of the bid: The fundamental contents of the contract specifications may not be modified, except for relative amendments explicitly permitted by law.
- Confidentiality of offers: The contracting authority is prohibited from disclosing to any candidate information that could lead to the revelation of other bidders' proposals.
- Equality of treatment among candidates: This principle must be strictly observed in every contract concluded by the contracting authority. It may not favor one party over another.

9- Kassasi Sidi Ahmed, "Amicable Settlement as an Exceptional Procedure for Concluding Public Procurement Contracts in Algerian Legislation," *Journal of Economic Growth and Entrepreneurship* 2, no. 3 (2021): 73.

- Transparency of procedures: The contracting authority must inform the candidates of the modalities of negotiation (e.g., face-to-face meetings, written exchanges of proposals), as well as its duration and conditions.

Collectively, these provisions provide a significant degree of transparency that ensures publicity, at least among those contractors eligible to enter into agreements with the authority. Furthermore, negotiation enables the achievement of the following objectives:

- Eliminating Ambiguity: Negotiation is necessary for raising questions between the contracting operators in order to clarify and dispel ambiguities concerning essential aspects of the contract, such as pricing, timelines for completion or delivery, and the quality of the goods to be supplied. This process helps to avoid misinterpretations that could lead to errors in evaluation and selection.
- Identifying the Most Suitable Contractor: Negotiation enables the contracting authority to gain insight into and form an informed opinion about the prospective contractor. Through negotiation sessions, the authority can assess the contractor's financial, technical, and operational capacities, which constitute some of the most important criteria for selecting the optimal candidate. This is particularly critical in urgent or emergency situations where time constraints do not favor the contracting authority.¹⁰
- Determining the Optimal Choice: Regardless of the precision or clarity of submitted offers, variations inevitably exist among them, and certain elements may overlap. Negotiation thus serves the purpose of identifying and clarifying the option that best serves the public interest.

To reinforce the role of negotiation in fostering transparency and integrity in the conclusion of directly negotiated contracts, the process should adhere to the following principles:

- Establishing a structured agenda for discussions.
- Allocating sessions specifically for technical experts to examine technical data.
- Documenting the proceedings of negotiation sessions, even if the results are provisional.
- Ensuring absolute confidentiality toward all competitors in order to uphold the principle of equality among them.

Negotiations are particularly significant in contracts involving foreign contractors. This is especially true in matters related to pricing, adjustment mechanisms, payment modalities, applicable governing law, and the determination of competent judicial authorities in the event of a dispute. This importance stems from the fact that foreign parties frequently refuse to submit to Algerian jurisdiction, preferring instead to resort to international arbitration.

10- Mena Mkhannashna, "Activating Free Competition within the Framework of Public Procurement," paper presented at the National Conference on the Procedures of Consultations and Public Procurement in Algeria, Faculty of Law and Political Science, University of Hadj Lakhdar, Batna, April 13–14, 2015, 136.

1.2.3 The Contracting Stage

Once the contracting authority has collected offers through inviting potential contractors and negotiating with them, and after selecting the most suitable and advantageous offer during the negotiation stage, the authority proceeds to award the contract directly to the contractor it has chosen and with whom it has negotiated all contractual terms. This process is carried out transparently, with the overarching aim of safeguarding public funds.

Contracting through negotiation necessitates strict adherence to prior stages in order to ensure the selection of the best and most appropriate contractor, while simultaneously protecting contracting authorities from corruption and malpractice.

From the provisions of Article 21 of Law No. 23-12 on public procurement, it becomes clear that the Algerian legislator has exhaustively enumerated—rather than illustratively—the situations in which direct negotiation may be employed. In each of these cases, the contracting authority, by virtue of a decision issued by the head of the relevant entity, may conclude contracts bypassing the formal requirements prescribed under the public procurement framework. It may also proceed directly to the execution stage prior to the formal conclusion of the contract, provided that a regularization contract is concluded within six months following the execution of the urgent contract or any contract that falls within the situations outlined in Article 21 of Law No. 23-12.¹¹

2. Limited Safeguards for Respecting the Exceptional Nature of Public procurement Contracts Concluded Through Direct Negotiation

In successive legislative frameworks governing public procurement, culminating in Law No. 23-12, the Algerian legislator has set forth a number of mechanisms allowing contracting authorities to conclude contracts without a formal call for competition and outside the procedural requirements normally mandated. These mechanisms empower contracting authorities, in cases of necessity or urgency, to conclude contracts by bypassing the usual contracting phase and moving directly to execution—though only to the extent justified by the emergency or necessity at hand.

2.1 Broad Discretionary Authority of the Contracting Authority in Directly Negotiated Contracts

The discretionary powers granted to contracting authorities when resorting to direct negotiation allow them, on the one hand, to interpret certain circumstances justifying its use. This is because the legal provisions contained in Article 41 of Law No. 23-12 are broadly worded, subject to multiple interpretations, and open to judicial or administrative discretion. On the other hand, these powers enable contracting authorities to determine what qualifies as a legitimate justification for resorting to direct negotiation. However, this discretion may give rise to abuse in applying this exceptional procedure, potentially undermining the principle of free competition and eroding the exceptional character of direct negotiation in public procurement.

11- Abd al-Aziz Abd al-Munim Khalifa, *The General Principles of Administrative Contracts* (Alexandria: Dar al-Fikr, 2005), 162.

2.1.1 Limited Safeguards for the Principle of Competition

One of the most significant safeguards introduced by Law 23-12 is the consolidation of the principle of free competition among contracting operators, achieved primarily through the tendering procedure as provided under Article 39 of the same law. This procedure rests fundamentally on the principles of free access to public procurement, equal treatment of economic operators, and transparency in contracting procedures. However, the recourse of the contracting authority to direct negotiation in public procurement does not exempt it from observing these fundamental principles. The exceptional nature of contracts concluded by direct negotiation must always be preserved.

Among these principles, the principle of competition is particularly vulnerable to violation when contracting authorities exercise their discretionary power in resorting to direct negotiation. This occurs especially when direct negotiation is employed outside the exhaustively enumerated cases set forth in Article 41 of Law 23-12, or when contracting authorities expand their interpretation of certain ambiguous provisions contained therein, such as those relating to monopolistic situations, urgent procurement, disasters, or technological emergencies. In these instances, the legislator has not clearly specified the exact reasons or circumstances that genuinely warrant resorting to direct negotiation. Moreover, Law 23-12 does not identify the authority competent to determine when direct negotiation is permissible. This issue, which had already arisen under Presidential Decree 02-250, persists, as contracting authorities retain broad discretionary power to define situations warranting negotiation or to interpret vaguely worded provisions. Such discretion, however, risks undermining fair competition, since the authority's discretionary power must never extend beyond what is explicitly authorized by law. The administration remains bound to uphold the principles enshrined in the Public Procurement Law.¹²

In practice, contracting authorities have significantly expanded their use of direct negotiation, particularly during the COVID-19 pandemic, when nearly all contracts were concluded through this procedure. In doing so, they circumvented the ordinary rules of competition, which are intended to guarantee transparency, fairness, and the sound management of public funds. As a result, many of these contracts were tainted by suspicions of corruption, as some authorities abused their discretion in resorting to negotiation. By contrast, certain public economic enterprises sought to avoid reliance on the exceptional nature of direct negotiation by adopting electronic contracting procedures. These institutions enabled the downloading and submission of bidding documents via email and were thereby able to conclude the majority of their contracts through open tendering. They resorted to direct negotiation only in truly exceptional circumstances, and only for contracts of a special nature that genuinely required recourse to exceptional procedures.¹³

Any infringement upon the principles of public procurement constitutes a breach of the principles of rational management of public funds, which Law 23-12 seeks to consolidate throughout its various chapters and sections. Granting priority to state-owned economic

12- Abd al-Latif Kadish, *Public Procurement: Legislation, Jurisprudence, and Case Law—A Comparative Study*, 1st ed. (Beirut: al-Halabi Legal Publications, 2010), 198.

13- Ben Nasser and Hiba, *op. cit.*, 125.

enterprises and authorizing them to contract through direct negotiation—even if based on legislative or regulatory provisions—represents a violation of the principle of equality among contracting operators. This, in turn, undermines the guarantees of the principle of competition, which rests upon the freedom of access to public procurement.¹⁴

The legislator ought not to have recognized any privileged status for this category of enterprises, given that such recognition undermines a constitutional principle: the principle of freedom of industry and commerce. These enterprises should be required to establish their market position through fair competition, rather than benefiting from preferential treatment. Such preferential practices have given rise to new forms of corruption in public procurement. Frequently, deadlines for project completion are not respected by state-owned economic enterprises, and contracting authorities are unable to impose penalties for breaches of contractual obligations. Moreover, the final prices proposed by these enterprises are often excessive when compared to those offered by private firms.

A more serious issue arises in that state-owned economic enterprises typically fail to fulfill public procurement contracts directly. Upon securing contracts, they frequently subcontract them to private operators, despite the fact that Presidential Decree 15-247 prohibits subcontracting unless it has been explicitly declared in the initial tender specifications. Law 23-12 has reinforced this same restriction, obligating such enterprises to carry out the contract obligations directly. Nonetheless, when subcontracting does occur, the prices charged by private subcontractors often differ significantly from those established in the original contract with the project owner. This practice has fostered a new, institutionalized form of corruption.

2.1.2 Limited Powers of Tender Committees and Bid Evaluation Committees

In the various laws governing public procurement, the Algerian legislator has granted powers to the Tender Opening Committees and the Bid Evaluation Committees. These bodies are authorized to exclude bids that do not comply with the tender specifications established by the contracting authority. Recognizing the importance of their role, the legislator has sought to restrict their work by requiring them to rely on a set of evaluation criteria. These include quality, execution timelines, aesthetic and functional aspects, and, where relevant, price. Furthermore, the committees are required to adhere to reference prices when assessing bids.

When examining contracts concluded through direct negotiation, reference to Law No. 23-12 reveals that the law does not explicitly require contract committees to exercise their oversight role. The legislator did not mandate the prior approval (*visa*) of the contracts committee for contracts concluded by direct negotiation. Instead, the law merely required the conclusion of a settlement contract within six months, as stipulated in Presidential Decree No. 15-247.

Given the urgent character of such contracts, the role of bid-opening and bid-evaluation committees is limited, owing to the specific nature of these transactions. In most cases, offers

14- Doudj Hamama, *Classification of Public Procurement Contracts According to the Organic Criterion* (PhD diss., Faculty of Law, University of Algiers 1, 2010), 79.

are presented by no more than three bidders. Since the legislator did not define the legal conditions or procedures for monitoring the financial envelopes of such operations, the contracts committee (evaluation of offers) is compelled to validate the offers submitted by the three bidders, while the contracting authority itself decides which to select—whether the most advantageous or simply the lowest-priced. This practice has become the norm in the conclusion of directly negotiated contracts.

This situation constitutes a significant entry point for corruption that threatens public funds. For instance, if the three bidders collude to artificially raise the financial envelope required for the contract, the contracting authority and its contracts committee are forced to accept one of the offers, even if the price is inflated. A second major factor exposing the contracting authority to the dictates and conditions of bidders is that, in directly negotiated contracts, the contracting authority cannot predetermine its exact needs, nor does it have sufficient time to prepare a detailed specification document. Consequently, in its effort to meet urgent public needs, the authority is left vulnerable to the demands of contractors.

An examination of amendments to public procurement law—from Executive Decree No. 91-434 through to Law No. 23-12—shows that the legislator has never given serious consideration to building a comprehensive legal framework for the governance of directly negotiated contracts. Such a framework would ensure transparency in the management of public funds and establish clear procedures governing the award of contracts under these exceptional circumstances. Instead, successive amendments have merely listed the cases in which a contracting authority may resort to direct negotiation or negotiation after consultation, without clarifying the authority of contracts committees in such matters, nor setting financial thresholds that may not be exceeded.

In practice, the role of the contracts committee in preparing settlement contracts has been reduced to mere approval and endorsement. It is illogical for a committee to refuse its endorsement after projects have already been executed, implemented, or even begun providing public services. Moreover, if a contracts committee identifies a violation of legislative or regulatory provisions and issues a decision of rejection, Article 170 permits certain actors to override that decision. This represents a serious infringement upon the powers of the contracts committee. It would have been more appropriate for the legislator to entrust such disputes to an impartial appeals body, or to administrative courts, in order to guarantee adequate protection of public funds.

The conclusion that emerges is that the legislator has imposed rigorous requirements on contracts concluded through competitive tendering—particularly with regard to the supervisory role of contracts committees, where approval and endorsement are mandatory. Law No. 23-12 also precisely defined the powers of bid-opening and bid-evaluation committees, consolidating their role in safeguarding procedural transparency. However, the legislator subsequently introduced exceptions for directly negotiated contracts that, in practice, curtailed the authority of both committees, reducing their role to mere endorsement. The large number of judicial proceedings currently underway in numerous public institutions

as a result of contracts concluded through direct negotiation constitutes clear evidence of this deficiency.¹⁵

2.2 Oversight Mechanisms of Limited Effectiveness in Contracts Concluded Through Direct Negotiation

An examination of the oversight framework applicable to public procurement contracts concluded through direct negotiation reveals that post-execution external control mechanisms are, for the most part, of limited effectiveness and suffer from several shortcomings. A close reading of the provisions of Law No. 23-12 shows little substantive difference from the preceding presidential decrees, particularly given the exceptional nature of such contracts. The post-contract phase of directly negotiated agreements often constitutes fertile ground for irregularities and corrupt practices. This is especially true when amendments (addenda) to such contracts are required, as the legislator has neither specified the procedures for concluding addenda in this context, nor identified the authority responsible for approving them. Notably, Article 41 of Law No. 23-12 makes no explicit reference—either directly or indirectly—to these matters.

2.2.1 Formalistic Oversight by the Budgetary Controller and the Public Accountant

As an exception, the legislator permits the commencement of contract execution prior to the completion of formal contracting procedures. The head of the relevant authority, minister, or wali (provincial governor) may, by reasoned decision, authorize the initiation of services before the formal conclusion of a public procurement contract. This raises the issue of ex ante oversight by the budgetary controller and the public accountant.

In principle, financial oversight of public procurement contracts is broad in both scope and subject matter. The law empowers the budgetary controller to exercise prior control over public procurement contracts, and similarly grants the public accountant—being one of the officials responsible for budget execution—the authority to verify the legality of expenditures. However, with respect to contracts concluded through direct negotiation, the relevant legal texts contain no provisions suggesting that such contracts are subject to prior oversight. This is due to their urgent nature, which necessitates immediate execution. Instead, these oversight bodies exercise only ex post control, through “regularization contracts” concluded within six months following execution.

This gap creates significant opportunities for corruption in contracts concluded through direct negotiation. The urgent nature of such contracts requires bypassing ordinary oversight mechanisms, as subjecting them to standard financial control procedures would undermine the very purpose of urgency—particularly in situations such as natural disasters or public health emergencies. For instance, during the COVID-19 pandemic, it was practically impossible to maintain regular oversight mechanisms. In Algeria, Presidential Decree No. 20-237 of 31 August 2020, which set out special measures adapting public procurement procedures in the context of COVID-19 prevention, explicitly authorized contracting

15- Ria Amina and Rouab Jamal, “The Role of Ex Ante Financial Oversight of Public Procurement in Combating and Preventing Corruption,” *Journal of Rights and Freedoms* 12, no. 1 (2022): 354.

authorities, ministers, or walis to initiate the execution of contracts prior to their formal conclusion, as stipulated in Article 2 of the decree.

Article 3 of Presidential Decree No. 20-237 permitted contracting authorities to submit multiple requests of the same nature, based on a reasoned decision or a set of reasoned decisions, with the same economic operator. This practice is not authorized by the laws and regulations governing public procurement, nor by financial oversight legislation. Furthermore, Article 5 of the same decree stipulates that: “*Services executed under this decree may, on an exceptional basis, be subject to financial settlement prior to the conclusion of a settlement contract and after the completion of the service, provided that it is validated by the competent authorizing officer.*”

Thus, the legislator allowed contracting authorities to proceed with financial settlement immediately after the service had been delivered, without waiting for the conclusion of a settlement contract, provided that the service was executed in accordance with the requirements of the contracting authority.¹⁶

The role of the public accountant in public procurement contracts concluded under Presidential Decree No. 20-237—issued in the context of measures to prevent the spread of COVID-19—was to ensure compliance with the rules of public accounting. This type of oversight focused on the legality of expenditure, requiring that the expenditure correspond to the financial allocation assigned to it, in accordance with public accounting rules. The budgetary controller carried out a similar verification process within the limits of the powers conferred upon him by law.

All contracts concluded during the COVID-19 period were executed using the exceptional method of public procurement. Additionally, the relevant legal frameworks recognize the right of the authorizing officer, in cases where the financial controller or public accountant refuses to approve a contract, to issue an *overriding order* (*mouqarrar at-tajawouz*). Once such an order is issued, the contract may proceed, provided that copies of the order are sent to both the General Inspectorate of Finance and the Court of Accounts.

It is evident that the legislator reinforced the oversight functions of both the budgetary controller and the public accountant in contracts concluded under the ordinary procurement procedures, broadening their powers and making these two institutions effective tools in combating corruption involving public funds. However, contracts concluded under exceptional procedures remain largely beyond the reach of this type of oversight. The exceptional nature and special characteristics conferred by the legislator on such contracts prevent oversight bodies from exercising their full supervisory role. It would therefore have been more appropriate for the legislator to establish specific oversight mechanisms enabling the budgetary controller and the public accountant to exercise control over contracts

16- Belwadhah al-Jilani, “The Role of Financial Oversight Bodies in Reducing Corruption and Protecting Public Funds in Algeria,” *Horizons of Management and Economics Sciences* 6, no. 1 (2023): 554.

concluded through direct negotiation, in a manner consistent with the particularities of this type of procurement.¹⁷

2.2.2- Ineffectiveness of Ex-Post Oversight by the General Inspectorate of Finance and the Court of Accounts

The General Inspectorate of Finance and the Court of Accounts constitute two of the most important financial oversight bodies in Algeria. The General Inspectorate of Finance was established by Decree No. 80-53 of 1 March 1980, while the Court of Accounts was created pursuant to Decree No. 80-05 of the same date.

With regard to the General Inspectorate of Finance, it exercises oversight over the financial and accounting management of state administrations, local authorities, as well as bodies, agencies, and institutions subject to the rules of public accounting. Consequently, all contracts concluded by legal persons are subject to the supervision of the Inspectorate. Although the legislator has granted the Inspectorate significant powers, allowing it to intervene, audit the entities under its jurisdiction, and freely review their accounts, the effectiveness of such oversight is measured by the binding executive decisions that result from it—particularly in cases where irregularities or violations are identified.

However, in practice, the oversight of the General Inspectorate of Finance falls short. Its periodic or annual reports remain at the level of mere observations and findings; they do not impose binding measures on the entities subject to its control. For example, in cases involving contracts concluded through direct negotiation, even when the Inspectorate establishes the existence of violations, it is unable to adopt urgent remedial measures. Instead, it merely communicates its findings to the supervisory authorities of the entity concerned. Oversight of this nature—without sanctions or deterrent measures—remains ineffective.

The reality demonstrates that, despite local entities being subject to the Inspectorate's supervision, financial corruption related to public procurement continues to grow. This fact serves as evidence of the inadequacy of its oversight. Moreover, the Inspectorate's monitoring is not conducted on a sufficiently regular basis; delays are frequent and, in some cases, extend over several years. Furthermore, even when the Inspectorate identifies serious irregularities or violations in contracts concluded through negotiation and submits its reports to the supervisory authority, its role effectively ends at that stage. The discretionary power then rests entirely with the hierarchical authority to decide upon any measures deemed appropriate.

It is therefore clear that the oversight exercised by the General Inspectorate of Finance remains limited to routine reporting, devoid of binding sanctions, which has significantly undermined its effectiveness.

With regard to the Court of Accounts—although it differs in nature from the General Inspectorate of Finance, as the former has, under recent reforms, acquired a judicial character—it nonetheless resembles the Inspectorate in that its oversight is *ex post facto*,

17- Nadia Tayab, "The Authority of the Contracting operator in Amicable Procurement Contracts," *Critical Review of Law and Political Science*, no. 1 (Faculty of Law and Political Science, Mouloud Mammeri University of Tizi Ouzou, 2011): 287–88.

applied after the execution of public procurement contracts, whether concluded through competitive tendering or direct negotiation.

The Court of Accounts begins its supervisory function only after expenditures have been made and revenues collected. While its oversight manifests in the long term, it is not confined merely to the legality of transactions; it also extends to an assessment of their appropriateness. The Court is entitled to examine all documents that may facilitate its auditing functions. Thus, in the case of contracts concluded by direct negotiation, the Court exercises its control to ensure compliance with the general principles of accounting law and public procurement legislation.

However, this type of oversight remains largely ineffective, since the contract would already have been executed and payments disbursed by the time scrutiny occurs. This is particularly evident given that settlement contracts must be prepared within six months, whereas the Court of Accounts operates on an annual review basis. Consequently, its oversight generally arrives too late to prevent the corruption that may affect public procurement in general and directly negotiated contracts in particular.

Although the Court retains the authority to initiate criminal proceedings against individuals proven to have engaged in corrupt practices, comparative experiences demonstrate that criminal prosecution is no longer regarded as the ultimate safeguard. Rather, emphasis is now placed on establishing a new form of oversight known as preventive (or proactive) control, which aims to forestall corruption from the outset.¹⁸

From this examination of the supervisory roles of both the General Inspectorate of Finance and the Court of Accounts, it is evident that both bodies provide only *ex post facto* oversight of public procurement. Their effectiveness is therefore limited, as they cannot halt corruption once it has occurred—particularly in contracts awarded through direct negotiation. It would have been more appropriate for the legislator, in Law No. 23-12, to grant broader powers to the administrative judge of urgent matters, enabling him or her to exercise prior oversight over contracts concluded by direct negotiation, in light of their urgent and exceptional nature.

Conclusion:

Direct negotiation constitutes one of the exceptional mechanisms for concluding public procurement contracts. Article 21 of Law No. 23-12 explicitly enumerates the situations in which contracting authorities may resort to concluding contracts without a formal call for competition, allowing them to contract directly with an economic operator deemed capable of fulfilling the terms of the agreement. In this type of contracting, the authority enjoys broad discretionary powers, whether in selecting the contracting party or in determining the timing and method of execution, given the particular nature of such contracts. However, the law stipulates that the contracting authority must not be responsible for creating the circumstances necessitating such exceptions, nor should they result from deliberate delays or maneuvers on the part of the authority.

18- Belwadhah, *op. cit.*, 556.

Study Findings:

This study reached several conclusions regarding the exceptional use of direct negotiation:

- Although the legislator enumerated the cases in which direct negotiation may be employed, these provisions were drafted in general and ambiguous terms, leaving room for multiple interpretations.
- The legislator did not clearly designate the authority responsible for approving such contracts, merely requiring a decision issued by the head of the relevant entity, without clarifying the role of tender committees or established oversight bodies.
- The exceptional character of such contracts has prevented the effective activation of oversight mechanisms that would otherwise ensure rational and transparent management of public funds.

Study Recommendations:

In light of these findings, this paper puts forward the following recommendations:

- Reconsider and refine the circumstances that justify resorting to direct negotiation, ensuring they are strictly limited to genuine cases of necessity or urgency.
- Clearly define the oversight bodies and entities authorized to exercise ex ante control over such contracts, thereby reinforcing accountability and sound financial management.
- Strengthen the role of urgent administrative judicial review over contracts concluded through direct negotiation, to ensure legality and transparency while preserving the exceptional nature of this procedure.

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