

Guarantee Provisions and Their Efficacy in Ensuring Public Procurements in Algerian Legislation

أحكام الكفالة ومدى نجاعتها في ضمان الصفقات العمومية في التشريع الجزائري



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Abstract:

A guarantee is recognized as a designated contractual arrangement, defined by standard legal stipulations in civil law, which legislators have integrated into the domain of public procurement as a safeguard to preserve public assets against mismanagement. This obligation is legally imposed on contractors to ensure the proper execution of public projects. This study delves into the legal framework governing such guarantees, scrutinizing their efficacy in securing public procurement through an analysis of the guarantee's legal definition, its prerequisites, and its implementation in public procurement settings.

key words: Guarantee, Financial Securities, Public Procurement, Public Funds

المخلص:

تعتبر الكفالة من العقود المسماة التي خصتها القواعد العامة في القانون المدني أحكام خاصة والتي استخدمها المشرع في مجال الصفقات العمومية باعتبارها أحد الضمانات المالية التي تكفل حماية المال العام من الإهدار وذلك بفرضها قانوناً وبشكل إلزامي على المتعاملين لتنفيذ الصفقات العمومية.

وتعالج هذه الدراسة أحكام هذه الكفالة ومدى نجاعتها في ضمان الصفقات العمومية من خلال التطرق إلى المفهوم القانوني للكفالة وشروطها، ثم إلى تطبيقاتها في مجال الصفقات العمومية. الكلمات المفتاحية: الكفالة، ضمانات مالية، الصفقات العمومية، المال العام

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Introduction:

The transition of the state towards a market-oriented economy demands adjustments to contemporary economic shifts. This transition has prompted the creation of extensive legal documentation that constitutes the legal infrastructure necessary for the enactment of investment strategies and the development and provisioning of public amenities for communal benefit.

The legislative documents set the rules for public procurement, promoting the principle of competition to effectively engage economic operators, thereby ensuring the conservation of public resources and preventing corruption.

The importance of these regulations is underscored by Law 23/12, which establishes essential norms for public procurement, oversees the management of public expenses, and requires that entities in this sector provide necessary assurances to the contracting authority¹. This regulatory framework optimizes contractor selection and protects public procurement objectives and assets.

The concept of guarantees, as dictated by "Presidential Decree No. 15-247," is an integral part of the securities within this domain², remaining effective until new regulations are enacted under this statute³. This includes various forms of securities like bid bonds, performance bonds, and advance payment guarantees. The aim of this study is to shed light on the conditions and requirements of these guarantees within the established legal framework and their application in public procurement. It also seeks to assess these particular conditions and put forth pertinent theoretical frameworks.

The primary question this study seeks to answer is: To what extent can guarantees serve as effective financial securities within the realm of public procurement?

This investigation is structured around two principal themes:

The first Topic: legal definition of the guarantee and its requirements;

The second Topic: practical applications of the guarantee in public procurement.

¹-Law No. 23/12 dated 05 August 2023, defines the general rules related to public procurement, Official Gazette No. 51 dated 06/08/2023. This law was enacted pursuant to Article 139/10 of the 2020 Constitution, which stipulates that general rules related to public procurement are guaranteed in areas legislated by Parliament by law.

²-Presidential Decree No. 15-247 dated 16 September 2015, "Regulation of Public Procurement and Delegations of Public Service," Official Gazette No. 50 dated 20/09/2015.

³-See: Article 112 of Law No. 23-12.

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The first Topic: legal definition of the guarantee and its requirements

In this segment, we explore the legal definition of the guarantee as prescribed by standard legal norms.

The first requirement: The Legal Concept of the Guarantee

Under Algerian statutory law, a guarantee is outlined as a contractual pledge wherein a party, the guarantor, commits to meet a certain obligation should the primary debtor default¹. This agreement, a bilateral contract between the guarantor and the creditor, purposefully excludes the debtor from any direct contractual relationship.

The activation of this guarantee does not require the debtor's approval and may proceed despite their opposition, underlining its primary role in securing the creditor's interests from the potential non-performance of the debtor. The guarantee is inherently dependent on the debtor's original obligation, obliging the guarantor to act upon the debtor's failure².

The clause "if the debtor himself does not fulfill it" is not a conditional or delaying factor for the guarantor; instead, it signifies that the guarantor's responsibility is activated by and remains contingent upon the continuation and non-fulfillment of the debtor's obligation³.

One intrinsic attribute of guarantees under general statutes is their nature as personal assurance contracts. This categorization implies that a guarantee represents a personal pledge by the guarantor.

The contract provides a personal guarantee to the creditor, whereby the guarantor takes on the obligations initially due from the debtor, thereby enhancing both security and trust for the creditor. This allows the creditor to directly demand fulfilment from the guarantor should the debtor fail to meet their obligations⁴.

¹-See Article 644 of Order No. 75/58 dated 26 September 1975, containing the amended and supplemented Civil Law.

²-Abdel Razzak Al-Sanhuri, "The Mediator in Explaining Civil Law," Volume Ten, Dar Ihya Al-Turath Al-Arabi, Beirut, n.d., p.19.

³-Mohammed Sabri Al-Saadi, "The Clear Explanation of Civil Law: Personal and Real Securities, Guaranty Contract," Dar Al-Huda, Algeria, 2011, p.14.

⁴-Nabil Ibrahim Saad, "Real and Personal Securities: Official Mortgage, Right of Specialty, Possessory Mortgage, Privilege Rights, Guaranty," Dar Al-Jamea Al-Jadeeda, Alexandria, 2007, p.284.

In the realm of contracts, guarantees are inherently linked and primarily aim to secure the fulfilment of a debt. The guarantor's duty to act is contingent on the presence and validity of the debtor's original obligation. A guarantee is only effective if there is a valid primary obligation, and the guarantor's commitment is only legitimate if the original obligation is valid. This dependency principle governs the functioning of the guarantee¹.

Furthermore, guarantees can resemble donation contracts if the guarantor does not seek compensation, making such agreements subject to the laws governing donations, which include the necessary legal capacity to enact such contracts.

For the creditor, such guarantees are unequivocally advantageous, yet for the guarantor, engaging in such agreements for remuneration, whether from the debtor or a third entity, converts them into exchange contracts².

In the realm of public procurement law, Presidential Decree No. 15-247, which oversees public procurement, does not articulate a distinct definition of 'guarantee,' thereby reverting to the foundational general rules that influenced its formulation.

The decree addresses guarantees in "Section Four: Guarantees" and delineates various types of guarantees, such as advance payment guarantees detailed in Article 110, and performance guarantees outlined in Article 124 and subsequent sections. These specifics will be explored further in subsequent sections of this study.

The implementation of the guarantee concept under Decree No. 15-247, particularly in public procurement and general facility delegations, shows notable differences from its use in civil law:

- 1- In civil law, a guarantee is a personal commitment by the guarantor to cover an obligation that the debtor has not met, directly mirroring the extent of the debtor's unfulfilled duty³.
- 2- In the domain of public procurement, guarantees function as mechanisms to ensure the precise execution and compliance with the stipulated terms between involved parties. It may be incumbent upon the guarantor to meet an

¹-Samir Abdel Sayed Tanagho, "Real and Personal Securities," Ma'arif Establishment, Alexandria, 1996, p.20.

²-Mohammed Sabri Al-Saadi, op. cit., p.19.

³-Ben Bouzid Dagbhar Noura, "The Legal Regulation of Guarantees and its Applications in Public Procurement Law," Journal of Legal and Political Research and Studies, Issue 8, University of Blida, 2009, p.51.

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obligation that differs from the debtor's initial commitment, such as delivering financial performance or specific services to fulfill the contractual stipulations.

3- The predominant purpose of guarantees within public procurement is to safeguard public interests and guarantee that projects are completed to the established standards, rather than merely satisfying the original obligation. In this setting, obligations might be secured to ensure project completion, service delivery, or the acquisition of essential supplies for the contracting authority. These guarantees do not directly secure the activities but provide safeguards against possible delays in contract completion or failure to meet critical terms, which could result in contract cancellation and the necessity for re-tendering. For instance, with performance guarantees, the contracting authority may utilize the guarantee funds to address problems identified during the provisional approval of a contract that the initial contractor failed to rectify.

The contrasting nature and focal point of obligations under guarantees in civil law¹, which aim at entirely fulfilling the original obligation, and those in public procurement, which prioritize proper execution and adherence to contractual conditions possibly through varying means, are markedly evident.

It is a perspective we share that the use of the term 'guarantee' in Decree No. 15-247 by the Algerian legislator was arguably inappropriate due to the significant conceptual differences in its application between civil law and public procurement. It would have been advisable for the legislator to select a term that more accurately reflects the specific financial guarantees intended in public procurement, by opting for specifically defined contracts rather than the broader term 'guarantee,' to circumvent confusion and enhance clarity in the regulatory legal framework.

The second requirement: Conditions of Validity and Effects of Guarantees

A guarantee agreement is inherently consensual, necessitating both objective and formal prerequisites as stipulated in general contract law, which include mutual agreement, definite subject matter, and a legitimate purpose.

For a contract to be valid, it must stem from the unified intentions of qualified parties without any flaws in consent. This agreement is formed between the

¹-Ben Bouzid Dagbar Noura, op. cit., p.53.

guarantor, who commits to satisfy a duty on behalf of the debtor, and the creditor, who is entitled to that duty.

Commonly, creating a guarantee does not demand a formal procedure; it hinges on the shared understanding between the guarantor and creditor, irrespective of the debtor's role, as they are excluded from the contractual bond¹.

The guarantee serves as a type of agreement rooted in consensus, where simply the coherent intentions of the guarantor and creditor are sufficient, thereby dispensing with the need for elaborate formalities. Such consent can be expressed verbally, in written form, by conventional actions, or impliedly, unless legally or contractually required to be explicitly stated², thus enhancing the contract's adaptability.

Although specific formalities for the establishment of a guarantee are not mandated by law, it adheres to the general principles of consensual contract formation. Nevertheless, the Algerian legal framework requires that guarantees be documented in writing, although obligations may be evidenced by oral testimony³. This indicates a legislative preference for written confirmation of guarantees, albeit not as a prerequisite for contract formation.

A guarantee can also be structured as a negotiable instrument or a promissory note, with the guarantor's principal obligation originating directly from the instrument, rather than being ancillary⁴.

In the sphere of public procurement, according to Decree No. 15-247, formality plays a crucial role in the validity of a guarantee. It mandates that guarantees be documented in writing and that the performance guarantee be enclosed in a sealed envelope labelled ⁵"Do not open - performance guarantee."

Furthermore, the decree mandates that the performance guarantee conforms to a specific format as dictated by a decree from the Minister of Finance⁶, akin to the guarantee of good execution⁷. This highlights the necessity for written guarantees in public procurement to avert annulment and requires that these guarantees be issued by either a bank regulated under Algerian law.

To ensure the validity and effectiveness of a guarantee, the consent involved must be authentic and free from any intention defects, such as

¹-Nabil Ibrahim Saad, op. cit., p.314.

²-See: Article 60 C.P.C. (Civil Procedure Code).

³-See: Article 644 C.P.C.

⁴-Abdel Razzak Al-Sanhuri, op. cit., p.77.

⁵-See: Article 125 of Decree No. 15-247.

⁶-See: Article 125/6 of Decree No. 15-247.

⁷-See: Article 133/7 of Decree No. 15-247.

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mistakes¹, fraud, coercion, or undue influence. In practice, issues often arise when a guarantor is misled or deceived.

To challenge the guarantee's validity on these grounds, the guarantor must demonstrate that the error was substantial and that the other party² was either also mistaken or aware of the deceit³.

Addressing defects of intention within public procurement proves challenging due to the contractual engagements involving legal entities and intricate procedures. Moreover, substantiating such defects is infrequent because of these complexities, and any such occurrences may invoke liability under general law⁴.

The second topic: Applications of Guarantees in Public Procurement

Within the realm of public procurement, guarantees act as essential financial mechanisms that safeguard public transactions and the management of public funds. While Decree No. 15-247, referred to as "Guarantees," does not specifically define 'guarantees,' it details various forms such as the performance guarantee (01), good execution guarantee (02), and advance repayment guarantee (03), which will be further detailed in later discussions.

The first requirement: Performance Guarantee

Under Decree No. 15-247, a performance guarantee is compulsory for public contracts pertaining to "works" and "supplies," specifically when these contracts surpass the thresholds outlined in the first and second paragraphs of Article 184⁵. The decree requires a performance guarantee that must exceed one percent (1%) of the proposed bid amount. This requirement is clearly specified in the tender documentation to ensure transparency and that all bidders are well-informed of the conditions⁶.

¹-Review the theory of defects of will in articles from 81 to 91 C.C. (Civil Code).

²-Article 82 C.C. states, "A mistake is considered fundamental if it reaches such severity that the contracting party would not have entered the contract had they not made this mistake. A mistake is especially considered fundamental if it occurs concerning a quality of the object both parties deem essential or must be considered as such due to the terms of the contract and good faith. If the mistake occurs in the person of the contractor or in one of their qualities, and that person or quality is the main reason for contracting."

³-Nabil Ibrahim Saad, op. cit., p.320.

⁴-Ben Bouzid Dagghbar Noura, op. cit., p.59.

⁵-See: Article 184 of Decree No. 15-247.

⁶-See: Article 125 of Decree No. 15-247.

A performance guarantee is a financial commitment made by a contractor, typically calculated as a percentage of the bid amount, to ensure the completion of a contract concerning works or supplies. This financial commitment is necessitated by regulations when the contractual value exceeds defined limits within the decree.

The rationale behind requiring a performance guarantee in public procurement transcends mere contract security; it is integral to organizing competitive procedures and ensuring adherence to contractual stipulations.

This requirement not only safeguards the procedural integrity but also mitigates delays in the execution of public contracts. Additionally, it underscores the contractor's commitment, distinguishing serious contenders from those who might submit low, unfeasible bids that undermine the competitive process and jeopardize the timely completion of contracts.

According to Decree No. 15-247, the guarantee must be issued either by a bank governed by Algerian law or a public procurement guarantee fund. For contractors based outside of Algeria, the guarantee must be provided by a bank operating under Algerian legislation and supported by a guarantee from a foreign bank¹.

Despite similar procedural complexities, the Algerian legislation has exempted certain public contracts from the necessity of a performance guarantee². This exemption could potentially provide leeway for less serious bidders to disadvantage earnest competitors, particularly as services and studies possess distinct requisites and are contracted in a manner akin to procurement for works and supplies.

Additionally, Decree No. 15-247 mandates that a performance guarantee is essential for public contracts when the estimated needs or contract values surpass three hundred million dinars, as specified³:

1- For works contracts: The requirement is invoked if the administrative estimate surpasses one billion dinars.

2- For supplies contracts: The requirement is applicable if the administrative estimate exceeds three hundred million dinars.

¹-See: Article 125 of Decree No. 15-247.

²-Fawzia Hachemi, "Financial Guarantees in the Field of Public Procurement," *Journal of Legal and Political Fiqh*, Volume 1, Issue 1, University of Tiaret, 2019, p.163.

³-See: Articles 125 and 184 of Decree No. 15/247.

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These criteria aim to confirm the sincerity of bids and boost confidence in managing public contracts that involve significant financial investments. "The guarantee from an unselected bidder who didn't file an appeal will be refunded the day following the end of the appeal period.

Likewise, the guarantee from a bidder who was not chosen but did appeal will be returned upon notification from the procurement committee of the appeal's rejection. The guarantee for the selected bidder will be refunded after they provide the performance bond"¹.

The second requirement: Good Execution Guarantee

Additionally, Decree No. 15-247 mandates that contractors provide a good execution guarantee alongside the advance repayment guarantee as detailed in Article 110. This guarantee is designed to ensure that the contract is carried out accurately and in compliance with the terms outlined in the advance repayment guarantee².

The good execution guarantee acts as an essential legal protection within the framework of public procurement law, providing additional assurance for the contracting authority against risks associated with the contract's implementation.

Issued by the contractor, this guarantee not only highlights their commitment to adhering to the contract conditions effectively but also addresses potential liabilities resulting from latent defects or non-compliance with agreed-upon quality standards, thus enhancing the contractor's dependability and dedication to the precise fulfillment of the contract.

Decree No. 15-247 grants exemptions for study and service contracts from the obligation of a good execution guarantee, which the contracting authority can verify prior to making any payments. Contracts overseeing these services, however, are not included in this exemption³.

"The legislator has determined the good execution guarantee amount to be between five percent (5%) and ten percent (10%) of the contract value, contingent on the service's nature and significance"⁴.

The decree specifies the parameters for the good execution guarantee in public contracts, indicating that it should amount to "1% to 5% of the contract value for contracts below the limits specified in Article 184 of Decree No. 15/247." Additionally, it grants the contracting authority the flexibility to waive

¹-See: Articles 125/4,5,6 of Decree No. 15-247.

²-See: Article 130 of Decree No. 15-247.

³-See: Article 130/2 of Decree No. 15-247.

⁴-See: Article 133/1 of Decree No. 15-247.

the requirement for a good execution guarantee for certain contracts, such as those with a performance duration of less than three months or contracts formed through straightforward mutual agreement with public agencies.

These regulations and exceptions are crafted to strike a balance between ensuring the quality of contract fulfillment and simplifying administrative processes. Decree No. 15/247 further introduces specific exemptions for categories such as artisans, technicians, and "small entities under Algerian law," from the requirement of a good execution guarantee for projects with cultural implications. This method helps protect cultural heritage and encourages the participation of small businesses and local specialists in the sector¹.

The law allows replacing the performance bond with a performance deduction, a tactic designed to simplify dealings in public procurement².

This allows for the understanding that while a good execution guarantee represents a sum deposited prior to the final contract payment, a performance deduction is a sum withheld by the contracting authority from the final payments upon contract completion³.

This flexible management of execution guarantees aims to reduce financial burdens on contractors, thereby fostering their continuous participation in public procurement activities without sacrificing the quality control of contract fulfillment.

The performance guarantee is valid from the start of the project until its anticipated completion⁴. "The performance guarantee is typically refunded within one month following the official approval of the contract"⁵.

The third requirement: Advance Repayment Guarantees

The contracting authority refrains from advancing payments for the execution of public contracts, with exceptions outlined in Decree No. 15-247 which permits advance payments under specified contracts, contingent upon the provision of legal guarantees, notably advance repayment guarantees.

The contracting authority generally does not make advance payments for the execution of public contracts, except as allowed under Decree No. 15-247, which authorizes advance payments for certain contracts, provided that legal safeguards, especially advance payment guarantees, are in place.

¹-See: Article 130/3 of Decree No. 15-247.

²-See: Article 133/4 of Decree No. 15-247.

³-See: Articles 133/5,6 of Decree No. 15-247.

⁴-Fawzia Hachemi, op. cit., p.167.

⁵-See: Article 134 of Decree No. 15-247.

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The contracting authority then recoups these advances by deducting them from the contractor's subsequent payments, either during or after the project's completion, to safeguard the interests of the contracting entity and ensure proper contract fulfilment¹.

Algerian legislation mandates that contractors secure a guarantee corresponding to the advances, issued by a bank "governed by Algerian law or a public procurement guarantee fund" for local contractors, while guarantees for foreign contractors must be supported by a reputable foreign bank to assure the retrieval of the advances².

The law enables the contracting authority to reclaim advances given to contractors through deductions from the payments owed to them. The recovery of advances commences when disbursements reach 35% of the original contract value and is completed when payments amount to 80% of the contract value³. This framework ensures a systematic and progressive recoupment of advances.

While the legislator aims to ease the conclusion of public contracts for contractors, it also emphasizes the necessity to safeguard public funds and guarantee that contracts are carried out both accurately and punctually. Financial guarantees play a vital role in sustaining this balance.

Conclusion:

Guarantees represent crucial financial instruments instituted by the Algerian legislator through Decree No. 15/247, emphasizing the critical role these contracts play both in promoting the public interest and in shielding public resources from potential misappropriation.

Additionally, these guarantees offer a layer of protection to the contractors, recognizing their role in delivering services, and also provide security for the contracting authority, especially evident in the context of advance repayment guarantees as previously discussed.

The insights gleaned from this analysis lead to the following determinations:

- _ Guarantees are key legal and financial instruments that ensure the contracting authority's protection and the security of public finances.
- _ A "performance guarantee" at the start of the bidding process serves as a preventive measure to affirm the seriousness of public contracts and promote transparency, helping to prevent manipulation.

¹-See: Article 110 of Decree No. 15-247.

²-Ibid.

³-See: Article 116 of Decree No. 15-247.

- The "good execution guarantee" legally ensures a project completes without hidden defects and is retained until after the project's final acceptance. If unaddressed defects are found, the contracting authority can withhold this guarantee.
- The "advance repayment guarantee" provided by the contractor through a bank secures the advances paid by the contracting authority for the contract's precise fulfilment. This guarantee also safeguards these funds if the contractor fails to meet obligations, requiring a bank compliant with Algerian law and specific formatting as dictated by the Minister of Finance.
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