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The Contractual Liability of the Administration in the Execution of Its Administrative Contracts: -The Fault Based Model- (Based on the Latest Legislation and Regulations on Public Procurement)

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Abstract:

Administrative contracts derive their importance from their connection to public services, as these services constitute both the subject and the purpose of such contracts. This objective can only be achieved through full performance of administrative contracts. However, the administration itself may sometimes obstruct execution of the administrative contract's object by failing to fulfill its contractual obligations arising from its administrative contracts. These obligations are diverse and may take the form of technical or financial obligations. Moreover, proper execution of these obligations also requires the administration to exercise its exceptional powers and multiple privileges correctly, including its powers of supervision, control, direction, modification, imposition of sanctions, and termination of the contract for reasons of public interest. Therefore, any breach by the administration of its contractual obligations, or any deviation in the exercise of its powers, constitutes contractual fault on its part, which gives rise to its contractual liability toward the contracting party-thereby entitling the latter to claim compensation, or to request the annulment or termination of the contract.

***Dr. Mokdad Zina**

Introduction:

The administration bears the responsibility of meeting public needs, which are constantly evolving and increasing. To fulfill this role, it frequently enters into administrative contracts. An administrative contract is one concluded by a public legal entity, concerning a public service, and reflecting the administration's intent to apply principles of public law.

This type of contract has attracted significant judicial and legislative attention due to its importance and close connection to public treasury. Administrative contracts serve as the primary mechanism for allocating public resources to implement national and local development plans, while promoting economic growth. Consequently, when the administration engages in such contractual relationships, it is governed by a specialized legal framework, primarily public procurement regulations.

This study focuses on the execution phase of a fully constituted administrative contract. Such a contract establishes reciprocal rights and obligations between the parties. However, due to the specific nature of this contract, the administration-by virtue of its status as a public authority- remains in a superior position vis-à-vis its contracting party, enjoying broad prerogatives in exercising its powers.

Nevertheless, administrative law seeks to maintain a balance between the administration's pursuit of the public interest through contractual arrangements and the legitimate interests of the contracting party. The contracting party is thus afforded certain rights to safeguard its interests and ensure proper performance of its contractual obligations. These guarantees also serve to prevent the administration's prerogatives from discouraging potential contractors, thereby preserving one of its most effective instruments for establishing and managing public services efficiently.

Among these rights, the ability to invoke the administration's contractual liability is particularly important. This study focuses on such liability as a fundamental right of the contracting party during the contract's execution. The administration's liability may arise when it breaches contractual obligations or deviates in the exercise of its powers. It may also arise in specific circumstances even in the absence of fault, such as unjust enrichment or threats to the contract's financial equilibrium. This liability may take several forms, including claims for financial compensation, annulment, termination, or damages. However, this study focuses exclusively on liability grounded in contractual fault.

Legal and non-legal dictionaries define fault in terms of negligence or failure to act. Accordingly, contractual fault implies that the administration has acted

negligently or failed to fulfill a duty, thereby breaching an existing obligation or infringing the rights of the contracting party (Delaunay, 2011, pp. 224-225). Contractual fault arises when the administration's exercise of its powers during execution causes harm or imposes undue burdens on the contracting party (Nabulsi, 2012, pp. 515-516).

- **the problematic:**

From this standpoint, a fundamental question arises: How can the administration be held contractually liable on the basis of fault in an administrative contract, given its legally protected prerogatives and the realities of administrative authority?

- **the method of analysis:**

To answer this question, the study employs legal research methodologies, including the descriptive method, which identifies and objectively explains legal issues, and the analytical method, which examines the relevant elements and legal provisions to address these issues and derive meaningful conclusions and recommendations.

Accordingly, this study relies upon a selection of recent legal texts related to public procurement, in addition to various academic and doctrinal references that are relevant to the subject. While these works often address the topic within broader discussions of administrative contracts or public procurement, specialized studies focusing solely on this issue remain limited or rare.

- **Study Hypotheses:**
- The forms of fault underlying the administration's contractual liability are manifold, contingent upon the nature of its contractual obligations and attendant powers.
- The contracting party endures inequitable treatment owing to the absence of explicit provisions in public procurement legislation governing the administration's fault-based contractual liability.
- Invoking the administration's contractual liability constitutes an effective safeguard for the rights of contracting parties, who occupy an inferior position vis-à-vis the administrative authority.

- **Study objectives:**

This study aims to clarify the fault-based foundation of the administration's contractual liability and its justifications by examining various forms of fault. It will refer to legal provisions governing public procurement and draw upon recent legislative, doctrinal, and judicial developments that safeguard the contracting party's rights in implementing administrative contracts.

Based on the foregoing, the study is divided into two main topics. The first topic examines the administration's contractual liability arising from its failure to fulfill contractual obligations, while the second topic focuses on liability resulting from deviation in the exercise of its contractual powers.

THE FIRST TOPIC: The Administration's Contractual Liability for Breach of Its Contractual Obligations

By its nature, the administrative contract generates reciprocal contractual obligations binding both parties—the contracting administration on one side, and the contracting party on the other. While the administration bases its prerogatives and powers within the administrative contract on the principle of ensuring the regular and continuous operation of public utilities to serve the public interest, the contracting party derives its rights directly from the contract itself. Although the parties to an administrative contract lack equality, with the administration wielding authority to control the contracting party's obligations, the administration remains bound to respect its own contractual commitments, whether expressly stated in the contract or arising from laws and regulations pertaining to its subject matter—even if these are fewer and less varied than those imposed on the contracting party.

Any breach by the administration of its obligations triggers its contractual liability, entitling the contracting party to seek judicial enforcement of appropriate penalties, whether by way of compensation or contract rescission. Such liability rests on contractual fault, whether the administration's non-performance constitutes deliberate breach or negligence (Khalifa, 2010, p. 219). This holds notwithstanding that contractual fault typically lacks malicious intent, given that its contracts primarily serve the public interest; nevertheless, such fault cannot be excused, and liability arises to restore equilibrium in the administrative contract while protecting the contracting party's interests—provided that the contracting party continues performing its obligations despite the administration's breach and does not contribute to the fault. Should the contracting party share in the fault, the court shall duly account for it when apportioning the administration's liability.

It merits noting that the administration's contractual obligations vary with the type of administrative contract and defy exhaustive classification; breach of any triggers contractual liability. Accordingly, this topic focuses on breaches of the principal common obligations found across administrative contracts generally, which fall into two categories: the administration's breach of its technical obligations; and the administration's breach of its financial obligations. Consequently, this topic divides into two requirements as follows: the administration's contractual liability arising from breach of its technical

obligations (First requirement); the administration's contractual liability arising from breach of its financial obligations (Second requirement).

First Requirement: The Administration's Contractual Liability for Breach of Its Technical Obligations

The administration must perform the administrative contract, as this encourages the contracting party to execute its own obligations. In executing the contract, it must adhere to all terms and obligations contained therein. This type of breach takes two forms: the administration's failure to enable the contracting party to commence performance of its contractual obligations (First section); and the administration's failure to perform its obligations properly (Second section).

First Section: The Administration's Failure to Enable the Contracting Party to Commence Performance of Its Contractual Obligations

Since administrative contracts are time-based in nature, obliging the contracting party to complete the assigned tasks within a specified timeframe, the administration must enable the contracting party to begin and proceed with execution until completion. Failure to fulfill or delay in this obligation triggers its contractual liability (Khalifa A. E., 2008, p. 209) (Khalifa A. E., 2008, pp. 94-95).

In public works and concession contracts, the contracting administration must deliver the worksite to the contracting party within the contractually agreed period, or absent such, within a reasonable timeframe (Kharbit, 2017, p. 26). The administration must honor this obligation to avoid contractual liability, including delivering the site free of material and legal impediments to commencement (Khalifa A.-E. a.-E., 2010, p. 223); assisting in obtaining requisite permits and approvals from competent authorities (AlBalooshi, 2016, pp. 21-22); ensuring no third-party interference (legal or physical) during execution; and handing over the precise contractually stipulated site without unilateral alteration, as a change could impose additional costs and incur liability (Khalifa A.-E. a.-E., 2010, p. 224).

To preclude post-contract changes, the administration must undertake suitable preliminary measures, such as verifying site adequacy for project area and analyzing soil suitability for technical specifications (Kharbit, 2017, p. 30). Any default or delay triggers contractual liability, particularly as execution timelines typically commence from worksite delivery to the contracting party (contractor).

Executive Decree No. 21-219 approving the General Administrative Clauses for public works procurement contracts (Executive Decree No. 21-219 dated

20/05/2021, approving the General Administrative Clauses applicable to public works procurement contracts, O.J. No. 50 dated 24/06/2021), affirms this in Article 30, deeming the execution period to start from service order notification; Articles 22 and 23 govern preparatory workshop organization as actual on-site commencement.

The administration's contractual liability also arises from failing to deliver engineering plans and designs prior to execution commencement, rendering performance impossible absent timely provision (contractual or reasonable period), given the contracting party's duty to follow specifications (Kharbit, 2017, p. 33). The Algerian legislature mandates detailed, precise technical specifications pre-contract to avert execution-phase amendments (Article 16-5 of Law No. 23-12 dated 05/08/2023 sets forth the general rules relating to public procurement, O.J. No. 51 dated 06/08/2023).

Likewise, liability arises from the failure to supply the necessary, essential, and appropriate materials required for the execution of the contract, or from the failure to grant the authorizations required for that purpose, such as permits for construction materials (Khalifa A. E., 2008, p. 98).

Second Section: The Administration's Improper Performance of Its Obligations

The administration must execute its obligations correctly and in good faith, where good faith entails performing the contract in accordance with its terms and conditions (Kharbit, 2017, p. 42). This imposes numerous obligations on the administration, failure to observe which constitutes contractual fault. These include the following:

Respecting the performance period. Although the contracting party is primarily responsible for timelines to ensure the regular and continuous operation of public services, the administration must also adhere to any explicitly stipulated deadlines. Where the contract is silent or contains only general provisions on timing, French Conseil d'État jurisprudence establishes that the administration must respect a reasonable performance period—not only for the overall contract duration but also for partial obligations specified therein (Altemawi, 2011, pp. 546-547). Determining the start of the performance period is therefore essential to establishing its endpoint[1].

[1]- Pursuant to Article 111 of Law No. 23-12, the modalities for its implementation shall be determined, where necessary, by regulatory instruments, while Article 112 thereof provides that any provisions contrary to this Law are repealed, and that provisions falling within the regulatory domain shall remain in force until the publication of the new regulatory texts adopted in implementation of this Law. Accordingly, since the regulatory texts referred to therein have not yet been issued, the provisions of Presidential Decree No. 15-247 of 16 September 2015, regulating public procurement and public service delegations, published in Official Gazette No. 50 of 20 September 2015, which are not contrary to Law No. 23-12, continue to apply. By reference to the provisions of

By way of example, where the administration enters into a concession contract with a contracting party granting it the exclusive and monopolistic operation of internal transport services, it may not enable third parties to exploit the same facility, nor even allow them to engage in similar activities in the same location (Kharbit, 2017, p. 44).

Honoring the contract as a whole. Furthermore, the administration is bound by the contract as a whole and may not undertake any act inconsistent with its capacity as a contracting party, or that would impose additional burdens or hardships on the contracting party in the performance of its contractual obligations, failing which it shall incur liability (Altemawi, 2011, p. 547). It may not act arbitrarily in rejecting works in public works contracts, suspend performance without a reason related to public interest, refuse delivery of agreed goods and materials, or reject minor defects that do not affect usability (AlBalooshi, 2016, pp. 32-33).

Second Requirement: The Administration's Breach of Financial Obligations

The administration's purpose in entering administrative contracts is to achieve the public interest, and this cannot be disputed, as the contracting party is also considered its assistant in realizing this objective. However, at the same time, it is undeniable that the contracting party's primary goal through these contracts is to achieve profit, which is a legitimate and undeniable matter, realized through obtaining financial remuneration from the administration in exchange for executing the contract. The financial remuneration is the material consideration paid by the administration to the contracting party in return for the works or supplies provided on its behalf. Another financial obligation falls upon the administration toward the contracting party, namely the return of the final performance bond after completing contract execution. Accordingly, the administration must fulfill all its financial obligations to the contracting party, and if it breaches them, its contractual liability arises on the basis of fault. Thus, the administration's breach of its financial obligations may manifest in: its breach of the financial remuneration obligation (First Section), which consists of: its failure to pay the financial remuneration or its unilateral modification thereof; the administration's delay in fulfilling its obligation to pay the financial

this Decree, the Algerian legislator expressly provided for the execution period and considered it one of the mandatory particulars that must be included in the public procurement contract pursuant to Article 95 thereof. Furthermore, Article 30 of the General Administrative Clauses applicable to public works contracts defines the execution period as the period extending from the date of notification of the service order until the expiry of the== contractual execution deadline, while the Special Instructions Booklet applicable to each public works procurement specifies the execution period.

remuneration; the administration's breach of its obligation to return the final performance bond (Second Section).

First Section: The Administration's Breach of Its Financial Remuneration Obligation

The breach of this obligation can be envisaged in two cases, which we address as follows:

First: The Administration's Failure to Pay the Financial Remuneration or Its Unilateral Modification Thereof

The financial remuneration constitutes one of the contracting party's most fundamental rights. Jurisprudence distinguishes between two types thereof, based on the differing legal nature of administrative contracts. Where the contracting party provides services directly to the administration, the latter is obligated to provide financial remuneration, termed the "price" in supply and public works contracts, etc. Conversely, where the contracting party serves the public directly (as in concession contracts), the financial remuneration takes the form of fees collected from users (Altemawi, 2011, pp. 556-557).

However, given that administrative contracts involve public funds, the administration must first verify proper performance and service delivery before disbursing remuneration to the contracting party.

The administration is bound to pay the financial remuneration to the contracting party at the times specified according to work progress or as stipulated in the contract terms. Accordingly, its refusal to provide financial remuneration without legal justification gives rise to its contractual liability (Vedel & Pierre Delvolvé, 1988, p. 364 et s). This is because such conduct affects the contracting party's financial position and capacity to undertake new projects.

It is settled that the provisions governing the financial remuneration in the contract are contractual terms that the administration cannot modify unilaterally without the contracting party's consent (Altemawi, 2011, pp. 557-558). Thus, any unilateral modification of the financial remuneration by the administration constitutes contractual fault, engaging its contractual liability, since financial benefits are a key consideration for the contracting party when entering the contract (Khalifa A. E., 2008, pp. 101-102). Moreover, the administration's right to modify contracts is grounded in ensuring the regular and continuous operation of public services and the public good, which does not encompass the

contracting party's remuneration. Furthermore, such unilateral action may deter individuals from contracting with the administration. By contrast, where the parties agree to modification, the new remuneration becomes binding under the principle that the contract is law between the contracting parties.

Accordingly, legislation—including Algerian law—has intervened to prevent unilateral price modifications by the administration that would trigger liability. It provides for price updates and revisions through reexamination and reassessment following initial agreement in the contract[2]. Nevertheless, should the administration violate the agreement or terms, its contractual liability arises.

Second: The Administration's Delay in Fulfilling Its Obligation to Pay the Financial Remuneration

The administration is not only obliged to pay the financial remuneration under the contract but must also do so without delay. Any delay constitutes contractual fault, giving rise to its contractual liability (including compensation to the contracting party), without the need to prove actual damage, even if the contract contains no explicit provision to that effect (Khalifa A. a., 2009, p. 230).

Delay in providing financial remuneration may result from the unavailability of financial authorization. Although a violation of financial authorization rules may trigger administrative, judicial, or political liability, it does not render the contract null, and the contract remains binding on the administration. The contracting party may seek termination of the contract with compensation if it can demonstrate that it suffered damage as a result (Kharbit, 2017, pp. 61-63).

Failure by the administration to provide financial remuneration on the due date may also give rise to the contracting party’s right to late payment interest—a statutory remedy for the delay in fulfilling the obligation to pay a specified sum, effective from the date of the contracting party's demand and without the need to prove actual damage, unless otherwise provided by law. In addition, compensatory interest may be awarded where the damage suffered by the contracting party due to the administration’s delay exceeds what late payment interest can cover, or where the delay is unusual and reflects bad faith (AlBalooshi, 2016, pp. 57-58).

[2]- Article 95 of Decree No. 15-247 requires the inclusion of a financial consideration clause as mandatory information in the public procurement contract, while allowing for the inclusion of a price revision and adjustment clause. Article 96 of the same Decree, together with Article 73 of Law No. 23-12, sets out the mechanisms for the payment of the financial consideration. Article 74 of Law No. 23-12 further provides that the price may be fixed or subject to revision and adjustment, and requires the procurement contract to specify the revision formulas and the manner of their application, subject to the conditions laid down in Articles 101 to 105 of Decree No. 15-247, pursuant to Article 97 thereof.

The Algerian legislature has addressed the provision of financial remuneration in public contracts, given the importance of this right for the contracting party and to clarify its financial position. Articles 108 to 123 of Decree 15/247 are devoted to this matter. Articles 108 et seq., together with Article 80 of Law 23-12, provide that financial remuneration is to be provided in installments to the contracting party and specify their forms. Articles 80(2) and (3) further clarify that the contracting authority must provide financial remuneration within deadlines commencing from receipt of the statement or invoice, and that failure to provide financial remuneration on time entitles the contracting party to late-payment interest in accordance with applicable procedures.

Second Section: The Administration's Breach of Its Obligation to Return the Final Performance Bond

In concluding administrative contracts, the administration seeks to award them to financially capable contracting parties. Consequently, the contracting party is required to provide financial guarantees protecting the administration from financial risks arising from non-performance of obligations. In general, a guarantee is an undertaking to compensate a third party for damages resulting from loss of funds or deprivation of benefits (Bahri, 2008-2009, p. 96). Accordingly, the contracting party must furnish a final performance bond as security for fulfilling its contractual obligations (Khalifa A. E., 2008, p. 104), which the administration retains until full execution. The administration may forfeit it if the contracting party fails to perform as stipulated.

Under Algerian legislation, the contracting authority is required to ensure provision of necessary guarantees facilitating optimal contract performance, with their nature and recovery procedures specified in tender documents, contracts, or relevant laws and regulations (Article 83 of Law 23-12, and Article 124 of Presidential Decree 15-247). These primarily consist of performance bonds valued between 1% and 10% of contract value, varying by contract type. They must be provided no later than submission of the contracting party's first interim payment request and cover all stages up to provisional acceptance. The contract may convert it to a final performance bond at provisional acceptance if a warranty period is stipulated, covering the period from provisional to final acceptance. Such final performance bond are fully recoverable within one month from the date of final acceptance (Articles 130 to 134 of Presidential Decree 15-247).

From the foregoing, it follows that the administration's contractual liability arises in two cases: first, if it refuses to release the final performance bond

despite the contracting party's full and proper fulfilment of all obligations, immediately upon contract completion or expiry of any agreed warranty period; and second, if it delays its return, as this contravenes good faith required in administrative contracts and causes unjustified damage to the contracting party (AlBalooshi, 2016, pp. 60-61).

THE SECOND TOPIC: The Administration's Contractual Liability for Deviation in the Exercise of Its Contractual Powers

In the administrative contract, the administration enjoys a range of exceptional powers and privileges vis-à-vis the contracting party that have no counterpart in private law and are unavailable to private individuals. The administration derives these exceptional powers from its superior position to the contracting party, as it is responsible for ensuring the regular and continuous operation of the public service that is the subject of the administrative contract, in pursuit of the public interest. Accordingly, it can be said that these powers are the legal means available to the administration during the execution phase of the administrative contract, intended to guarantee its performance and achievement of the purpose for which it was concluded. They comprise several powers, namely: the power of supervision and direction, the power of modification, the power to impose penalties, and the power to terminate the administrative contract.

These powers constitute an inherent right of the administration, exercised pursuant to its privilege of direct execution, issued by its unilateral will without prior recourse to the courts. They exist without need for explicit stipulation in the contract, due to the inherent nature of the administrative contract[3]. Consequently, the administration may not waive their exercise entirely or in part, nor restrict its right thereto, as they pertain to public policy. Any agreement to the contrary party is null and void, as established by the case law of the French Council of State (Altemawi, 2011, p. 432).

In principle, these powers do not engage the administration's contractual liability so long as it exercises them within the bounds of legality. Decisions issued pursuant thereto are administrative acts subject to the legality requirements applicable to such acts, including competence, form, procedure, subject matter, cause, and purpose. However, should the administration engage

[3]- Such powers may be provided for in the legal or regulatory texts governing administrative contracts, in the standard contract specifications, or in the administrative contract itself. Accordingly, the role of the text is limited to recognizing the administration’s right to exercise these powers, regulating their use, and specifying the means and conditions for their exercise; it does not create the powers themselves.

in deviation in the exercise of powers to the detriment of the contracting party's rights, this constitutes contractual fault on the administration's part, giving rise to its contractual liability toward the contracting party. Accordingly, this section addresses: the administration's contractual liability for deviation in exercising the powers of supervision and direction and the power of modification (First Requirement); and the administration's contractual liability for deviation in exercising the power to impose penalties and the power of termination for public interest reasons (Second Requirement).

First Requirement: The Administration's Contractual Liability for Deviation in Exercising the Powers of Supervision and Direction and the Power of Modification

The administration has the right to monitor the contracting party to ensure performance according to the contract terms, and it may even intervene to direct the execution process. However, for the exercise of this power to be lawful, it must adhere to specific limits and constraints; deviation therefrom renders its conduct unlawful and engages its liability. For instance, while the administration has the right to direct the contractual process pursuant to its power of supervision and direction, it may not exceed direction to the extent of modifying the contract. Even the power of contract modification, which the administration also possesses vis-à-vis the contracting party, is subject to restrictions that must be respected, lest it too becomes unlawful and triggers the administration's liability. This will be addressed through the first section: deviation in the exercise of powers regarding the power of supervision and direction; and the second section: deviation in the exercise of powers regarding the power of modification.

First Section: Deviation in the Exercise of Powers Regarding the Power of Supervision and Direction (The unlawful exercise of the power to Supervise and Directe)

The administration's power of supervision over the administrative contract has two meanings. The narrow meaning is its right to monitor execution and verify compliance with contract provisions, conducted through physical acts such as the administration's representative entering work sites or receiving and examining documents, or through investigations or complaints from users. Or through legal acts such as issuing execution orders, instructions, or warnings to the contracting party. The broad meaning encompasses the power of direction, i.e., the administration directing execution works and selecting the most appropriate methods therefore, involving deeper intervention through legal acts only, such as issuing instructions to follow a specific execution method or

excluding a particular method (Khalifa A. E., 2008, pp. 255-256)[4]. It should be noted that this supervision involving intervention in execution modalities varies according to the contracts' degree of connection to the public service, the basis of the administration's powers. In public works contracts, the administration's supervisory power is broad regarding material selection and execution methods, as it is the project owner (Altemawi, 2011, pp. 435-436)[5]. Similarly, in public service concession contracts, where the concessionaire manages the public service itself, the administration may intervene at any time to alter the concessionaire's management style and dealings with service users (ABD EL-Hamid, 2014, p. 63). This power is weaker in supply contracts, where the link between performance and public service operation is tenuous; here the supplier acts independently in choosing execution methods unless the contract provides otherwise (Altemawi, 2011, p. 436).

However, while the administration enjoys broad supervisory powers over the contracting party's performance, such supervision is not absolute but must be exercised within limits and constraints necessary to provide guarantees to the contracting party. This power ceases where it suffices to verify the contracting party's proper performance of obligations and continuation thereof as stipulated in the contract; the administration's contractual liability arises if exercised otherwise (Kharbit, 2017, pp. 67-68). Among the most important constraints is that it must not alter the contract's nature (Altemawi, 2011, p. 436). This yields two key principles for exercising this power: adherence to legality, and refraining from modifying contract terms. Where there is deviation in the exercise of powers beyond fault, this does not engage liability on the basis of fault; if compensation is required to restore contractual financial equilibrium, it falls under no-fault liability.

Accordingly, the administration's liability arises if it exercises this power outside the public interest or what is required for the regular and continuous operation of the public service, or if supervision is conducted by an unauthorized authority in violation of laws and regulations. For example, in public works contracts, contractual fault occurs if the administration demands the contracting party. Procure materials or hire excess workers beyond work

[4]- Article 3 of the General Administrative Clauses applicable to public works procurement contracts in Algeria provides that the contracting authority shall notify by any written means the names of the appointed bodies responsible for supervising the works contract; Article 27 thereof addresses service orders and all related matters, defining the service order as a written order issued by the contracting authority to express its authority in direction, and its seventh paragraph stipulates the contracting party's obligation to comply with the specifications of the service orders notified to it.

[5]- For instance, Article 25(4) of the General Administrative Clauses applicable to public works contracts in Algeria provides that the contracting authority may, after consulting the technical consultant, request the removal of specific workers or employees of the contractor from the worksite.

needs, order work suspension beyond reasonable limits, or conduct supervision to the point of hindering or obstructing work, thereby constituting deviation in the exercise of powers. Liability also arises if supervision entails modifying contract terms, such as deciding to substitute different materials in public works contracts for those agreed upon, thereby altering a contractual term (Kharbit, 2017, p. 68)[6].

Second Section: Deviation in the Exercise of Powers Regarding the Power of Modification (The unlawful exercise of the power to modificate the contract)

The administration has been granted, contrary to the norm in private law transactions, the power to modify the contract's terms and provisions during execution, increasing or decreasing the contracting party's obligations, by its unilateral will without requiring the contracting party's consent, for the public interest on one hand and to safeguard public funds on the other, in light of what is required for proper contract performance and the continuity of public service operation (Hashmi, 2018, p. 42).

The administration must exercise the power of modification within limits and constraints that it is bound to respect, lest its liability arise, as this power is not absolute. Accordingly, the general restrictions on the power of modification are: that subsequent circumstances justifying modification must arise after contract conclusion; that the modification must relate wholly or partially to the contract; that it must occur during the contract term; that sufficient financial authorization must exist to cover increased expenditures resulting therefrom; that its purpose must be to achieve the public interest; and that the modification decision must be issued within the general principles of administrative legality (Khalifa A. E., 2008, p. 266), (AlBalooshi, 2016, pp. 91-98). Legality here means that the modification decision must be issued by the administration respecting all elements of legality required for administrative decisions: competence, form, procedure, subject matter, cause, and purpose of the public interest within the framework of applicable legal and regulatory texts.

As for its scope, the power of modification does not encompass all contract terms but is limited to those related to public service management; it may not modify contract terms unconnected thereto (Altemawi, 2011, p. 446). Such as terms concerning the contracting party's financial benefits. The modification

[6]- Article 27/8 of the General Administrative Clauses applicable to public works procurement contracts in Algeria provides that when the contracting party notices that the specifications of the service order exceed its contractual obligations, it must submit its written and justified observations to the contracting authority within ten days from the date of notification thereof, under penalty of forfeiture of rights.

concerns the quantity of the contracting party's obligations, increasing or decreasing them, where quantity here means volume, not type (Kharbit, 2017, p. 82). In this regard, the administration must ensure that modifications do not exceed a certain limit, so as not to disrupt the contract's financial equilibrium or upend its economics (Altemawi, 2011, pp. 446-448). Modifications may concern execution methods and means to align with modern discoveries, or to employ better means, superior materials, or special technical methods instead of those agreed in the contract, provided the contract's subject matter or execution site in public works contracts, for example, is not altered (Hashmi, 2018, pp. 70-71). Modifications may also concern the execution period, allowing the administration to extend, prolong, postpone, shorten, or suspend the original contract duration whenever circumstances require and the public interest demands (Jubeir, 2006, p. 455).

The Algerian legislature has authorized the contracting authority to exercise the power of modification pursuant to the annex provided for in Article 81 of Law 23-12, which permits its conclusion if aimed at increasing or decreasing services and/or modifying one or more contractual clauses in the public contract. Articles 135 to 139 of Presidential Decree 15-247 also address it, with Article 139 setting 10% of the total contract value as the maximum limit for modification authority; exceeding it entitles the contracting party to compensation. In public works contracts, the limit is 20%, and exceeding it allows a claim for compensatory damages based on harm suffered, per Article 36 of Decree 21-219 (previously mentioned)[7].

Based on the foregoing, the administration's performance of modifications contrary to the scope and limits of this power constitutes fault leading to liability for compensation of damage suffered by the contracting party due to this fault. By contrast, contract modification by mutual agreement does not engage either party's liability except within the limits agreed upon (Kharbit, 2017, pp. 83, 89)

Second Requirement: The Administration's Contractual Liability for Deviation in Exercising the Power to Impose Penalties and the Power of Termination for public interest reasons

The execution of administrative contracts generally, and the administrative contract in particular, is governed by the principle of good faith performance, requiring the optimal solution on the assumption that the creditor (whether the contracting authority or the contracting party) is in the debtor's position, i.e., presuming the best solutions for fulfilling obligations. Any breach here

[7]- Article 36 of the Decree provides for the modification of the original scope, including the facilities, components of the project, and the services to be performed, while Article 37 addresses the rules for modifying the execution period of public works contracts.

constitutes not merely a contractual violation but an impairment of the public service that is the subject of the administrative contract. Therefore, the contracting party's breach of contractual obligations justifies the administration imposing penalties, and even absent such breach, it may terminate the contract for public interest reasons linked to the public service. However, pursuant to the same principle, the administration must adhere to legality limits when exercising these serious powers without deviation, under penalty of liability. This will be addressed through the following two branches: first section: deviation in the exercise of powers regarding the power to impose penalties; second section: deviation in the exercise of powers regarding the power of termination for public interest reasons.

First Section: deviation in the exercise of powers regarding the power to impose penalties (The unlawful exercise of the power to impose sanctions)

Pursuant to the administration's public authority and the link of administrative contracts to public services, the administration may impose penalties on the contracting party without judicial recourse, even absent damage to it, and even if not stipulated in the contract, where the contracting party fails to perform obligations set forth therein, in general conditions, or in governing legal and regulatory texts. It matters not whether non-performance stems from intent, negligence, or otherwise, as the contracting party's breach in such cases impairs the public service and causes it significant harm. Accordingly, these penalties aim to secure public service operation by ensuring optimal performance of the contracting party's obligations. Forms of contracting party breach include: failure to provide financial guarantees; unjustified refusal or suspension of performance; non-personal performance without administration authorization; failure to respect execution deadlines; and non-conforming performance. These justify various penalties, including financial penalties: delay fines[8]. and bond forfeiture[9]. coercive penalties involving performance at the contracting party's

[8]- Article 84 of Law No. 23-12 provides for these financial penalties, specifying their conditions and the circumstances under which exemptions may apply. Such penalties may be imposed for delays in execution or for non-compliant performance. Likewise, Article 95 of Presidential Decree No. 15-247, concerning the mandatory particulars of public procurement contracts, requires that these financial penalties, their conditions, and exemptions be included among the contract particulars. These provisions are also reflected in Article 121 of the General Administrative Clauses applicable to public works contracts, which classifies the penalties into two types: financial penalties for delays and financial penalties for non-compliant performance, specifying the conditions and circumstances for their application.

[9]- Article 83 of the Public Procurement Law (No. 23-12) provides that the contracting authority must ensure the availability of the necessary guarantees to secure the best conditions for selecting the contracting party and/or the

expense (execution at the contracting party's expense, purchase at the supplier's expense, placing the service under guardianship)[10]. and the most severe, terminatory penalties terminating the contractual relationship due to the contracting party's serious faults[11].

Accordingly, before imposing any of the foregoing penalties, the administration must observe several restrictions and conditions: existence of contracting party fault; adherence to prior notice where required by law as an essential procedure before penalizing the contracting party. Although the prevailing view does not require prior notice before imposing penalties, some laws mandate notifying the errant contracting party of its fault to allow correction prior thereto (AlBalooshi, 2016, p. 111). including Algerian legislation[12]. Since these penalties are imposed via administrative decisions linked to the administrative contract, they must respect legality limits to prevent abuse; given the administration's discretionary power in imposing them, it must ensure proportionality.

Accordingly, if the administration breaches any of the aforementioned restrictions, or if its penalty decisions are unlawful or abusive, its power is deemed unlawful, engaging its contractual liability toward the contracting party. Likewise, the administration may not impose penalties unauthorized by

best conditions for executing the contract. These guarantees, as well as the procedures for their recovery, are determined in the contract specifications or in the contract itself, in accordance with the applicable legislative and regulatory provisions. Articles 130 to 133 of Presidential Decree No. 15-247 regulate the performance bond, allowing the administration to forfeit the bond if the contracting party breaches its obligations. Article 119/3/1 explicitly provides for the forfeiture of the performance bond as a penalty to compensate the contracting authority for any damage caused by the contracting party's fault.

[10]- Articles 119 and 120 of the General Administrative Clauses applicable to public works contracts provide for coercive penalties, referred to as deterrent measures, and specify their conditions—including contracting party fault, prior warning, and the opportunity for the contracting party to present a defense—as well as the circumstances under which they may be applied.

[11]- Articles 90 and 93 of the Public Procurement Law provide for the penalty of contract termination and specify the conditions for its application, including contracting party fault and the issuance of two prior warnings (first and second). Termination "at the contracting party's expense" means that the contracting party bears the additional costs arising from the new contract. Likewise, Article 95 of Presidential Decree No. 15-247, concerning the mandatory particulars of public procurement contracts, requires that the conditions for contract = = termination be included as one of the contract's mandatory particulars. Articles 119 and 122–127 of the General Administrative Clauses applicable to public works contracts also address the circumstances and forms of termination (which may be simple or at the contracting party's expense), its conditions, and its legal effects.

[12]- Article 90 of the Public Procurement Law provides that issuing warnings is an essential procedural step prior to imposing the penalty of contract termination, requiring that two warnings be issued to the contracting party. Article 149 of Presidential Decree No. 15-247, which governs the penalty of contract termination, refers the determination of the warning's particulars to regulatory measures issued by the Minister of Finance, specifically: the Minister of Finance's decision dated 28 March 2011, which specifies the information to be included in the warning and the period for its issuance, published in Official Gazette No. 24 on 20 April 2011. Furthermore, Article 119 of the General Administrative Clauses applicable to public works contracts stipulates the warning requirement as a prerequisite before applying deterrent measures (execution at the contracting party's expense) or termination penalties.

legislation, nor penalties falling within judicial competence, lest it exceed its authority; thus, its penalty power is subject to judicial review (Kharbit, 2017, p. 70).

Second Section: deviation in the exercise of powers regarding the power of termination for public interest reasons (The unlawful exercise of the power to terminate the contract for reasons of public interests)

The administration enjoys a significant privilege in the administrative contract: the power to terminate it unilaterally before final completion, without contracting party fault, without judicial recourse, and even absent stipulation in the contract or general conditions, if public interest so requires. This serious power is counterbalanced by the contracting party's right to full compensation where its contract is terminated thus. This power is granted to the administration to preserve the regular and continuous operation of the public service and pertains to public policy (ABD EL-Hamid, 2014, pp. 73-76).

Consequently, the contract may not exclude this power, nor may the administration waive it. However, when exercising this discretionary power, the administration is subject to judicial review to prevent deviation (AlBalooshi, 2016, p. 157), (ABD EL-Hamid, 2014, p. 75). Justifications for termination for public interest reasons include: the contract becoming unnecessary; no longer aligning with the public service's needs for which it was concluded; or the public service being abolished or its scope modified such that contract continuation is incompatible with public good requirements and service needs. The contract or law may expressly provide for this power, in which case such provisions apply (Kharbit, 2017, pp. 90-91). The Algerian legislature has provided for the power to terminate a contract for reasons of public interest in Article 91 of Law 23-12[13], as well as in Article 123/1/2[14], and Article 123/3/2[15].

The administration's right to terminate the administrative contract for public interest is not absolute but conditional upon two requirements: that the public good or service interest necessitates termination; and that the termination decision satisfies all conditions for the legality of discretionary acts (Meaning: free from deviation in the exercise of powers). Accordingly, an administration termination decision for public interest reasons is illegitimate, engaging liability

[13]- This article provides that: "The contracting authority may unilaterally terminate the public procurement contract when justified by the public interest, even in the absence of any fault on the part of the contracting party".

[14]- The article provides that: "Termination may occur in different ways depending on the reason for it… even if the contracting party has not committed any fault, provided it is justified by the public interest".

[15]- The article provides that: "In the case of unilateral termination justified by the public interest, the contracting party may, where appropriate, be compensated for the loss suffered and for the profit they could have earned had they performed all the services".

on the basis of fault, in two cases: first, where termination contravenes its purpose (the public interest); second, where the decision exceeds legality frameworks that the administration must respect when acting pursuant to discretionary power (Kharbit, 2017, p. 92).

Conclusion:

The execution of administrative contracts is inherently complex due to their connection to public services and the pursuit of the public interest, often at the expense of public funds. Given the numerous obligations imposed on both parties and the exceptional privileges enjoyed by the administration in relation to the contracting party—who represents the weaker party, as its obligations are tied to the public service—the breach of such obligations by the administration is deemed an impairment of the public service.

To ensure balance within the framework of administrative superiority, administrative jurisprudence recognizes the administration's contractual liability when it fails to fulfill its contractual obligations. Since administrative contracts impose reciprocal obligations on the administration and the contracting party, any breach—whether technical, financial, or resulting from deviation in exercising its powers contrary to the purpose of the public interest, their constraints, or legality limits—engages the administration's contractual liability on a fault-based principle, entitling the contracting party to compensation. Accordingly, the administration's powers are subject to judicial review, which serves as the most effective safeguard for protecting the contracting party's rights.

- **Key findings include:**
- The administration's liability arises when it fails to enable the contracting party to commence performance. Although Algerian law specifies the start of performance in the General Administrative Conditions for public works contracts, it does not explicitly establish the administration's liability for breaching this obligation.
- Liability also arises when the administration fails to execute the contract properly, including delays in performance, failure to protect the contracting party from competition, or actions inconsistent with its role as contracting party that impose additional burdens or difficulties on the contracting party.
- Unjustified refusal to pay financial remuneration constitutes contractual fault, as does the administration's unilateral modification of such remuneration, since financial terms in the contract are binding and cannot be altered without the contracting party's consent. Algerian public

procurement legislation mitigates this risk through provisions for price updates and reassessment after agreement.

- Delays in paying financial remuneration, whether in good or bad faith, constitute contractual fault, triggering the administration's liability and entitling the contracting party to compensatory or late-payment interest, even without explicit contract provisions or proof of direct damage.
- The administration is contractually liable if it refuses to release the final performance bond upon full and proper fulfillment of obligations or delays its return, which contravenes good faith.
- Algerian public procurement legislation primarily focuses on contracting party breaches and the penalties applicable, while the administration's power to impose coercive or terminatory sanctions exists even without explicit contractual provisions. Conversely, the legislature does not clearly recognize the contracting party's right to compensation for the administration's errors in executing the contract.
- Explicit recognition of the administration's contractual liability for execution errors stemming from deviation in exercising discretionary powers is generally absent, except in cases of termination for public interest, where the General Administrative Clauses for public works provide for full compensation, whereas Law 23-12 on public procurement remains silent.
- The absence of explicit provisions for contractual liability in cases of breach of obligations or deviation in exercising discretionary powers may constitute inequity toward the contracting party. This silence raises issues regarding whether it results from oversight, will be rectified in the future, or was deliberate, considering it falls under the general rules of contractual liability, which are enforceable through administrative judicial review based on available evidence and the judge's conviction.
- **Proposals:**

Accordingly, the following proposals may be made:

- It would be desirable for the Algerian legislature to include, in the legal texts governing public procurement or in forthcoming implementing regulations, explicit provisions recognizing the administration's contractual liability for breaching its technical or financial obligations or for deviating in the exercise of its powers. Such provisions should expressly acknowledge the contracting party's right to compensation resulting from contractual fault, clearly specifying the types and degrees of such fault, the levels of compensation (Meaning: full or partial

compensation, including conditions, timing of assessment, calculation methods,…etc.), and the procedures for claiming it. This would encourage contracting parties to place greater trust in the administration and enter into contractual relations, thereby balancing the public interest pursued by the administration with the private interests of the contracting party.

- It would also be desirable for the Algerian legislature to issue General Administrative Conditions applicable to supply contracts, similar to those established for public works contracts, clearly outlining therein the scope of the administration's contractual liability.

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