

The Use of Negotiation as an Exceptional Mechanism in Algerian Public Procurement Law

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Abstract. X This study examines the negotiation procedure in the award of public contracts as an exceptional mechanism that grants the contracting authority a certain degree of flexibility in concluding its contracts, in contrast to competitive tendering procedures, which strictly bind the administration to open competition among all economic operators. Under the negotiation procedure, the contracting authority is not required to open competition to all operators; however, when resorting to this method, the administration must comply with the cases exhaustively provided for under public procurement legislation, whether relating to direct negotiation or negotiation following consultation. Furthermore, the contracting authority remains subject to certain procedural requirements, even if these are less complex and time-consuming than those governing calls for tenders. The distinguishing feature of this study lies in its comparative approach between the current Law No. 23-12 and the former Presidential Decree No. 15-247, with the aim of identifying the legislative developments introduced in this field.

1. INTRODUCTION

Public contracts constitute one of the most important categories of administrative contracts due to their close connection with public funds. Consequently, contracting authorities involved in public procurement are required to follow specific procedures and are subject to a defined and diversified oversight framework aimed at rationalizing public expenditure, limiting negative practices, and preventing the waste of public funds.¹

An examination of public procurement procedures reveals that the contracting authority relinquishes part of its freedom when relying on calls for tenders, due to the formal and procedural constraints imposed by law. Conversely, this freedom is partially restored through another, more flexible contracting method, which exempts the administration from strict compliance with the formalities and procedures governing calls for tenders. This method allows the contracting authority, under specific circumstances expressly provided for by law, to select its contracting partner without resorting to advertising or inviting competition.²

This method is known as negotiation, previously referred to under Presidential Decree No. 15-247 as mutual agreement.³ The importance of this study stems from the fact that this contracting method excludes competition, which runs counter to the general principles governing public contracting. Accordingly, both the current Law No. 23-12 and the former Presidential Decree No.⁴ 15-247 have established negotiation as an exceptional rule, which may only be applied in cases exhaustively enumerated by law.

This leads to the following research question: To what extent does the contracting authority enjoy freedom when relying on the negotiation procedure for the award of public contracts?

To answer this question, this study adopts a descriptive, analytical, and comparative approach to the legal provisions governing negotiation under the current legal framework and mutual agreement under the former framework, with the aim of identifying the innovations introduced by Law No. 23-12 governing public procurement.

Accordingly, the study is structured into three sections:

- Section One: The general concept of the negotiation procedure in public procurement
- Section Two: Forms of the negotiation procedure in public procurement
- Section Three: Procedures governing the negotiation method in public procurement

1.1. Axis One: The General Concept of the Negotiated Procedure in the Award of Public Contracts

The negotiated procedure is considered an exceptional method of contracting in the field of public procurement. However, before addressing this method, it is necessary to provide a conceptual framework for it, both through the doctrinal definitions developed by legal scholars and through an examination of the provisions set forth in the legal texts governing public procurement with regard to this procedure.

¹ Bouamrane, Adel. *The General Theory of Administrative Decisions and Contracts: A Legislative, Doctrinal, and Judicial Study*. Algiers: Dar Al-Houda, 2010, p.104.

² Mohamed El-Saghir Baali, *Administrative Contracts*, Dar Al-'Ulum, Algiers, 2005, p. 32.

³ Presidential Decree No. 15-247 of 16 September 2015, on the Organization of Public Procurement and Public Service Delegations, *Official Gazette*, No. 50, 20 September 2015.

⁴ Law No. 23-12 of 5 August 2023, establishing the General Rules on Public Procurement, *Official Gazette*, No. 51, 6 August 2023.

1.2. First: Doctrinal Definitions of the Negotiated Procedure

According to one strand of legal doctrine, contracting by negotiation is defined as:

A special contract concluded by the administration with a bidder or supplier of its own choosing, without the need to publish a contract notice and without the obligation to invite competition in order to obtain multiple offers for the purpose of selecting the best one. In principle, this type of contracting involves only a single offer submitted by a single bidder chosen directly by the administration.⁵

The negotiated procedure has also been defined as:

A procedure that allows the administration to contract, in urgent cases that do not tolerate delay, with any supplier or contractor it chooses, provided that the value of the contract does not exceed certain limits, without being bound by tendering procedures that include an invitation to submit bids.⁶

Another doctrinal opinion defines it as:

A method of administrative contracting whereby the administration is released from all constraints imposed under the procedures of public tendering and auctioning. As a result, competitors in the work subject to direct agreement are precluded from challenging the measures taken by the administration during the stages preceding the conclusion of the contract, insofar as such measures constitute merely internal, interest-based rules established solely for the benefit of the administration.⁷

Negotiation has also been defined as:

A contracting mechanism whereby an agreement is reached between the administration and its contracting party through direct selection. In this case, the administration is not bound by the procedures applicable to tenders or auctions, thereby avoiding the procedural complexities associated with tendering mechanisms. This grants the administration considerable flexibility in concluding administrative contracts through the exercise of its discretionary powers to select its contracting partner on the basis of trust and integrity.⁸

Accordingly, it becomes evident that all these definitions concur in that the negotiated procedure releases the administration from the constraints inherent in the call for tenders procedure. Nevertheless, the contracting authority may resort to this method only in cases exhaustively defined by law. The general rule governing public procurement remains the call for tenders, which is founded upon the principles of competition, transparency of procedures, and integrity.

1.3. Second: The Legal Definition of the Negotiated Procedure in Certain Laws Governing Public Procurement

The Algerian legislator has defined the negotiated procedure throughout the various legislative stages governing public procurement in Algeria, as follows:

The negotiated procedure was defined in the first ordinance regulating public procurement in Algeria, Ordinance No. 67-90, under the designation of direct agreement (mutual consent), as follows:⁹

Contracts awarded by mutual consent are those in which the administration freely negotiates with contractors and suppliers whom it decides to consult and awards the contract to whomever it chooses among them.

Subsequently, Executive Decree No. 82-145, regulating contracts concluded by public operators, defined the negotiated procedure (direct agreement) as:

A procedure whereby the contract is awarded to a single contracting operator without a call for competition, while consultation is not excluded.

Thereafter, Executive Decree No. 91-434 defined the negotiated procedure (direct agreement) as:¹⁰

A procedure for awarding a contract to a single contracting operator without a formal call for competition.

Law No. 02-250 later defined the negotiated procedure (direct agreement) as:

A procedure for awarding the contract to a single operator without a formal call for competition.¹¹

Presidential Decree No. 10-236 subsequently defined the negotiated procedure (direct agreement) as:

A procedure for awarding the contract to a single operator without a formal call for competition,¹²

which is the same definition adopted by Presidential Decree No. 15-247 relating to the regulation of public contracts and public service delegations.¹³

Finally, Law No. 23-12, as previously mentioned, defines the negotiated procedure (direct agreement) as:

"A procedure whereby a public contract is awarded to a single economic operator without a formal call for competition. The negotiated procedure may take the form of direct negotiation or negotiation following consultation, and such consultation shall be conducted through all appropriate written means..."¹⁴

On the basis of these legal definitions, it may be inferred that the negotiated procedure (direct agreement) constitutes an exceptional legal mechanism for the award of public contracts. Under this procedure, the contract is allocated and awarded to a single contracting operator in the absence of a formal competitive process. Furthermore, it is noteworthy that the Algerian legislator

⁵ Abdel Latif Quteis, *Public Procurement: Legislation, Doctrine, and Judicial Practice*, 2nd ed., Al-Halabi Legal Publications, Beirut, Lebanon, 2013, p. 197.

⁶ Mohamed bin Said bin Hamad Al-Maamari, *Judicial Control over Administrative Contracts in the Formation and Execution Phases*, Dar Al-Jami'a Al-Jadida, Egypt, 2011, p. 108.

⁷ Abdel Aziz Abdel Monem Khalifa, *General Principles of Administrative Contracts*, Dar Al-Fikr Al-Jami'i, Egypt, 2005, p. 181.

⁸ Mohammad Khalaf Al-Jubouri, *Administrative Contracts*, 1st ed., Dar Al-Thaqafa for Publishing and Distribution, Jordan, 2010, p. 99.

⁹ Article 26 of Decree No. 82-145 dated 10 April 1982, regulating contracts concluded by public contractors, *Official Gazette*, No. 15, 1982.

¹⁰ See Article 23 of Executive Decree No. 91-343 dated 9 November 1991, concerning the regulation of public procurement contracts, *Official Gazette*, No. 57, 1991.

¹¹ Article 22 of Presidential Decree No. 02-250 dated 24 July 2002, concerning the regulation of public procurement contracts, *Official Gazette*, No. 52, 2002.

¹² Article 22 of Presidential Decree No. 02-250 dated 24 July 2002, concerning the regulation of public procurement contracts, *Official Gazette*, No. 52, 2002.

¹³ Article 27 of Presidential Decree No. 10-236 dated 7 October 2010, concerning the regulation of public procurement contracts, as amended and supplemented, *Official Gazette*, No. 58, 7 October 2010.

¹⁴ Article 41 of Presidential Decree No. 15-247, cited above.

has consistently addressed this contractual technique across the successive legislative frameworks governing public procurement, while providing a more detailed and elaborated regulation thereof in Law No. 23-12.

1.4. Section Two: Forms of Negotiation Procedures in Concluding Public Procurement Contracts

Referring to Article 40 of Law No. 23-12 mentioned above, the Algerian legislator divided the negotiation method into two types: the first is the direct negotiation procedure, and the second is the competitive negotiation after consultation. Thus, the legislator did not differ significantly from Article 41 of Presidential Decree No. 15-247 cited above, where the Algerian legislator also divided negotiation into two forms: simple negotiation and negotiation after consultation.

I. Direct Negotiation

This procedure is considered a negotiation method addressed to a specific person or a group of known individuals and does not require any formalities for contacting competitors. The procedure is simple, which allows for saving time and promptly meeting the contracting authority's needs. However, this simplicity necessitates enhanced oversight and stricter ethical standards.

Consequently, its application is surrounded by a set of conditions strictly defined by law. The Algerian legislator was explicit in Law No. 23-12,¹⁵ specifically in paragraph 3 of Article 41, emphasizing that the negotiation procedure constitutes an exceptional rule for concluding contracts and may only be employed in cases expressly stipulated by law. This principle had already been established in Presidential Decree No. 15-247 regarding negotiation procedures, where the contracting authority was exempted from the formal requirements of the tendering process. However, the authority was required to comply with the specific conditions for resorting to direct negotiation, as laid out in Article 41 of Law No. 23-12. These cases can be identified as follows:

1. Case of a Sole Monopolistic Contractor:

This case is mentioned in paragraph 1 of Article 41 of Law No. 23-12 cited above. The contracting authority resorts to it when it is unable to execute the contract except through a single economic operator holding a monopolistic position in the market, or to protect exclusive rights, or for technical, cultural, or artistic considerations. The services concerned with cultural and artistic considerations are specified by a joint decision of the Minister of Culture and the Minister of Finance.

This is the same case referred to in paragraph 1 of Article 49 of Presidential Decree No. 15-247 cited above. Thus, it is evident that the Algerian legislator has maintained the same monopolistic scenario as before. The monopolistic nature justifies the use of the direct negotiation procedure, since the service requested by the contracting authority can only be provided by a single monopolistic entity. This situation is considered justified, and the legislator wisely relieved the authority from undergoing the formal tendering procedures. Indeed, there is no need to impose formalities and prolonged procedures when there is only one contractor capable of delivering the required service or possessing the technical capacities specified by the contracting authority.¹⁶

2. Promotion of Emerging Trademark-Holding Enterprises:

This case was introduced by Law No. 23-12. It stipulates that when promoting emerging enterprises holding a trademark recognized under the applicable legislation and regulations, and providing services in the fields of digitization and innovation, direct negotiation may be used only if the solutions offered by the enterprise are unique and innovative.¹⁷

In our view, this procedure represents one of the most effective measures added by the Algerian legislator in the Public Procurement Law, as such cases significantly contribute to the advancement of the national economy.

3. Case of Urgent Necessity:

Paragraph 3 of Article 41 of Law No. 23-12 cited above provides that in cases of urgent necessity, justified by a threat to an investment or property of the contracting authority, public order, or by an imminent danger affecting an existing property or investment, or in emergencies related to health crises, technological disasters, or natural disasters, the situation may not be compatible with standard public procurement procedures. It is required that the contracting authority could not have foreseen the circumstances causing the urgency, and that the urgency is not the result of deliberate delay or manipulation by the authority itself.

This is the same case referred to in Presidential Decree No. 15-247 cited above.¹⁸ What is particularly notable is that the legislator added an important provision concerning health crises and technological or natural disasters, such as the COVID-19 pandemic. Granting the contracting authority such exceptional powers in these situations is significant. The authority is considered in an urgent position in the context of administrative contracts if it does not enter into a contractual relationship promptly, as delay may result in the loss of public funds or investments. Consequently, the standard tendering procedure becomes inapplicable.

The administration bears the burden of proof regarding the existence of urgent necessity. Hence, the phrase "justified urgency" appears at the beginning of the second paragraph above, indicating that the urgent situation must be unexpected and arise suddenly in the field, catching the contracting authority off guard. This represents the legislator's attempt to balance exceptional procedures with the general rule of public procurement.¹⁹

It is worth noting that the concept of urgency is well established in legal practice across multiple fields. For instance, in litigation, urgent rulings differ from ordinary proceedings regarding procedural rules, session scheduling, the nature of judgments, and appeal deadlines.

4. Case of Urgent Supply with Special Conditions

Paragraph 4 of Article 41 of Law No. 23-12 cited above provides that the contracting authority may resort to direct negotiation in cases of urgent supply aimed at ensuring the provision of essential goods to the population, provided that the circumstances

¹⁵ Kherchi Al-Noui, *Project Implementation within the Framework of Public Procurement Regulation*, Dar Al-Khaldounia for Publishing, Algeria, 2011, p. 165.

¹⁶ Ammar Boudiaf, *Explanation of Public Procurement Regulation – Pursuant to Presidential Decree No. 15-247*, Part One, 5th ed., Jisur for Publishing and Distribution, Algeria, 2017, p. 223.

¹⁷ Paragraph 2 of Article 41 of Law No. 23-12, cited above.

¹⁸ Paragraph 2 of Article 49 of Presidential Decree No. 15-247, cited above.

¹⁹ Ammar Boudiaf, *Explanation of Public Procurement Regulation – Pursuant to Presidential Decree No. 15-247*, Part One, 5th ed., Jisur for Publishing and Distribution, Algeria, 2017, p. 225.

necessitating the urgency were unforeseen and not the result of deliberate delay by the authority. This is the same case mentioned in Presidential Decree No. 15-247, without any modification.²⁰

In such cases, the direct negotiation procedure is the most efficient method. If the administration were bound by conventional procurement procedures, including publication, deadlines, and formalities, this could negatively affect the market and disrupt the timely provision of essential goods to the population. The phrase “to ensure the provision of essential goods to the population” implies that the administration requires a certain product or material and, due to urgent circumstances, must deliver it to the population quickly—for instance, in the aftermath of an earthquake or flood in specific areas.

Under these circumstances, the administration may employ exceptional contracting provisions, engaging one or more suppliers to deliver the required goods and products, enabling it to perform its public service obligations efficiently. This is allowed provided that the urgent situation was unforeseen and not the result of manipulative actions, thereby preventing any abuse or fraudulent use of exceptional procurement procedures.²¹

5. Case of a Project of National Importance

Paragraph 5 of Article 41 of Law No. 23-12 cited above provides that the contracting authority may resort to direct negotiation when the project in question is of national importance and possesses an urgent nature, making it incompatible with standard public procurement timelines. It is required that the circumstances necessitating the urgency were unforeseen by the contracting authority and were not the result of deliberate delay.

In such cases, resorting to this exceptional procurement method is subject to prior approval by the Council of Ministers if the contract amount equals or exceeds 10,000,000,000 DZD (ten billion Algerian dinars), and to prior approval during a government meeting if the contract amount is below this threshold. This is the same provision referred to in Presidential Decree No. 15-247 cited above.²²

It is evident that the special nature of such projects produces a positive general impact affecting the entire national territory, given that the paragraph describes the project as of national importance and of priority. Hence, it must be submitted to the highest executive authority, represented either by the Council of Ministers or a government meeting.

A notable innovation in this provision, compared to Decree No. 10-236 (2010), is the explicit determination of the contract amount and financial threshold in Presidential Decree No. 15-247 and Law No. 23-12, which represents a clear legislative improvement.

6. Case Concerning the Promotion of National Public Production Capacity

Paragraph 6 of Article 41 of Law No. 23-12 cited above allows the contracting authority to resort to direct negotiation for the promotion of production and/or national production capacity. In such cases, this exceptional method is subject to prior approval by the Council of Ministers if the contract amount equals or exceeds 10,000,000,000 DZD, or prior approval during a government meeting if the contract amount is below this threshold. This is identical to the case mentioned in Presidential Decree No. 15-247, without any modifications.²³

The rationale behind this provision is to enable the contracting authority to conclude contracts quickly, in order to develop national production capacity. However, a critique of the legislator is that the wording remains very broad and absolute, leaving room for wide interpretation. Despite expectations for amendment in the updated Public Procurement Law, the provision remains unchanged.

7. Case Involving a Legislative or Regulatory Provision Granting a Contract to a Public Institution

Paragraph 7 of Article 41 of Law No. 23-12 cited above provides that the contracting authority may resort to direct negotiation when a legislative or regulatory provision grants a public institution subject to commercial rules the exclusive right to perform an operation fully or partially funded by the state budget or local government budgets.

Alternatively, this procedure may be used when the institution performs all of its activities with the legal entities subject to public law mentioned in Article 9 of Law No. 23-12, namely the State, local authorities, and public institutions governed by public law.

This paragraph introduces two distinct cases:

a) When a legislative or regulatory text grants a commercial public institution the exclusive right to perform a service operation funded wholly or partially by the state or local budgets.

b) When the institution conducts all its activities with legal entities subject to public law, as specified in Article 9.

This provision improves upon the previous 2010 regulation (Article 43, Paragraph 5 of Executive Decree No. 10-236), which vaguely referred to “public institution” without specifying its nature. The 2015 Decree (Article 49, Paragraph 6) clarified the institution’s nature as a “public institution of industrial and commercial character,” and the current law (Article 41, Paragraph 7 of Law No. 23-12) further refines this, specifying institutions performing operations funded fully or partially by the state or local budgets.

The legislator’s intent is to prioritize contracting for these institutions, where the source of priority is a legislative or regulatory provision granting them exclusive public service rights. This allows such institutions to contract via direct negotiation in public procurement.

However, it is noteworthy that granting priority and exclusive contracting rights to some public institutions may conflict with the principle of equality, a key principle in the new Public Procurement Law. From a constitutional perspective, particularly under the 2020 constitutional amendment on freedom of commerce and industry, recognizing exclusive rights for certain commercial public institutions raises questions about fairness and market competition. Ideally, all institutions operating in the same sector should compete, rather than granting special privileges or exclusive rights to a single entity, ensuring economic policy does not favor one institution over another.²⁴

²⁰ Paragraph 3 of Article 49 of Presidential Decree No. 15-247, cited above.

²¹ Ammar Boudiaf, *Explanation of Public Procurement Regulation – Pursuant to Presidential Decree No. 15-247*, Part One, 5th ed., Jisur for Publishing and Distribution, Algeria, 2017, p. 227.

²² Ammar Boudiaf, *Ibid.*, p. 227.

²³ Paragraph 5 of Article 49, Presidential Decree 15-247, cited above.

²⁴ Ammar Boudiaf, *Ibid.*, p.p 230-231.

Second – The Negotiated Procedure after Consultation

The Negotiated Procedure after Consultation is one of the procedures provided for under Algerian public procurement legislation. It falls within the category of negotiated procedures; however, it differs from the Direct Negotiated Procedure in that it incorporates a degree—albeit limited—of competition, which is otherwise absent in the latter.

In this procedure, the contracting authority addresses a consultation to a number of economic operators rather than negotiating with a single operator. The contracting authority may limit the consultation to a shortlist of undertakings selected from the register of economic operators (or the approved operators' file), on the basis that such undertakings are deemed to possess the technical, professional, and financial capacities required to perform the subject matter of the contract.

The Negotiated Procedure after Consultation is characterized by simplified procedural requirements compared to other public procurement award procedures. It is particularly suited to situations of relative urgency, as it enables the contracting authority to expedite the contract award process while ensuring compliance with the fundamental principles governing public procurement in Algeria, notably transparency, equal treatment of candidates, and a minimum level of competition.²⁵

Cases in Which the Contracting Authority May Resort to the Negotiated Procedure after Consultation
The contracting authority may resort to the Negotiated Procedure after Consultation in the following cases:

1. Where the Call for Tenders Is Declared Unsuccessful for the Second Time :²⁶

The grounds for declaring a call for tenders unsuccessful may take different forms. It may result either from the absence of any bids submitted or from the submission of non-compliant bids. In both instances, requiring the contracting authority to repeat the procedure under the same specifications (terms of reference) for a second time may lead to a loss of time and missed development opportunities.

Accordingly, appropriate solutions must be adopted to ensure transparency in the procedures and to establish the principles of fair competition among tenderers, while at the same time facilitating administrative processes and ensuring the continuity of public service requirements. For example, in cases where no bids are received, or where the bids submitted are deemed non-compliant, the underlying cause may lie in the specifications themselves—either because they contain excessively restrictive conditions that the market cannot reasonably meet, or because they suffer from ambiguity.

In such circumstances, insisting on maintaining the same specifications for a second call for tenders constitutes an avoidable waste of time. This may be remedied by granting the contracting authority the power to amend the specifications upon re-launching the procedure, thereby enhancing both efficiency and competition.²⁷

2. In the Case of Study Contracts and Specific Supplies or Services That Do Not, by Their Nature, Require a Call for Tenders

Pursuant to paragraph (2) of Article 42 of Law No. 23-12, the contracting authority may resort to the Negotiated Procedure after Consultation in respect of study contracts, specific supplies, and particular services whose nature does not require recourse to a call for tenders. The specific character of such contracts is determined by their subject matter, by a low level of competition in the relevant market, or by the confidential nature of the services concerned. This provision reiterates the same situation previously provided for under Presidential Decree No. 15-247.²⁸

From the wording of the above paragraph, it may be inferred that the contracting authority is granted a certain margin of discretion in selecting its co-contracting party directly, without resorting to press publication procedures. However, the provision gives rise to ambiguity, particularly with respect to the expression "low level of competition."

This raises the question as to the distinction between this case and that of an unsuccessful procedure. Indeed, a declaration of unsuccessfulness may itself result from insufficient competition revealed during the evaluation of bids by the competent committee. By contrast, the reference to the "confidential nature" of certain services appears more readily justifiable, given the specific characteristics of certain sectors and activities—a rationale that has been reiterated in Law No. 23-12.

3. Public Works Contracts Connected with the Exercise of Sovereign Functions of State Institutions:

This case is provided for in paragraph (3) of Article 42 of Law No. 23-12, which authorizes the contracting authority to resort to the Negotiated Procedure after Consultation in respect of public works contracts directly related to the sovereign institutions of the State. The same provision had previously been stipulated under Presidential Decree No. 15-247.²⁹

It may be observed that this ground is expressly confined to public works contracts, to the exclusion of other categories of public contracts (such as supplies or services). This limitation is justified by the direct connection between such works and the exercise of sovereign functions, which warrant specific procedural flexibility in light of their institutional and strategic sensitivity.

4. Contracts Previously Awarded and Subsequently Terminated Where Their Nature Is Incompatible with the Time Limits of a New Call for Tenders:³⁰

This ground was introduced by Presidential Decree No. 15-247 and has been retained in identical wording under Law No. 23-12. It constitutes an objective situation in which the contracting authority may have initially awarded a contract for works, supplies, or services in accordance with the competitive tendering procedures prescribed by public procurement legislation. However, due to objective circumstances, the contract is subsequently terminated.

In such a case, the contracting authority may be unable to initiate a new publication and call for tenders procedure, particularly where the project in question cannot withstand the timeframes required for launching and completing a new competitive process. The recourse to the Negotiated Procedure after Consultation therefore serves to ensure continuity in the execution of the project while preserving a minimum degree of competition.

5. Operations Implemented within the Framework of Intergovernmental Cooperation Strategies and Bilateral Relations Between

²⁵ Ammar Boudiaf, *Ibid.*, p.p 230-231

²⁶ Paragraph 1 of Article 42, of Law No. 23-12, cited above.

²⁷ Kherchi El-Noui, *Ibid.*, p170.

²⁸ Paragraph 2 of Article 51, Presidential Decree 15-247, cited above

²⁹ Paragraph 3 of Article 51, Presidential Decree 15-247, cited above

³⁰ Paragraph 4 of Article 42, of Law No. 23-12, cited above.

Two States Concerning Concessional Financing, Debt Conversion into Development Projects, or Grants:³¹

This case arises where the relevant financing agreements expressly provide for such a procedure. In this context, the contracting authority may restrict the consultation to undertakings of the partner State concerned in the case of bilateral cooperation, or to undertakings of the financing State in the case of concessional funding arrangements.

The rationale underlying this provision lies in the need to give effect to and respect the State's external commitments of an international character. Its inclusion among the grounds for resorting to the Negotiated Procedure after Consultation therefore appears both reasonable and legally justified, as it ensures conformity with international financing agreements while maintaining procedural coherence within the national public procurement framework.

Section Three: Procedures for Awarding Public Contracts through Negotiated Methods

As previously demonstrated in this study, contracting through negotiation in the award of public contracts encompasses two distinct procedures: the first concerns the Direct Negotiated Procedure, while the second relates to the Negotiated Procedure after Consultation. Each procedure differs in terms of the award process, particularly with regard to the extent of discretion afforded to the contracting authority in selecting its co-contracting party. This section examines these aspects in detail.

I. Administrative Discretion in Selecting the Co-Contracting Economic Operator through Negotiation

The negotiated method enables the contracting authority to award public contracts without resorting to the publication and advertising procedures prescribed by public procurement legislation. This constitutes the principal distinction between negotiated procedures and the call for tenders procedure.

In principle, negotiation exempts the contracting authority from one of the most significant formal constraints governing public contracting—namely, the obligation of prior publication. However, such exemption does not entirely release the contracting authority from compliance with other formal requirements governing the award of public contracts.³²

II. Formal Constraints Governing the Negotiated Procedure

As previously indicated, negotiation under Algerian public procurement law takes two forms, which differ in the degree of discretion granted to the contracting authority in selecting the economic operator deemed most suitable for the contract.

1. Direct Negotiated Procedure

The freedom of contract in selecting the co-contracting party does not operate uniformly within the Direct Negotiated Procedure. The contracting authority enjoys broader discretion under this procedure, particularly in the cases enumerated in Article 41 of Law No. 23-12 (currently in force) and previously under Article 49 of Presidential Decree No. 15-247. Nevertheless, such discretion remains subject to several formal constraints:

a. Determination of Needs

The contracting authority must define its needs in compliance with Article 16 of Law No. 23-12. These provisions apply irrespective of the financial amount of the contract, except in expressly stipulated exceptional cases under the same law.

b. Verification of the Economic Operator's Capacities

The contracting authority is required to verify the technical, professional, and financial capacities of the economic operator, as provided in Section IV of Chapter II and Article 43 of Law No. 23-12.

c. Cases of Compelling Urgency

In situations of compelling urgency, authorization may be granted to the contracting authority to commence performance of the services prior to the formal conclusion of the public contract. Such authorization must be issued by a reasoned decision of the competent public authority (the head of the public body, minister, wali, or president of the municipal council), and is limited to the following situations:

- An imminent danger affecting property or an investment already materialized on the ground;
- A threat to property, an investment, or public order;
- A state of emergency relating to a health crisis or to technological or natural disasters officially declared by the competent authorities.

In such cases, the services performed must be strictly limited to what is necessary to address the urgent circumstances. Notwithstanding the commencement of performance, a public contract must subsequently be formalized by way of regularization, as an exception to the principle established in Article 6 of Law No. 23-12, which requires prior conclusion of the contract before performance begins.

Where the operation exceeds the financial thresholds set out in Article 18 of Law No. 23-12, the regularization contract must be concluded within six (6) months from the date of signature of the authorization decision and submitted to the competent external control body for public contracts.

d. Organization of Negotiations

The contracting authority must organize the negotiations in accordance with the conditions set out in Article 40 of Law No. 23-12.

2. Negotiated Procedure after Consultation

One of the principal formal constraints imposed by the Algerian legislature in this procedure is the obligation, where appropriate, to publish the provisional award decision. This requirement is provided for in Article 56 of Law No. 23-12.

The publication of the provisional award constitutes an essential safeguard for tenderers' rights, enabling them to exercise their right to challenge the award decision. The publication must comply with the conditions previously set out in Article 65 of Presidential Decree No. 15-247.³³

³¹ Paragraph 5 of Article 42, of Law No. 23-12, cited above.

³² Nabil Azrayeb, *The Powers of the Administration in the Field of Public Procurement under Algerian Legislation* (1st edn, Maktabat Al-Wafaa Al-Qanuniyya, Alexandria 2018), p. 57.

³³ Additional clarification regarding the formal constraints applicable to the Negotiated Procedure after Consultation is provided under Article 52

In the case of services performed abroad or services of a confidential nature, the publication of the provisional award may be replaced by direct notification to the economic operators who were consulted.

It is therefore evident that, although the Algerian legislature has granted the contracting authority a margin of discretion under the negotiated procedures (in both their direct and consultation-based forms), such discretion remains circumscribed by formal safeguards under Law No. 23-12 and previously under Presidential Decree No. 15-247. These constraints aim to uphold the principles of transparency and integrity in the award of public contracts, thereby ensuring a balance between administrative flexibility and the protection of competition.

2. CONCLUSION

This study has demonstrated that the negotiated method constitutes an exceptional mode of contracting under Law No. 23-12, which lays down the general rules governing public procurement in Algeria. Recourse to this method is strictly limited to the cases exhaustively enumerated by the legislature.

In both its forms—the Direct Negotiated Procedure and the Negotiated Procedure after Consultation—the negotiated method grants the contracting authority a degree of flexibility in awarding public contracts, allowing it to depart from the formal and often lengthy procedures associated with the call for tenders. However, such flexibility is counterbalanced by a set of formal and substantive constraints that the contracting authority must observe when resorting to this exceptional procedure.

Notwithstanding these constraints, the present study reveals that the Algerian legislature has not established sufficiently robust safeguards to ensure that negotiation operates as an effective mechanism for the protection of public funds. This observation applies both to Presidential Decree No. 15-247 and to the current Law No. 23-12, even though the latter has attempted to address certain shortcomings of the former. In many instances, the legal framework remains ambiguous, particularly with regard to the conditions and regulatory parameters governing the various cases in which negotiation may be invoked.

In light of the foregoing analysis, the study advances the following recommendations:

- The legislature should reconsider and further refine the negotiated method, ensuring greater clarity—especially with respect to the cases and procedures governing both direct negotiation and negotiation after consultation.
- Existing procedural gaps and ambiguities should be addressed so that negotiation may function as an effective deterrent mechanism aimed at safeguarding public funds. The protection of public funds cannot be achieved merely by conferring an exceptional character upon negotiation through the restriction of its scope of application; rather, its procedures must be clearly and precisely defined.
- Finally, the overall regulation of public procurement should be grounded in practical administrative realities and informed by field experience in order to establish effective safeguards for the protection of public funds. This requires the prompt adoption of the implementing regulations pursuant to Law No. 23-12, while discontinuing reliance on the corresponding provisions of Presidential Decree No. 15-247.

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