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Scope of application of the Algerian Public Procurement Law

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Abstract:

Public procurement is considered a highly important administrative contract due to its close connection to the public treasury and its role as an effective means and tool for spending public funds, ensuring the smooth running of public facilities and achieving the common good of citizens. Based on this, the legislator has defined the scope of application of the Public Procurement Law, both in terms of parties. Contracts may only be concluded by the public purchaser, whether a public or private legal entity, with one or more economic operators. Furthermore, contracts may only be concluded if they relate to public works, the acquisition of supplies, the provision of services, or the completion of studies.

Keywords: Public purchaser, economic operator, public works and supplies, services, and studies.

Introduction

Among the legal actions undertaken by the public administration, whether national or local, is the conclusion of administrative contracts concluded according to the agreement of the two wills with the conformity of the offer and acceptance. Among these contracts are those related to public procurement, which were regulated by the Algerian legislator under the new Law No. 23-12 dated August 5, 2023[1], and Presidential Decree No. 15-247 dated September 16, 2015[2], which is in effect until the issuance of the regulations for the new law, t is defined as those written contracts concluded by the public buyer, called the contracting authority, for a financial consideration, with one or more economic operators, called the contracting operator, to meet the needs of the contracting authority in terms of completing works, purchasing supplies, providing services, or completing studies, Given the importance of public procurement, as it is directly and closely linked to the public treasury and public funds, the legislator has defined the scope and area of application of the law relating to it. This will be studied and detailed in this

study, which begins with the following question: What is the scope and area of application of the public procurement law?

The answer to this question will be based on analytical and descriptive approaches. Based on these approaches, the study will be divided into the following two headings:

Section 1: The scope of application of the Public Procurement Law in terms of parties.

Section 2: The scope of application of the Public Procurement Law in terms of subject matter.

Section 1: The scope of application of the Public Procurement Law in terms of the parties.

This refers to the parties to the contractual relationship in a public transaction: the public buyer, referred to in the text as the contracting authority, and the economic operator, referred to as the contracting operator.

A: The public purchaser as a party to a public procurement contract.

The public purchaser may be a public legal entity or a private legal entity as a contracting interest.

1- The public buyer is a person under public law as a party to a public procurement contract.

Throughout all stages of regulating and codifying public procurement, the Algerian legislator has sometimes narrowed the scope of this party, namely the public buyer, and sometimes expanded it. Article 9 of the current Public Procurement Law defines the first party to a public procurement contract, referring here to public law persons, stating that: "The provisions of this law apply to public contracts subject to expenditures by:

- The state, represented by public bodies and administrations.

- Regional authorities.

- Public institutions subject to public law..."[3]

- **The state is represented by public bodies and administrations.**

The state is one of the legal persons; indeed, it is the primary legal person from which other persons branch out. What is meant here is the narrow meaning of the state, represented by the central executive authority, rather than the broader concept adopted in constitutional law, which considers the state to be an interaction of the three concepts of authority, people, and territory. The matter here is limited to ministries, whose organization, composition, and powers are subject to the composition of the government and the distribution of tasks within it. The ministry consists of the minister, as the head of

the ministry's administration and its legal representative. Under this description, the minister has the authority to conclude contracts in the ministry's name[4].

- **Local authorities:**

The wilaya: The wilaya is considered one of the state's regional authorities. Under this description, it represents the second level of local administration and one of the most important applications of regional decentralization. It is also the state's decentralized administrative department. As such, it constitutes a space for implementing public policies that are collaborative and consultative between regional authorities and the state. It contributes, along with the state, to the management and planning of the territory, as well as to economic, social, and cultural development, as well as the protection, promotion, and improvement of citizens' living conditions[5].

It goes without saying that the state is represented in all areas by the governor, in accordance with state law. The state's departments, directorates, divisions, and departments lack any legal independence. The governor is the one who concludes public contracts and transactions on behalf of the state. This is confirmed by Article 105 of the State Law, which states: "The governor represents the state in all civil and administrative activities, in accordance with the forms and conditions stipulated in the applicable laws and regulations. He shall, in the name of the state, perform all management of the properties and rights that comprise the state's assets, in accordance with the provisions of this law."

According to this article, the process of concluding public contracts is among the administrative acts carried out by the governor on behalf of the state, as the latter enjoys a legal personality that results in independence in financial liability and the capacity to conclude legal transactions, in line with the text of Article 1 in its second paragraph of the same law, which states the following: “It enjoys a legal personality and an independent financial liability.”[6]

Since the state enjoys a fixed contracting capacity, its function within the state's administrative organization and its various burdens require it to enter into contractual relationships to implement development projects and serve the public. On this basis, the aforementioned state law has allocated a special section entitled: "Auctions, Tenders and Contracts" in Articles 135, 136 and 137 thereof. Article 135 stipulates that: "Contracts related to works, services or supplies for the state and its public institutions of an administrative nature shall be concluded in accordance with the laws and regulations in force and applicable to public contracts." This article is an explicit reference to the texts regulating public contracts.[7]

Municipality: What applies to the state also applies to the municipality, as the latter is considered the basic territorial community in the Algerian administrative organization. It is an administrative unit that is organically and legally separate from both the state and the state. It also enjoys legal personality and financial independence. The municipality constitutes an independent and autonomous entity,[8] established by Articles 49 and 50 of the Civil Code, as well as Article 1 of the

2011 Municipal Law, which states: "The municipality is the basic territorial community of the state. It enjoys legal personality and independent financial liability...".

Since the municipality enjoys legal personality and the capacity to contract, its function within the state's administrative organization and its various and diverse tasks also require it to enter into contractual relationships under public law. This is aimed at undertaking local development and serving the public, especially since it represents the basis of decentralization within the state. According to Article 78 of the Municipal Law, the President of the Municipal People's Council, as the representative of the municipality, represents the municipality in all civil and administrative activities, in accordance with the terms and conditions stipulated in applicable legislation and regulations.

There is no doubt that when a municipality uses public law, it is subject to the regulation of public procurement, whether concluding contracts for works, services, supplies, or studies. In this regard, the legislator has provided special provisions for municipal procurement, under the title "Tenders and Public Procurement," in the 2011 Municipal Law, particularly in Articles 189 to 194[9], Article 189 stipulates that: “Contracts for supplies, works, and the provision of services carried out by the municipality and municipal public institutions of an administrative nature shall be concluded in accordance with the applicable regulations applicable to public contracts.”[10].

- **Public institutions subject to public law:**

With the transformation of the state from a guardian state to an intervening state, public institutions were created. These are public persons with legal personality established by the state to manage specialized public facilities, granting them independence and an independent financial status, and they have the right to litigate. According to the definition of a public institution, the public facility in this case moves in its movement from the center of power to the center of the periphery. It is considered the practical image of what is called service decentralization, which is based on two opposing yet complementary elements: the element of partial and relative independence from the central administrative authority, and the element of subordination to the center and its connection with the guardianship bond.[11]

The Algerian legislator has approved the use of public administrative institutions, granting them legal personality, which is clearly evident in Article 49 of the Civil Code. These institutions are defined as an administrative organization that indirectly manages state funds, in accordance with the objectives determined by the legal organization, under state supervision. More precisely, they are institutions that engage in purely administrative activities and are used by the state and local regional groups as a means of managing their public administrative facilities.

They enjoy legal personality and are subject in their activities to the provisions of administrative law. Their disputes are heard by the administrative judiciary, and their workers are classified as public employees. Their funds enjoy the legal protection imposed by legislation, considering them public funds,

and their contracts are subject to the Public Procurement Law[12]. It is the same whether these public administrative institutions are national or local.

Among the new developments introduced by the current Public Procurement Law 23-12 is that it gave definitions to the institutions that can conclude public contracts in accordance with the provisions of this law, including public institutions subject to public law. It defined them in the second paragraph of Article 4 of the same law as those institutions with legal personality and financial independence established by the state or local authorities. These institutions are characterized by an administrative, scientific, cultural, professional, health or other nature, and their accounts are kept in accordance with the rules of public accounting.

2- The Public purchaser is a private legal entity as a party to a public procurement contract.

In this regard, private legal entities are considered parties to a public procurement contract as a contracting interest. Article 9 of the current Public Procurement Law 23-12 clarifies this by stating: "The provisions of this law shall apply to public procurements involving expenditures from:... - Public institutions and public economic institutions entrusted by the state or local authorities with delegated supervision of the project. - Public institutions subject to commercial rules regarding the implementation of an operation directly financed, in whole or in part, from the state budget or the budget of local authorities." The details are as follows:

- **Public institutions subject to commercial rules, charged with carrying out an operation financed in whole or in part by the state budget or local authorities:**

The current Public Procurement Law defines these institutions similarly to the institutions mentioned above, in the third paragraph of Article 4 of the same law.

According to this paragraph, they are defined as institutions with legal personality and financial independence, established by the state or local authorities. These institutions may be in the form of a private management institution, or of a scientific, technological, or other nature. Their accounts are maintained in accordance with the financial accounting system stipulated in Law 07-11 of Dhu al-Qi'dah 15, 1428, corresponding to November 25, 2007.[13]

The extension of the Public Procurement Law to public institutions subject to commercial rules is subject to the availability of two conditions:

-The institution subject to commercial rules must be a public institution:

This means that it must not be owned by a private entity, as this is a public transaction whose objective is to achieve the public interest. Furthermore, the public institution is the competent authority over the subject of the transaction (electricity, gas, communications, transportation, etc.), and has the capacity to implement the transaction. This is on the one hand, and on the other hand, the legislator desires that these institutions play a role in development and reduce the burden on the public treasury. In this case, the public institution subject to the legislation governing commercial activity is not an economic operator, but rather a contracting authority charged with monitoring and supervising the transaction process on behalf of the state or regional authorities. On this basis, it is granted certain

privileges of public authority, and therefore is subject to the same rules as the state, regional authorities, and public institutions of a national and local administrative nature.[14]

- Public funds must play a role in financing the transaction:

This means that the transaction undertaken by a public institution subject to the legislation governing commercial activity must be fully or partially financed, with a temporary or final contribution from the state budget or the budget of regional authorities, so that the transaction is considered administrative in nature and falls under administrative contracts.[15]

- **Public economic institutions:**

Paragraph 4 of Article 4 of the same law defines them as commercial companies in which the state or any other legal entity subject to public law directly or indirectly owns the majority of its share capital, when it exercises delegated supervision of the project at the behest of the state or local authorities.[16]

The project owner is the state or local authorities, according to the Public Procurement Law[17]. However, Article 2 of Executive Decree No. 14-320 of November 20, 2014, regarding project supervision and delegated project supervision, limited the project owner to the state as a legal entity subject to public law.[18]

Article 3 of the aforementioned decree also refers to the public institution or body to which the project owner delegates the project or program through a delegated project supervision agreement. The entity is responsible for implementing or completing all or part of the project or program initiated by the project owner, regardless of whether the project owner is the state or local authorities.

According to the same article, the delegated project owner is specifically mentioned by several institutions, including the public economic institution[19]. He is given the status of a secondary spending officer to implement expenditures related to the project subject to the delegated project supervision agreement, in accordance with the rules and procedures of public accounting, as stipulated in Article 11 of the same decree.[20]

On this basis, it can be said that the legislator, the state or local authorities, is free to choose the delegated project owner, and the principles related to public procurement do not apply to him, as long as the matter is concluded pursuant to an agreement. However, the delegated project owner must adhere to these principles stipulated in the Public Procurement Law when selecting the economic operator responsible for implementing the project.

B: The economic operator as a party to the public contract.

The economic operator will be defined as a party to the public contract, and the rules relating to its selection will be set out as outlined below.

1- Definition of an Economic Operator:

Article 2 of the current Public Procurement Law stipulates that a public procurement contract, whether for works, supplies, studies, or services, is concluded with one or more economic operators[21], known as the contracting operator, who is the second party to the procurement contract. Article 3 of the current Public Procurement Law stipulates that an economic operator can be one or more natural or legal persons bound by the procurement contract, either individually or within the framework of a temporary group of institutions.[22]

The same wording appears in Article 37 of Presidential Decree 15-247, which is in effect. However, this article specifically refers to the contracting operator, not the economic operator. Although the latter becomes a contracting operator when the procurement contract is awarded, there is no legal problem with this.

2- Rules for selecting an economic operator:

To ensure the proper selection of the contracting operator, the contracting authority must first verify the technical, professional and financial capabilities of the nominated economic operators before evaluating the technical offers. The selection must be based on objective, non-discriminatory grounds related to the subject of the transaction and commensurate with its scope[23], in accordance with Article 43 of the Public Procurement Law 23-12.[24]

The contracting authority is also responsible for investigating and inquiring when evaluating nominations, when necessary, to determine the capabilities of the contracting economic operators to ensure proper selection of the contracting operator, by all legal means, with other contracting authorities, administrations and bodies entrusted with the mission of the public service, and with banks and Algerian representations abroad[25]. This is what is stipulated in the first paragraph of Article 44 of the same law. Each nominated economic operator may submit his pledges individually or within the framework of a group or bloc during the candidacy to conclude the public transaction, with the possibility of seeking assistance from the capabilities and qualifications of other institutions, in accordance with the second paragraph of Article 44. It is prohibited for any contracting economic operator to: Or a candidate may submit more than one offer or represent more than one contractor or candidate for the same public contract, in accordance with the third and fourth paragraphs of Article 44 mentioned above.[26]

All economic operators must hold a national card, sector cards, and a card at the level of each contracting service, which must be updated regularly. The content of these cards and the conditions for updating them are determined by a decision issued by the Minister of Finance, in accordance with the text of Article 45 of the current Public Procurement Law.[27]

Section 2: The scope of application of the Public Procurement Law in terms of substance.

Article 2 of the new Public Procurement Law 23-12 stipulates the areas of public procurement and addresses them in detail. Article 24 of the same law confirms this, stating: "The contracting authority may conclude one or more public contracts to meet a specific need. Public contracts include one or more of the following operations:

- Completion of works.
- Acquisition of supplies.
- Completion of studies.
- Provision of services..."[28] The details are as follows:

A: Public Works Contract and Procurement of Supplies.

1- Public Works Contract:

Although the Algerian legislator considers the public works contract an administrative contract and subjects it to the regulation of public procurement, it has not addressed its definition, leaving the matter to the discretion of jurisprudence and the judiciary. Based on this, a public works contract can be defined as: "an agreement between the administration and an individual, company, or institution to construct, renovate, or maintain a property on behalf of a public legal entity in exchange for a consideration agreed upon in the contract with the aim of achieving the public interest.".[29]

The first paragraph of Article 25 of Public Procurement Law 23-12 states that a public works contract aims to construct a facility, construction, or civil engineering works, as well as the operation of various networks by an economic operator, while respecting the needs determined by the contracting authority as the project owner.

The second paragraph of the same article also states that a facility is a set of construction or civil engineering works that result in an economic or technical function.

Public works contracts, according to the third paragraph of the same article, include the construction, renovation, maintenance, rehabilitation, adaptation, restoration, repair, reinforcement, or demolition of a facility or part thereof, including the associated equipment necessary for its operation.

The Algerian legislator has put an end to any interpretation if a public contract stipulates the provision of services, studies or supplies, and the original subject of the contract relates to the completion of works, then the contract is considered a works contract, as stipulated in the last paragraph of Article 25 of the same law.[30]

In order for us to have public works, the following conditions must be met:

- Work on real estate: As for work, it may be related to the construction of a public road, a bridge, or a group of housing units, or the restoration of their roofs or walls. The concept of work includes preparatory work such as construction, demolition, and rehabilitation, as well as subsequent work such as restoration and maintenance. There is no doubt that this particular administrative contract is closely related to the

concept of local or national development. As for real estate, the work must be directed to a property regardless of its importance[31], whether this property is real estate by nature or real estate by allocation.[32]

Real estate by allocation is stipulated in Article 683, Paragraph 2 of the Civil Code, which states: "However, a movable property placed by its owner in a property he owns for the purpose of serving or exploiting this property is considered real estate by allocation.".[33]

The requirement that a public works contract relate to real estate is due to the close connection between public works and public utilities.[34]

- That the work be done on behalf of a public legal entity, so that we are faced with a public works contract, the work on a property with the pictures or examples referred to in the first part must be on behalf of a public legal entity, and it is the same whether it concerns a regional entity such as the state, the province or the municipality, or a public facility such as a university or a public hospital institution. The public works contract has seen expansion and spread in this millennium.[35]

- The contract must aim to achieve the public interest. Undoubtedly, the description of a public contract is only valid if the objective behind the subject matter of the contract, which concerns real estate, is to achieve the public interest.[36]

- The contract must meet the required financial threshold. Algerian legislators have set a specific financial threshold for public works contracts, defined in Article 13 of Decree 15/247 in force. The financial value must exceed 12 million DZD for the contract to qualify as a public works contract.[37]

The participating institutions must have a professional specialization and classification certificate. Executive Decree No. 11/110 dated 06/03/2011, pursuant to Article 1 thereof, requires all institutions operating within the framework of implementing public contracts in the field of construction, public works, irrigation and forestry to have a professional specialization and classification certificate as a condition for concluding contracts with the state, regional groups and public administrations. This Executive Decree No. 23/283 was issued on 11/29/1993.[38]

Article 03 of No. 11/110 defines the certificate as follows: “The certificate of specialization and professional classification of establishments is a regulatory document for construction works, public works, irrigation and forestry works.

The aforementioned certificate entitles the establishment that holds it to national jurisdiction in the specific field of work.” Article 04 thereof clarifies the information contained in this certificate, and Article 06 specifies its validity period as 03 years.[39]

2- Supplies Acquisition Contract:

Different administrative bodies, while carrying out their activities and seeking to meet all public needs and serve the public, need to conclude other types of contracts, such as supply contracts or supplies acquisition contracts.

The secret to public administrations' recognition of concluding supply contracts lies in the fact that their activities may require the availability of a specific product and their acquisition of it with the aim of achieving the public interest and serving the public.

This occurs on a periodic, frequent, continuous, and regular basis. A supply contract is defined as: "An agreement between the administration and a person (the supplier) for the purpose of financing and supplying it with its needs of movable property in exchange for a consideration that the administration is obligated to pay with the aim of achieving the public interest.".[40]

According to the first paragraph of Article 25 of the current Public Procurement Law, a public supplies contract aims to acquire, lease, or sell on hire purchase, with or without the option to purchase, equipment or materials of any form, by the contracting authority, intended to meet the needs related to its activity with an economic operator.

If the lease is accompanied by the provision of a service, the public contract is a services contract, in accordance with the provisions of the second paragraph of the aforementioned article.

This article also states the same as its third paragraph, which states that if work related to the placement and installation of supplies is included in the public contract, and its financial value is less than the value of these supplies, the public contract is a supplies contract.

Also, according to paragraph four, if the content of a public contract includes services and supplies, and the financial value of the supplies exceeds the financial value of the services, the public contract is considered a supplies contract.

Paragraph five of the same article of the same presidential decree adds that a public supplies contract may include equipment materials or complete production facilities that are not new, with a guaranteed service life or have been refurbished with a warranty.[41]

B: Service Provision and Study Contract.

1- Service Provision.

Contract While the administration provides numerous services to the public, whether centralized, decentralized, regional, or service-oriented, it also certainly needs to serve a specific aspect of its activity. Accordingly, the importance of the service contract lies in its role as the legal and contractual framework that enables the administration to benefit from a specific service provided by a third party in exchange for a fee. Given its importance, it has been mentioned in all public procurement laws in Algeria, starting with Order 69/60 and ending with Presidential Decree 15/247.[42]

A service contract can be defined as: "An agreement between the contracting administration and another natural or legal person with the intent of providing a specific service to the contracting administration related to the management of a public facility in exchange for a financial consideration.".[43]

Article 28 of the Public Procurement Law 23-12 states that a public service contract concluded with a service contractor aims to provide services and is a public contract that differs from contracts for works, supplies, or studies.[44]

2- The Study Contract.

This particular contract, unlike the three previous administrative contracts, has been subject to confusion by the legislator. Sometimes it refers to it by reference and codification, and other times it neglects to refer to it, then returns to mention it and explicitly mention it in the new decree. Accordingly, the study contract is considered an administrative contract under Algerian law according to the text, and the administration is required, if it wishes to conclude this contract, to comply with the regulations governing public procurement, either in terms of the methods and procedures for conclusion, or in terms of oversight. A study contract can be defined as: "an agreement between the contracting administration and another person, by which the latter is obligated to conduct studies specified in the contract, in exchange for a sum of money that it is obligated to pay, in the public interest, such as a contract between the Housing Directorate and an engineering studies office for the purpose of developing engineering designs for residential complexes. The study contract, unlike other contracts, focuses on a technical and artistic aspect of a scientific nature, whereby areas, figures, engineering designs, research, statistics, and laboratory analyses are utilized and placed at the disposal of the relevant administration[45]. Article 27 of the current Public Procurement Law outlines the objective. The study deal aims to provide intellectual services.

Conclusion.

In conclusion to this study, it can be said that public procurement is the primary tool and means used by the legislator to preserve public funds, rationalize their spending, and disburse them through proper and legitimate channels. This is to achieve the public interest, ensure the continuity of public utilities and the provision of their services, and satisfy citizens' desires regularly and steadily. Therefore, it was imperative for the legislator to clarify the scope of its application, both in terms of the parties and the subject matter. Accordingly, the following conclusions can be drawn:

1. The legislator, through his definition of public procurement, defined the parties to the contractual relationship and did not leave the matter to jurisprudence and the judiciary to determine this.

2. The legislator defined the scope of application of the Public Procurement Law exclusively in terms of its parties. Public procurement may only be concluded by the persons specified in Article 9 of the Public Procurement Law.

3. The legislator also defined the scope of application of this law exclusively in terms of the subject matter. Public procurement may not be concluded outside the subjects and forms specified in Articles 2 and 24 thereof.

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