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Regulations governing the power of the administration in the selection of the contracting party: An analytical study under Presidential Decree 15/247 and Law 23/12.

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Abstract: The authority of the administration in the selection of the contracting party is not absolute, but is subject to certain rules and constraints established by the public procurement law. These rules aim to prevent the arbitrary exercise of authority by the administration, while ensuring fair competition between competing candidates for public contracts. These rules are manifested in the prescribed procedures for public procurement and the key criteria used in the selection process.

Keywords: Administration, public procurement, authority, regulations, contractor

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Introduction:

Public procurement is one of the most important administrative contracts in Algeria. It serves as a means of implementing the concept of maintaining public facilities and satisfying public needs, while protecting public funds. For this reason, the contracting authority must be precise and objective in its choice of the most suitable contractor capable of performing the contract in the public interest, in terms of the material and human resources proposed and the guarantees offered. The contracting authority must also take into account the contractor's track record and experience in carrying out projects, as evidenced by the qualification certificate and previous transactions with other entities, in order to assess their seriousness and compliance with procurement standards and deadlines.

In this context, in order to achieve the public interest, public procurement law grants the contracting authority the power to select the contractor through certain methods and procedures established by law. It also grants certain rights to the contractor to counter any potential abuse by the contracting authority that could compromise the fairness of the selection process.

This issue is closely related to the idea of protecting public expenditure, or what is known as safeguarding public funds. Giving the administration the power to select the contracting party through defined methods and a set of rules aims to protect public expenditure and links the selection of the contracting party to the noble concept of safeguarding public funds.

In addition, giving contracting authorities unrestricted freedom in the selection of the contracting party may open the door to the commission of offences under general law and, more specifically, offences related to public procurement. These include, for example, the granting of unjustified privileges in public procurement, the use of influence by public officials, favouritism, bribery and conflicts of interest.

In the light of these considerations, the following question can be asked"To what extent does the legislator regulate the power of the contracting authority to select the contracting party"?

The first section: Procedure for selecting the contractor

Public procurement contracts are the most effective legal and economic instruments for implementing national and local development plans, given their close link with public funds, which the administration must protect by ensuring accuracy and objectivity in the selection of the appropriate contractor capable of fulfilling the contract in terms of material and human resources and the guarantees offered. The contracting authority must also take into account the contractor's track record and experience in carrying out projects, as evidenced by the

qualification certificate and previous transactions with other entities, in order to assess their seriousness and compliance with procurement standards and deadlines.

First requirement:

Methods of selecting the contracting partyAs a general principle, administrative contracts are subject to procedures that vary in terms of the discretionary power and contractual freedom of the administration.The administration is also subject to the nature of the contract concluded and its impact on public funds and the economy. For this reason, the legislator of public procurement laws requires the adoption of a specific method of awarding contracts, i.e. tendering.This method is considered the general rule for the selection of the contracting party, in accordance with Law 23-12, which contains the general rules for public procurement.However, in some cases, the legislator requires the use of an alternative method to the tender to select the contracting party. This alternative method is negotiation, which the contracting authority may use under certain conditions and requirements.

On this basis, we have decided to divide this section into two requirements. In the first requirement we will discuss contracting by tender and in the second requirement we will discuss contracting by negotiation.

The first subsection: Contracting by tender

Tendering is considered to be one of the most important methods of selecting the contracting party with the administration, as it is based on the existence of a number of contractors who are interested in contracting with the administration and who compete with each other. The administration then selects the contractor who offers the best economic advantages.

Therefore, the tendering process limits the administration's freedom to choose the contractor, which gives it legal and jurisprudential significance. This has led us to divide this subsection into two parts. In the first part we will define tendering and in the second part we will discuss the forms of tendering.

First: Definition of tendering

Tendering is considered to be a method used by the administration to carry out public procurement with the aim of selecting the contracting party. It includes several definitions, including.

1-Legal definition:

The legislator defined tendering in the context of Article 38 of Law 23-12[1], to which Article 39 of the same law refers, as follows: "It is a procedure aimed at obtaining offers from several competing contractors, with the contract being awarded, without negotiation, to the contractor who submits the best offer in terms of economic advantage, on the basis of objective selection criteria established before the start of the procedure. The invitation to tender shall be deemed not to

have been carried out if no tenders are received or if, after evaluation of the tenders, it is announced that no tender corresponds to the subject of the contract or to the content of the terms and conditions, or if the financing of the requirements cannot be guaranteed".

2-Legal definition:

The tendering method is defined as the approach used by the public administration to conclude its administrative contracts of a usual and simple nature, such as the supply of regular and repetitive needs or the contract for the administrative transport of equipment and tools. This method is based on financial and economic considerations. The administration uses this method to request services which require the involvement of third parties in order to meet its needs in a specific field[2].

It is also defined as "an administrative contract in which the natural or legal person, known as the contracting party, undertakes to provide supplies, services or carry out works for the benefit of the contracting entity, which is one of the state entities (ministry, governorate, municipality, public administrative institution)"[3].

Professor Abdul Raouf Jaber describes this method as one of the legally defined methods that prescribe a set of procedures by which the obligated party is obliged to choose the best conditions, most suitable prices and complete specifications among competitors for the purpose of binding contracts[4].

Similarly, Professor Hussein Osman Mohammed Osman defines the tendering method as a method by which the public authority undertakes to select the best party to contract with, whether from a financial or technical point of view[5].

Second: Forms of tendering

Article 39 of Law No. 23/12 specifies the forms of invitations to tender, which may be either national, restricted to national public entities subject to Algerian law, or international, open to all national and foreign entities, whether resident or not[6].

The text of Article 39 of Law No. 23/12 clearly identifies four types of tender:

1. Open tender:

Defined in Article 43 of Presidential Decree 15-247 as a procedure in which any eligible candidate may submit a bid[7].

This definition indicates that an open invitation to tender allows any qualified bidder to submit its bid, thus opening competition among bidders. There are no selective or exclusionary conditions, and those who meet the requirements of the announced tender may participate and submit their bids. In addition, the scope of an open invitation to tender may be extended to foreign parties if it is national or international, in accordance with Article 42 of Presidential Decree 15-247[8].

The contracting authorities use open tenders for projects or works that require precise and in-depth technical expertise[9].

2. Open tender with minimum requirements:

This is a procedure which allows all candidates who meet certain minimum conditions of eligibility, defined in advance by the contracting authority, to submit a bid. There is no pre-selection of candidates by the contracting authority. The qualifying conditions relate to the technical, financial and professional capacity to perform the contract and should be proportionate to the nature, complexity and importance of the project[10].

Article 43 of Law 23/12 states that: "The contracting authority shall verify the technical, professional and financial capabilities of the candidates and contractors before evaluating the technical offers[11].

One of the advantages of this form of tender is that it reduces the comparison work that the contracting authority must carry out in open tenders on a larger scale. However, in this form, offers received from eligible persons are accepted, while the rest of the offers that do not meet the requirements of an open tender with minimum requirements are excluded. It thus ensures the participation of those who have a certain level of competence, specialisation or qualification[12]."

3. Limited invitation to tender:

According to Article 45 of Presidential Decree 15-247, this is a selective consultation procedure in which only pre-selected candidates are invited to submit a commitment. The contracting authority may specify in the terms of reference the maximum number of candidates to be invited to submit a commitment after the initial selection, with a minimum of five candidates in the case of studies or complex and very important operations[13].

It is clear from the text of the article that the Public Procurement Regulatory Authority has given the administration a large degree of freedom by allowing it to contact and select operators freely. It also emphasises the need to respect the principles of public procurement and provides a legal framework for the procedure by indicating the use of a limited invitation to tender in a single stage based on detailed technical specifications drawn up by reference to standards or functional requirements. Alternatively, it may be carried out in two stages on the basis of a functional programme if the contracting authority is unable to determine the technical means of satisfying its needs.

The contracting authority may also consult qualified economic operators registered on an open list drawn up by the contracting authority on the basis of an initial selection for the execution of studies, complex engineering works, works of special importance or recurrent contracts.

In this case, the initial selection must be renewed every three years.

4. Competition:

Article 47 of Presidential Decree 15-247 states that this is a procedure in which artists compete in order to select a design or project that corresponds to a programme drawn up by the project owner for the implementation of a project with special technical, economic, aesthetic or artistic aspects, before awarding the contract to one of the competition winners. The winner of the competition who submits the best offer from an economic point of view is awarded the contract without negotiation[14].

The competition procedure is used by the contracting authorities in particular in the fields of regional development, town planning, architecture, engineering and information technology[15].

As stated in paragraph 4 of Article 47 of Presidential Decree 15-247, it is not obligatory to award the contract for supervising the execution of the project by competitive tender if:

-The amount does not exceed the limit set out in Article 13, paragraph 1 of Presidential Decree 15-247.

-The subject matter involves intervention in an existing building or infrastructure or does not involve design tasks[16].

Furthermore, paragraph 5 of article 47 confirms that an arbitration committee will be appointed to give its opinion on the selection of the plan or project[17].

From the text of Article 47, it can be seen that the competition is a procedure intended for natural persons rather than legal entities, as it focuses on the artistic aspect. This makes the article more restrictive in relation to the intended purpose of the procedure, which includes the possibility of awarding the contract by means of a call for proposals, which can be submitted by both natural and legal persons, as stated in Article 37 of Presidential Decree 15-247.

It is also clear that the legislator supports the competitive procedure with a legal basis, namely the arbitration committee, in order to protect the administration from accusations and doubts and to keep it away from any form of administrative corruption.

Section 2: Negotiated contracts

Since the call for tenders is the general rule for the selection of a contracting party by the administration, this general rule must have exceptions based on objective reasons that allow the administration to select the contracting party in specific circumstances without following the procedures of the call for tenders.

This exception is represented by the negotiation procedure under Presidential Decree 15/247 or the negotiation procedure under Law 23/12 as a method adopted by the administration to select the contracting party on the basis of specific cases.

Negotiation is considered to be a more flexible method because it gives the administration complete freedom in choosing the person with whom to

contract.For this reason, we have decided to divide this requirement into two subsections: in the first subsection, we will discuss the definition of negotiation, and in the second subsection, we will discuss the forms of negotiation and the cases in which it is used.

Firstly, the definition of negotiation is mentioned in Article 40 of Law 23/12 as follows:"The procedure for awarding a contract to a single economic operator without a formal call for competition". Negotiation may take the form of direct negotiation or negotiation after consultation. This consultation shall be organised by all appropriate written means..."[18].

The definition provided accurately and effectively highlights the different forms of negotiation. Negotiation is a process by which the contracting authority selects the contracting party and reaches agreement on prices and conditions with a view to concluding a contract[19].

On this basis, the negotiation process gives the administration the freedom to choose the party with whom to contract. However, this freedom is not absolute, as there are legal conditions that the administration must respect in order to ensure transparency, competition and the proper use of public funds[20].

Secondly, there are the forms of negotiation and the cases in which they are used. The negotiation procedure allows the contracting authority to deviate from the complex rules and procedures laid down in the tendering procedure. It holds discussions with those who are deemed capable of carrying out the desired work in accordance with the requirements of the public interest. In other words, the contracting authority directly selects the party with whom it will enter into a contract, in what is known as direct negotiation. However, in the case of complex or very important works, if the contracting authority considers that the tendering procedure is inappropriate and ineffective, it may, after consultation, resort to negotiation.

Negotiation therefore takes two forms: direct negotiation and negotiation after consultation. Both forms involve direct negotiations with known individuals or groups, and no particular formality is required for contacting competitors during either form of procedure. Contact may be made by any appropriate written means.

1- Direct negotiation and when to use it:

Direct negotiation is one of the forms of negotiation that allows the contracting authority to exclude the principle of competition and to select the contracting party directly after negotiating with it.

Law 23/12 and Presidential Decree 15-247 have removed the ambiguity surrounding this type of contract by clarifying its aspects.

They have made it an exceptional procedure, as stated in paragraph 2 of Article 40 of Law 23/12, which reads as follows "Direct negotiation is an exceptional

basis for concluding contracts and can only be adopted in the cases provided for in Article 41 of this Law."

It is clear from the wording of the article that the legislator has reaffirmed the exceptional nature of direct negotiation, despite the fact that the aforementioned Article 40 of Law 23/12 already considered negotiation as an exceptional basis for the award of public contracts. This repetition was not intended by the legislator, but rather to emphasise that direct negotiation, in its specific form, is an exception to the general exceptional nature of negotiation.This results in a limitation of the power of the contracting authority to use direct negotiation[21].

The legislator has specified that direct negotiation in exclusive cases is different from negotiation after consultation, as described in Article 41 of Law 23/12 These cases are the following:

*** Monopoly situation of the contracting party:** This refers to a situation where services can only be provided by a single contractor due to its monopolistic position. A monopoly is characterised by the existence of a single economic operator who dominates the market or a specific sector. It may involve the exclusive possession of certain goods without competition, the protection of exclusive rights or cultural and technical considerations[22].

***Justified urgency:** In this case, the contracting authority may conclude a contract by direct negotiation. However, the legislator imposes conditions for recourse to this case, including:

-The urgency must relate to an imminent danger to property or investments.

-The contracting authority must prove the necessity and urgency by providing sufficient justification. This is referred to as "justified urgency", especially since the legislator has not specified or regulated the cases of urgency.

-The danger should be manifested in the field or in emergency situations related to health crises, technological or natural disasters, where public procurement procedures, characterised by lengthy and complex formalities, are not compatible with the need to prevent such risks[23].

It should be noted that in cases of urgency, the contracting authority should not have foreseen the circumstances giving rise to the urgency or have engaged in delaying tactics[23]. The urgency which justifies the contracting authority in concluding a contract by direct negotiation ceases to exist when one of these conditions is no longer fulfilled[24].

***Urgent supplies to meet the basic needs of the population:** This case applies to a specific and precise field where the subject matter of the contract relates to ensuring the basic needs of the population.It occurs when the contracting authority has an urgent and immediate need to provide the population with a specific need or material.For example, in the event of an earthquake or floods affecting a certain area of the country, the administration in this situation ensures the supply of

certain consumer goods to the population.In this case, it is necessary to expedite the delivery of these goods to the population.If the administration is required to comply with regular procurement procedures, including publication and time limits, this may have a negative impact on the scope for meeting public needs. It is therefore appropriate to allow it to contract by a simplified agreement method[25].

***A case of national importance:**

Law 23/12 confirms this case and considers it a case of direct negotiation. There is no doubt that the special nature of this project will have a positive impact on the entire territory of the State, as described in article 41 of this law, which states that it is of national importance[26]. The use of this exceptional method of concluding contracts requires the prior authorisation of the Council of Ministers if the amount of the contract is equal to or exceeds ten billion Algerian dinars (10,000,000,000 DZD). If the amount of the contract is less than the aforementioned amount, it requires prior approval during a meeting of the Government, as indicated in paragraph 05 of Article 41 of Law 23/12.

***A case related to the promotion of production or the national production tool:**

The wisdom behind the inclusion of this case is to enable the competent administration to conclude the contract in a timely manner with the aim of promoting the national production tool. This case requires the prior approval of the Council of Ministers and its procedures are similar to the case of a project of national priority mentioned above. In both cases, the prior approval of the Council of Ministers or the Council of Government is required, depending on the amount of the contract[27].

***A case where there is a legislative or regulatory provision granting a public entity subject to commercial rules the exclusive right to perform a public service mission:**

We note that the legislator has granted public entities subject to commercial rules, which may take the form of a special administrative or scientific or technological entity, the exclusive role of providing public services in a specific field.It has empowered them to negotiate public contracts.This exclusive attribute recognised by the legislator for public entities subject to commercial rules does not imply monopolistic attributes, as established in paragraph 1 of Article 41 of Law 23/12.The latter indicates the existence of a single competitor monopolising a specific activity, while the exclusive attribute means that there are many institutions operating in a given field and the text recognises the granting of an exclusive right to one of them to carry out the public service mission.

2- Negotiation after consultation and cases of recourse to it: This method is another form of negotiation provided for in Article 40 of Law 23/12.Unlike the other methods of concluding contracts, the legislator has not provided a specific

definition for negotiation after consultation.However, it can be said that it is the procedure by which the contracting party concludes the contract after prior consultation on the market conditions and the status of the economic operators, using appropriate written methods. Technical, economic and social considerations relating to the implementation of public contracts often require recourse to negotiation after consultation, which requires prior consultation with the competent authorities."

In Article 42 of Law 23/12, the legislator has defined the exclusive cases of negotiation after consultation, which are as follows:

***Announcement of the infeasibility of the second call for tenders:**

This is the case when the administration publishes a call for tenders but does not receive any bids, or the bids received do not meet the requirements of the tender specifications, or it is not possible to guarantee the necessary financing. In this case, the administration declares the tender to be unfeasible and, on this basis, the contracting authority launches a second call for tenders in accordance with the same procedures. If the second invitation to tender is also declared infeasible, the contracting authority shall, after consultation, resort to negotiation[28].

***Contracts for studies, supplies and specific services:**

The specific nature of these contracts requires the use of negotiation after consultation by the contracting authority. However, the legislator did not specify the nature of these studies, supplies and specific services, nor did he clarify the purpose of exempting them from the tendering procedure. It should be noted that this case does not apply to works contracts, as the text only mentions studies, supplies and services. The term "specific" adds some ambiguity and could refer to government contracts that require secrecy in their conclusion and execution, relating to state secrets and national sovereignty. Examples include arms contracts and supplies for the Ministry of National Defence, which, because of their sensitive nature, are not subject to competitive tendering[29].

***Contracts for works directly related to sovereign public bodies of the State:**

Considering this case as a form of negotiation after consultation was intended by the legislator due to the confidentiality and precision required for operations related to national security and defence. This type of contract is characterised by a degree of secrecy that is incompatible with publicity through the tendering process.

***Contracts that have been terminated or are incompatible with the deadlines for a new call for tenders:**

In this case, the legislator allows contracting authorities to conclude public contracts by negotiation after consultation.This is due to the specific nature of the contracts awarded, which have been terminated or are incompatible with the deadlines for a new call for tenders. The contracting authority may give notice to

the contractor who has not fulfilled his contractual obligations within a specified period, and if the contractor does not remedy his default within the notice period or for any other reason justified by the public interest, the contracting authority may unilaterally terminate the public contract in whole or in part[30].

***Projects of a strategic and development nature:**

In this case, the scope of consultation is limited to the public authorities concerned.In the case of bilateral agreements involving the conversion of debt into projects, the contracting authority must limit the consultation to the institutions of the country providing the funds[31]. The wisdom of including this case among those in which negotiation is used is to emphasise and respect the State's external commitments of a strategic nature[32].

The second issue: Criteria and guarantees for selecting the contractor

The establishment of criteria for the selection of the contractor is an inherent competence of the contracting authority, which also seeks to establish guarantees that provide the best conditions for the selection of contractors in order to ensure proper execution. However, the contracting authority also has certain rights that may conflict with these criteria, which has led the legislator to surround the process of establishing criteria with a series of legal controls[33].

On this basis, we have decided to divide this topic into two requirements. In the first requisite, we will discuss the criteria and guarantees for the selection of the contracting party, while in the second requisite we will deal with the legal controls in the determination of the selection criteria.

First condition: Criteria for the selection of the contracting party

The Algerian legislator, through the provisions of Articles 52 and 53 of Law 23/12, recognises the authority of the administration and its right to select the contractor on the basis of the published criteria, which must be included in the tender documents. This selection must be based on an established evaluation system. The contracting authority must also select the best offer in terms of economic advantage, as follows[34]:

***The use of several criteria:**

The legislator recognises the use of several criteria to select the best offer among the proposals submitted.These criteria include:

-Quality.
-Execution or delivery times.
-Price or total cost of selection and use.
-Aesthetic and functional aspects.
-Efficiency in terms of the social aspect of promoting the professional integration of people disadvantaged in the labour market and people with disabilities, as well as efficiency in terms of sustainable development.
-Technical value.

-After-sales service and technical assistance.
-Financing conditions and reduction of the transferable share granted by foreign institutions.
Other criteria may be used as long as they are listed in the tender specifications[35].

***According to the price criterion, if the subject of the contract allows it[36]:**
By imposing these controls and criteria on the contracting authority, the legislator may have intended to prevent the contracting authority from being neutral with regard to the legal framework and from discriminating between competing tenderers or favouring one over the other.
Furthermore, the legislator obliges the competent administration to inform the competitors, through the specifications, of the selection criteria and the value of each criterion. The purpose of this is to inform each competitor of the evaluation criteria, since it is sufficient to study the tender specifications in order to know the standards according to which the public contractor or the selected tender will be chosen.
In this specific case, the legislator has defined the guidelines for the administration and provided a set of criteria that must be followed if they are explicitly mentioned in the tender specifications[37].
The legislator has not strictly declared these conditions and criteria to be exhaustive. On the contrary, Article 53, paragraph 2 of Law 23/12 allows the administration to include additional criteria that must be mentioned in the tender specifications.
It can be said that the first part of Article 53 of Law 23/12 complements Articles 43 and 44 of the same law, which deal with the qualification of candidates. In these articles, the legislator emphasises the need to award the financial contract to the most capable party, taking into account its technical, professional and financial capabilities[38].
To this end, the contracting authority evaluates the technical proposals and asks about the capabilities and references of the contractors. They use all the legal means available to other contracting authorities, as well as the departments and bodies in charge of public works, banks and Algerian representations abroad[39].
To this end, a national card for economic operators and sectoral cards are used and regularly updated in each contracting entity[40].
The content of these cards and the conditions for their updating are determined by a decision of the Minister of Finance.
It should be noted that, as a general rule, the contract is awarded to the bidder with the best offer and the lowest price among other offers. However, it is permissible to award the contract to the most suitable tender, even if it is not the lowest price, for reasons of public interest.These reasons must be supported by serious factors

relating to the nature of the work to be procured. The difference between the most suitable offer and the lowest price should not be significant and the committee's decision to select and nominate this offer must be justified[41].

It is worth noting that the legislator did not prescribe the observance of a specific ranking in the process of selecting the contracting party. However, in the first part of Chapter III of Law 23/12, under the heading "Promotion of national production and the national production tool", Article 62 states that preference should be given to products of Algerian origin or to institutions subject to Algerian law, the majority of whose capital is owned by Algerians resident in Algeria.In other words, Law 23/12 sought to establish the principle of equality between all operators, on the one hand, and to promote products of Algerian origin or institutions subject to Algerian law[42], on the other. It should be noted that the previous Presidential Decree 15/247 granted a 25% preference to products of Algerian origin, unlike the current law, which does not specify the percentage.The preference established by Law 23/12 is intended to encourage Algerian products and support national contractors, who have long complained about the quality of their dealings with the public administration and its preference for foreign contractors. Perhaps the allocation of a margin of preference for national contractors is a response to previous demands and an attempt by the public procurement regulator to encourage and stimulate the national public procurement market[43].

Second - Guarantees for the selection of the contractor

It should be noted that, when selecting contractors, the contracting authority must provide the necessary guarantees to ensure the best conditions for selecting contractors and/or the best conditions for performing the contract[44].

Section Two: Legal controls on the definition of selection criteria

The contracting authority has the power to choose the contractor freely, but the Algerian legislator limits this power with controls to protect the contractor on the one hand, and to prevent the administration from abusing its power on the other. On this basis, we have divided this requirement into two subsections. The first deals with the obligation to inform the contractor of the selection criteria and the second with the alignment of the selection criteria with the subject of the contract.

First - Obligation to inform the contractor of the selection criteria

The contracting authority's obligation to inform the contractor is laid down in the Public Procurement Code, which stipulates that the documents relating to the call for tenders must contain all the necessary information to enable the contracting parties to make acceptable commitments, in particular by specifying the economic, technical and financial conditions and, where applicable, the guarantees[45].

The obligation to inform the supplier of the criteria used by the contracting authority for the selection of the supplier is not merely a permission, but an obligation. Any failure or omission to mention these criteria entails the responsibility of the person in charge of the contract and directly affects the competition[46].

Therefore, the obligation to inform the contractor of the selection criteria is nothing more than a translation of the rules of free competition and leaves room for the rules of the market, since the contracting party is trying to meet the public demand, so it must have full knowledge of the criteria in order to submit an acceptable tender in accordance with the requirements of the demand itself. It is impossible for the contracting authority to submit a tender for a contract of which it is unaware. Therefore, informing the contractor of the selection criteria is a mandatory requirement which entails several principles, including[47]:

1-Non-modification of the selection criteria: The selection of the contractor on the basis of the criteria set out in the tender documents requires that these criteria remain unchanged after they have been communicated to the contractor. The contractor has the right to base his offer on stable criteria and not to be surprised by changes to these criteria, for whatever reason, because the process is twofold. The stability of the demand leads to the stability of the offer, because the emphasis is on obtaining it according to market rules, and this is what actually distinguishes public procurement contracts from other administrative contracts[48].

However, there is a certain temporal specificity and it is necessary to clarify the period during which the criteria may not be modified. If the contracting authorities are recognised for their role in drawing up the specifications and including appropriate selection criteria in line with what they intend to offer in the context of their contracts, this control ends after the invitation to tender has been published. Once the specifications have been made available to the bidders, the contracting authorities lose any right to modify the selection criteria[49].

2- Non-discrimination in information on the criteria

In order to promote genuine and effective competition and ensure equality between tenderers, contracting authorities must ensure that all parties to the contract have the same level of knowledge of the criteria. Therefore, the legislator prohibits any negotiation with candidates after the opening of tenders and during their evaluation for the purpose of selecting the contracting entity. Negotiating with some bidders over others would provide them with more detailed and accurate information than was available prior to the opening of tenders. This could lead to the modification or adjustment of bids based on information about criteria that would not have been clear without such negotiations.

Second - Alignment of selection criteria with the subject of the contract

The legislator requires that the technical evaluation system be adapted to the nature, complexity and importance of each project. This means that the selection criteria must be compatible with the subject of the contract, i.e. the criteria must be equal and proportionate to the service required. This principle applies to all procedures, including negotiated contracts. It is important not to confuse the award of a contract without formal competition with the abandonment of the idea of selecting the contractor on the basis of criteria which should be adapted to the subject of the contract[50].

The selection of a contractor whose organisation is subject to Algerian law can only be based on the criteria set by the contracting authority in the tender documents.

Therefore, the very definition of the criteria allows participation in the tender procedure and the submission of a bid that meets the requirements of the contract.It is therefore essential to ensure that the criteria are in line with the subject of the contract so that bidders can participate in the bidding process in accordance with their capabilities and resources.

Conclusion:

The public administration uses public contracts to meet its needs and supervises their execution. In this context, it is responsible for selecting the contractors with whom it concludes contracts, either by means of a general call for tenders or, exceptionally, by means of negotiation.

The contracting authority uses one of these methods, either a call for tenders or negotiation, to select the contractor on the basis of the authority granted to it by the public procurement authority. However, this authority is not granted without conditions, as the regulator has imposed controls to ensure the selection of the most suitable and capable contractor for the execution of the public contract, while at the same time guaranteeing the freedom of competition and preventing the administration from abusing the authority granted.

The legislator's recognition of the authority of the contracting authority to select the contractor according to its own discretion and specific conditions has led to conflicts with the non-selected candidates. In order to resolve these conflicts, the legislator has granted the selected contractors the right to challenge the decision to award the contract provisionally. This challenge can be made administratively before specialised procurement committees, known as administrative appeals, or judicially before the administrative judiciary, known as judicial appeals. The contractor involved in a dispute with the contracting authority must follow the prescribed legal procedures and ensure that the necessary legal conditions for the validity of its challenge are met.

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[1]- References include Law 23-12 of 6 August 2023, which regulates public procurement and the delegation of public bodies, published in the Official Journal No. 51.

[2]- They also mention books such as "Administrative Contracts" by Mohamed Sghir Belali, published by Dar Al-Alam for Publishing and Distribution in Algeria in 2005, page 26.

[3]- Naciren Tassriki, author of "Administrative Law: Administrative Organisation, Administrative Activity", published by Dar Belqis in Algeria in 2013-2014, page 169.

[4]- Abdul Raouf Jaber wrote "Guarantees of Public Construction Projects (Tender, Exceptions, Contract, Guarantees, Administrative Guarantees, Insurance)" published by Halabi Legal Publications in Lebanon in 2003, pages 49-50.

[5]- Hussein Osman Mohamed Osman wrote "Principles of Administrative Law" published by Halabi Legal Publications in Lebanon in 2010, page 601.

[6]- Project Management in the Framework of Public Procurement Management" by Al-Nawwai Kharshi, published by Dar Al-Khaldooniya for Publishing and Distribution in Algeria, 2011, page 176.

[7]- Article 43 of Presidential Decree 15-247.

[8]- Administrative law and administrative institutions, administrative organisation, administrative activity, comparative study" by Hussein Taheri, published by Dar Al-Khaldooniya for Publishing and Distribution in Algeria, 2012, page 119.

[9]- Legal System of Public Tenders, Comparative Study" by Mahmoud Khalaf Al-Jubouri, published by Dar Al-Thaqafah Library for Publishing and Distribution in Jordan, 1998, page 68.

[10]- Al-Nawwai Kharshi, same reference as above, page 177.

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[13]- Article 45 of Presidential Decree 15-247, cited above.

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[20]- Yaqouta Aliwat, "Applications of the General Theory of Administrative Contracts to Public Procurement in Algeria", Doctoral thesis, Faculty of Law, University of Constantine, 2009, page 131
[21]- Nadia Tiab, "Authority of the contracting entity in negotiated contracts", Critique Journal of Law and Political Sciences, Issue 1, Mouloud Mammeri University, Tizi Ouzou, 2011, page 302.
[22]- The passage explains article 3, paragraph 3, of Decree No. 03-03 of 19 July 2003 on competition, published in the Official Gazette No. 43 of 20 July 2003, as amended and supplemented by Law No. 08-12 of 25 June 2008, published in the Official Gazette No. 36 of 2 July 2008. It defines monopolistic practices as a situation in which an entity acquires an economic position in a specific market that hinders effective competition and enables it to take significant independent action against its competitors, customers or financiers.
[23]- It also refers to Article 41, paragraph 03 of Law 23/12.
[24]- Samia Sahnoun, "Negotiation procedures in public procurement law", Master's thesis, Faculty of Law, Business Law Department, University of Algiers 01, Algeria, page 70.
[25]- Amar Boudiaf, same reference as above, page 198.
[26]- Article 41 of Law 23/12.
[27]- Paragraph 06 of Article 49 of Law 23/12.
[28]- Paragraph 02 of Article 42 of Law 23/12.
[29]- Nadia Tiab, the same reference as above, page 313.
[30]- Article 90 of Law 23/12.
[31]- Refer to the provisions of Article 42, Paragraph 06 of Law 23/12.
[32]- Amar Boudiaf, the same reference as above, page 203.
[33]- Paragraph 2 of Article 43 of Law 23/12, and also the provisions of Article 53, Paragraph 1 of Law 23/12.
[34]- Saham Shakhtami, "Internal Control over Public Procurements in Algeria," Doctoral Thesis in Law, Faculty of Law and Political Science, Arabi Ben Mhidi University, Oum El Bouaghi, 2017, page 106.
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[44]- Paragraph 1 of Article 83 of Law 23/12.
[45]- Elbéhiri Mohamed Rifaat Ibrahim, "The Theory of Administrative Contracts and International Public Markets," doctoral thesis, University of Nice Sophia Antipolis, 2004, page 510.
[46]- Alain Laguerre: "Public Markets and Competition," doctoral thesis in law, University of Paris X, 1984, page 64.
[47]- Laurent Richer, "Do Procurement Procedures Align Supply and Demand?" Revue des Contrats Publics, No. 66, 2007, page 62.
[48]- Christophe Lajoy, "Public Procurement Law," Berti Edition, page 55.
[49]- Christophe Lajoy, op.cit, p 64
[50]- The Article 53, Paragraph 03 of Law 23/12 stipulates that: 'The technical proposal evaluation system must be compatible with the nature, complexity, and importance of each project'" emphasizes the requirement for the technical evaluation system to align with the specific characteristics of each project as per the mentioned law