

Legal Guarantees of Transparency Rules in Public Transactions Concluded According to the Consulting Method: An Analytical Reading of the Provisions of Law No. 23-12 and Presidential Decree No. 15-247

Mellal ABDELHAMMID

University Center of Maghnia

Mediterranean Laboratory for Legal Studies,
Faculty of Law and Political Science, Tlemcen
hamidmellalm@gmail.com

Abstract:

Public transactions concluded through the adapted (consulting) procedures are no less important than those carried out through formal procedures. In all cases, the public contract remains inherently tied to the concept of public funds. Thus, the Algerian legislator, through Law No. 23-12 dated August 5, 2023, which defines the general rules governing public procurement, and Presidential Decree No. 15-247 on the regulation of public contracts and public service delegations, has enshrined a set of guarantees to support procedural transparency – even when the contracting method is adapted.

The Public Procurement Law seeks to uphold transparency values for public interest considerations, while also ensuring the economic operator's right to equality and free access to tenders, regardless of the contracting method used.

Keywords: Public Contract, Adapted Procedure, Consultation, Transparency

Garanties juridiques des règles de transparence dans les transactions publiques conclues selon la méthode de consultation : Une lecture analytique des dispositions de la loi n° 23-12 et du décret présidentiel n° 15-247

Résumé

Les transactions publiques conclues par les procédures adaptées (de consultation) ne sont pas moins importantes que celles réalisées par les procédures formelles. Dans tous les cas, le contrat public reste intrinsèquement lié au concept de fonds publics. Ainsi, le législateur algérien, à travers la loi n° 23-12 du 5 août 2023, qui définit les règles générales régissant les marchés publics, et le décret présidentiel n° 15-247 sur la régulation des marchés publics et des délégations de services publics, a inscrit un ensemble de garanties visant à soutenir la transparence procédurale – même lorsque la méthode de passation est adaptée. La loi sur les marchés publics cherche à promouvoir les valeurs de transparence pour des considérations d'intérêt public, tout en garantissant le droit de l'opérateur économique à l'égalité et à un accès libre aux appels d'offres, quel que soit le mode de passation utilisé.

Mots-clés : Contrat public, procédure adaptée, consultation, transparence

Introduction

Public contracts are among the most important administrative activities due to their association with public funds. For this reason, the legislator has granted them a special legal framework distinct from other administrative contracts, binding the administration to a set of general principles aimed at avoiding waste and abuse of public resources.

Among the most important of these principles – stipulated in Article 5 of Law No. 23-12 dated August 5, 2023, which defines the general rules governing public contracts – is the principle of **transparency of procedures**, a key mechanism in the fight against corruption. This same principle is reiterated in Article 5 of Presidential Decree No. 15-247, which governs public contracts and public service delegations.

Transparency in public procurement is defined as a system that allows the economic operator, bidder, or even any interested party to ensure that the selection process of the contractor was conducted through clear and impartial means, free of any ambiguity.

The principle of transparency is the gateway to achieving other principles such as equality and free access to tenders, by ensuring clarity and eliminating vagueness in procedures.

When discussing the transparency of formal procedures, we find that the legislator has clearly defined the contracting stages, steps, and obligations, leaving no room for the contracting authority to deviate – except in limited cases. In contrast, **adapted procedures** grant some flexibility to the administration in their design and implementation.

This gives rise to the following central research question:

To what extent are the rules of transparency upheld in public contracts concluded through adapted procedures?

To answer this question, the analytical method is adopted by examining the legal texts that establish the legal guarantees and manifestations of the principle of transparency.

Based on this, the study is divided into two main sections:

- Transparency of Pre-Contractual Procedures in Adapted Public Contracts;
- Embodiment of Transparency Principles in the Conclusion of Public Contracts.

1. Transparency of Pre-Contractual Procedures in Adapted Public Contracts

Before any contractual process begins, and in an effort to ensure the effectiveness of tenders and the protection of public funds under the principle of transparency, the contracting authority is required to perform a set of preliminary, binding procedures – primarily **identifying needs and preparing the specifications document**.

1.1. Transparency Guarantees in the Needs Identification Phase

Identifying needs is the first step taken by the contracting authority when preparing the specifications. This preliminary procedure is legally based on Presidential Decree No. 15-247, specifically in Chapter 1, Section 2 of Title I, under the heading "Needs Identification." According to **Article 27**, it states:

“The needs of the contracting authorities to be fulfilled must be defined before initiating any procedure for concluding a public contract.”

Although this concept had already been addressed in previous legal texts – particularly **Executive Decree No. 98-227** dated July 13, 1998, concerning state capital expenditures – which required institutions to conduct a study before registering any public project financing request – this decree reaffirms and strengthens the practice.

Referring back to Article 27 of Presidential Decree 15-247, and by analyzing its clauses, it is evident that the legislator is keen to instill transparency values in the needs assessment process. According to **paragraph 2** of the article:

“The amount of the contracting authority’s needs shall be determined based on a sincere and rational administrative estimate, in accordance with the conditions defined in this article.”

Such a sincere and rational estimate plays a crucial role in determining the financial threshold of any public contract. If the estimated value exceeds the threshold defined in **Article 13** of the same decree, the formal procedures apply, including external oversight by public procurement committees. If the estimate does not exceed the threshold, then the contract is subject to **adapted procedures**.

Moreover, the needs must be prepared with precision in terms of their nature and scope. According to **paragraph 4** of Article 27:

“Needs must be prepared precisely in terms of their nature and scope, based on detailed technical specifications established on the basis of measurable and/or performance criteria or functional requirements. These specifications must not be oriented toward a particular product or economic operator.”

The more detailed, clear, and unambiguous the needs are, the more rational the offers submitted by bidders will be. This helps avoid exaggerated bids that could either disqualify bidders due to budget overruns or result in awarding contracts with unrealistic financial values that do not reflect the actual value of the services required.

On the other hand, this precision in preparing the needs helps avoid low pricing of certain items or total amounts by bidders due to their misjudgment of the services, caused by a lack of clarity and detail. This may result in either the public contract awardees waiving the execution of services or carrying them out slowly, incurring financial losses, and in some cases, the termination of the public contract, thus failing to achieve the primary objective, which is meeting public needs.

Accordingly, and in order to ensure the efficiency of the need's identification and preparation process, the contracting authorities must resort to external entities, such as certified consulting offices or experts in the field, depending on the nature and subject of each public contract.

1.2. Accurate and Clear Preparation of the Specifications Document to Achieve Procedural Transparency

After the contracting authority identifies its needs, the nature and subject of the public contract become clear – it may be a contract for execution of works, procurement of supplies, conducting studies, or provision of services. Consequently, the process of preparing the specifications document begins, outlining the terms under which the contract will be concluded and executed.

Specifications documents are known as the set of documents containing the terms of the administrative contract, usually prepared in advance by the administration. The contractor's role is limited to accepting them as they are, and any violation of these rules results in the nullification of the contract.

Professor Ammar Boudiaf defined the specifications document as:

"An official document prepared unilaterally by the administration concerned with the contract or project, through which it defines all the terms related to competition rules in all their aspects, the conditions for participation, and the methods for selecting the contractor."

Professor Jalila Mounia defined it as:

"A set of clauses related to the subject of the contract and its constituent documents, the requirements for candidates, the criteria used for selecting the contractor, and the scoring method for both the technical and financial offers."

Therefore, the specifications document can be defined as a collection of documents and clauses prepared by the contracting authority prior to launching the procedure, in which all the terms of conclusion and execution are defined with a high degree of clarity and precision.

The accuracy of the specifications document requires the definition of the services to be performed under the contract and all the conditions for its conclusion and execution. Therefore, the contracting authority must prepare it carefully to ensure procedural transparency.

Moreover, its prior preparation is in itself a guarantee of this transparency, as no changes can be made to its provisions once it has been approved and made public.

Among the most important clauses in the specifications document that ensure transparency and best guarantee the rights of economic operators are those related to pre-determined selection criteria. The clearer and more precise they are in the specifications document, the more transparent and fair the candidate selection process will be. For example, when the contracting authority includes material capabilities as a scoring criterion, it must specify their type and technical specifications—such as authorized load—and the supporting documents required in detail, like the mandatory vehicle guarantee certificate. It must also precisely define the supporting documents for the selection criteria that cannot be completed afterward, so that no discretionary authority is left to decide whether they can be supplemented or not, thereby eliminating any potential manipulation by the administration in selecting candidates.

In addition to selection criteria, the specifications document contains other provisions that reflect procedural transparency, including those related to the method of preparing offers, and the time, date, and method of submitting them. It also includes provisions regulating the roles and duties of the committee for opening envelopes and evaluating offers.

2. Embodying the Principles of Transparency through the Conclusion of Public Contracts

The principle of transparency is considered one of the most important general principles that the legislator was keen to establish throughout all the stages of the contracting process—from announcing the competition to the final awarding of the contract.

We will address this requirement through two key elements in this phase, reinforcing the transparency of procedures:

2.1. The Limitations of Announcements Under Adapted Procedures and the Extent to Which They Uphold Transparency Principles

The announcement is considered one of the most important manifestations of transparency in public procurement. It is a formal and essential procedure, part of public order, and cannot be violated. This ensures general competition among candidates to win the contract, without exclusion or arbitrariness on the part of the concerned contracting authority.

An announcement is the act of informing all interested parties of the intention to contract, as well as informing them about how to access the contract conditions, the type of specifications and services, and the location, time, and date for submitting and opening offers.

The announcement is the first procedure undertaken by the administration to inform economic operators of its intention to contract, and it is the most important step, as it presents a clear vision to potential candidates.

Due to the importance of this procedure, the legislator has regulated it with rules and provisions that every contracting authority must follow. By examining the articles of Presidential Decree 15-247, we find that the announcement is mandatory in both formal and adapted procedures, with a difference in the method and means of publication.

Unlike formal procedures where the legislator imposed press publicity through Articles 61 and 65 – and linked it to mandatory information according to Article 62 – in adapted procedures, the administration is not exempt from publicity.

This is confirmed by **Article 14**, which states in its first paragraph:

“The above-mentioned needs must be subject to appropriate publicity and consultation with qualified economic operators in writing, in order to select the best offer in terms of economic advantages.”

Although the procedures followed are adapted procedures, the legislator obligated the administration to publicize the announcement, and this in itself is a reinforcement of transparency. Even if it did not require press publicity and left it to the administration’s discretion to choose the method of publicizing the announcement, this does not mean it is not responsible for ensuring that requests reach economic operators. It is required to prove, before any external oversight, the appropriateness of the publicity, such as posting certificates issued by administrative bodies where the consultation was announced on their notice boards, or a certification from the supervising authority that sent the announcements to other administrative bodies for publicity.

In addition, to reinforce the transparency of the announcement procedure in adapted procedures, the legislator established another mechanism that every contracting authority must comply with, which is the **mandatory written consultation of qualified economic operators**.

In these consultation letters, the subject of the contract, the deadlines for preparing the offers, and the date and time of envelope opening may be specified, along with a copy of the announcement. These consultation letters are a guarantee for attracting the largest possible number of participants and ensuring the transparency of the announcement.

Perhaps the legislator's choice of this method of announcement was not to diminish the manifestations of transparency and integrity, but rather to protect public funds—since press announcements are costly and burdensome to contracting authorities—and to save time.

2.2. Manifestations of Transparency Through Offer Submission and Examination Mechanisms

After the announcement of the consultation and the preparation of offers by the candidates, envelopes are submitted on the last day for offer preparation and before the end of this stage's closing time.

Then comes the role of the envelope opening and offer evaluation committee, which performs its oversight role as part of the internal control of each contracting authority. This committee ensures, through its task of opening envelopes and evaluating offers, the enforcement of the fundamental principles of public contracts, including the principle of procedural transparency. Therefore, we will explore the main manifestations of transparency through the articles regulating this committee.

According to Article 70 of Presidential Decree 15-247, the process of opening envelopes related to the application file and the technical and financial offers takes place in a public session, at the same session and on the date and time previously specified in the specifications document and the consultation announcement.

This article is a real guarantee of procedural transparency. In the presence of bidders who submitted offers, the envelope opening process is carried out transparently and fairly, especially since this stage represents the initial qualification

phase for bidders. Those who do not meet the competition conditions will not have their technical and financial offers opened and will be excluded during the evaluation phase.

During the evaluation phase, the committee's study of the technical offers is conducted according to the methodology included in the specifications document and previously defined, as stipulated in Article 72 of the same decree.

The work of this committee is recorded in two separate registers for each of its tasks—envelope opening and offer evaluation—in accordance with the provisions of Article 162 of the aforementioned decree in its last paragraph, which states:

“The envelope opening and offer evaluation committee records its work related to the opening of envelopes and the evaluation of offers in two separate registers, numbered by the authorizing officer and initialed.”

This serves as a guarantee of the transparency of these committees' work before any external oversight.

Conclusion

Based on the above, the following conclusions were reached:

1. **Procedural transparency**, in addition to its important role in protecting public funds, plays a significant role in attracting economic operators, thus increasing the effectiveness of public procurement and leading to broader competition and better offers.
2. The **consultation method** reflects the general principles governing public contracts, such as transparency and procedural integrity, even if not to the same ex-

tent as in the request for proposals method, since the legislator, in some cases, left it to the discretionary power of the contracting authority, such as in the case of appropriate announcements.

3. The **preliminary and rational determination of needs** by the contracting authorities, and their accurate preparation according to detailed technical specifications, plays a major role in protecting public funds from manipulation by contracting authorities or even by economic operators.
4. The **specifications documents**, whether prepared according to formal procedures or adapted procedures, remain the most important legal tool for enforcing procedural transparency, as they include all clauses of the contract to be executed and all its conclusion and execution conditions.

Based on the findings, the study recommends the following:

1. To ensure the clarity of the provisions and clauses of the specifications document, each contracting authority must include a clause related to clarifications during the offer preparation phase. This allows any bidder who has withdrawn the specifications document to request clarification from the contracting authority regarding any ambiguity. The administration must respond in writing to them and to all other bidders who withdrew the specifications document, in the context of procedural transparency.
2. The **adapted specifications documents must be subjected to an actual review** by internal committees established within each contracting authority, com-

- posed of qualified employees and agents, with the need for regular updates.
3. **A review of the publicity method for adapted procedures** is necessary by adopting a unified approach among all contracting authorities, to be determined by the legislator, even if it does not follow the same provisions as announcements in formal procedures.
 4. **Enhancing the qualifications of the agents assigned to the envelope opening and offer evaluation committee**, as they are the actual tool for enforcing the fundamental principles of public contracts, including the principle of procedural transparency.
 5. **Obligating contracting authorities to conclude agreements with specialized entities**, certified consulting offices, and accredited experts to assign them the task of accurately identifying needs based on the subject of each contract.

Sources and References:

Ammar Boudiaf, *Explanation of Public Procurement Organization*, Part One, 5th Edition, Djisour Publishing and Distribution, Algeria, 2017.

Atik Habiba, *Formalism in the Administrative Contract – A Comparative Study*, Master's thesis in Advanced Public Law, Faculty of Law and Political Science, Abou Bekr Belkaid University, Tlemcen, Academic Year 2015–2016.

C- Legal Texts:

Jalila Mounia, *The New Organization of Public Procurement According to Presidential Decree No. 15-247*, Mofam Publishing, Algeria, 2018.

Law No. 23-12, dated August 5, 2023, defining the general rules related to public procurement, Official Gazette, Issue 51, Year 2023.

Presidential Decree No. 15-247, dated September 16, 2015, concerning the organization of public procurement and public service delegations, Official Gazette, Issue 50, Year 2015.