... ZAOULI N°10, Vol. 8, Août 2025, pp. 3-41 ISSN : 2788-9343

Soumission : **13/03/2025** **Acceptation : 09/07/2025** **Publication** : **25/08/2025**

The Clauses of Public Procurement Contracts Between Private Justice and Contractual Justice: An Analytical Approach in Light of Algerian Legislation

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Abstract:
Public procurement is considered an essential tool for managing public services and ensuring their continuity. However, its unique nature allows it to go beyond the classic framework of civil contracts. It combines the logic of private justice, based on equality and mutual consent between parties, with the logic of contractual justice, which seeks to restore contractual balance whenever it is disrupted by privileges granted to the administration or exceptional, urgent circumstances. This article aims to analyze the legal framework for public procurement in Algeria by examining the extent to which regulatory texts achieve a balance between these two dimensions. The study concludes that the Algerian legislature has attempted to reconcile the requirements of protecting the public interest and guaranteeing the rights of economic operators. However, some practical shortcomings remain, particularly with regard to dispute resolution mechanisms and ensuring transparency. The article proposes a set of recommendations, most notably: activating digitalization in contracting, enhancing the culture of legal education among stakeholders, and developing alternative dispute resolution mechanisms to achieve more equitable and effective justice

Key words: *Public Procurement; Private Justice; Contractual Justice; Public Interest; Contractual Balance.*

Résumé :
Les marchés publics sont considérés comme un outil essentiel pour gérer les services publics et assurer leur continuité. Cependant, leur nature unique leur permet de dépasser le cadre classique des contrats civils. Ils combinent la logique de la justice privée, fondée sur l'égalité et le consentement mutuel entre les parties, avec la logique de la justice contractuelle, qui vise à rétablir l'équilibre contractuel lorsqu'il est perturbé par des privilèges accordés à l'administration ou par des circonstances exceptionnelles et urgentes. Cet article vise à analyser le cadre juridique des marchés publics en Algérie en examinant dans quelle mesure les textes réglementaires parviennent à établir un équilibre entre ces deux dimensions. L'étude conclut que le législateur algérien a tenté de concilier les exigences de protection de l'intérêt public et de garantie des droits des opérateurs économiques. Toutefois, certaines lacunes pratiques subsistent, notamment en ce qui concerne les mécanismes de règlement des litiges et la garantie de la transparence. L'article propose une série de recommandations, notamment : activer la numérisation dans la passation des marchés, renforcer la culture de l'éducation juridique parmi les parties prenantes et développer des mécanismes alternatifs de règlement des litiges afin de parvenir à une justice plus équitable et plus efficace.

Mots clés : *Marchés publics ; Justice privée ; Justice contractuelle ; Intérêt public ; Équilibre contractuel.*

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Introduction:

Public contracts are among the most prominent legal and regulatory tools used by the state and public institutions to meet their needs for works, supplies, services, and studies. They constitute one of the fundamental pillars for ensuring the smooth running of public facilities and achieving economic and social development. Because they are contracts of a special nature, they are not concluded according to the traditional rules governing purely civil contracts. Rather, they are subject to a combination of legal rules that combine the requirements of public law with the requirements of private law, ensuring the public interest without harming the rights of contracting parties.

Hence, a jurisprudential debate has emerged regarding the justice that must be applied in these contracts. Some argue that they should be subject to "special justice," which embodies the principles of formal equality and the sovereignty of the will, as is the case in civil law. Others assert that their administrative nature requires the application of "contractual justice," which aims to restore contractual balance whenever it is disrupted due to the exceptional privileges enjoyed by the administration or unforeseen emergency circumstances. Public contracts, although formally contracts, transcend the mere convergence of two wills, becoming a tool for serving the public interest. This requires special adaptation of their provisions to align with this dual role.

This dilemma raises several fundamental questions, including: How can we reconcile the principles of private justice, which enshrine formal equality between parties, with

the principles of contractual justice, which are based on achieving balance and protecting the contracting party from power imbalances? Is it sufficient to rely solely on the traditional mechanisms provided by civil law to ensure the fairness of public contracts, or is there a need to develop special mechanisms that take into account the nature of these contracts and their objectives related to the public interest?

Examining these issues requires a return to the philosophical and legal roots of the concept of justice, on the one hand, and an analysis of the specificity of public contracts in Algerian law in light of legislation and judicial precedent, on the other. This aims to highlight the adequacy of current legal mechanisms in achieving contractual balance and guaranteeing the rights of the various contracting parties.

Section One: Public Contracts: Terms and Conditions Between Private and Contractual Justice

Public contracts are administrative contracts that seek to achieve the public interest. However, they are affected by provisions that balance private justice, which protects the rights of the parties, and contractual justice, which ensures fairness within the contractual relationship.

Section One: Distinguishing Between Private and Contractual Justice in Administrative Contracts

Although justice is a philosophical concept, it is closely linked to law. The law seeks to achieve justice through legal rules that regulate relationships between individuals in all areas of life. On the one hand, it is linked to the law, and on

Soumission : 13/03/2025 **Acceptation** : 09/07/2025 **Publication** : 25/08/2025

the other, it is considered a human moral value that individuals strive for.

Section One: Definition of Contractual Justice

Since the creation of man on earth, God has provided him with the bounties and resources of nature for his benefit. With the evolution of society from the individual to the group, the idea of fair distribution emerged. This has led to the outbreak of wars and conflicts over wealth and land. Justice has been and continues to be a demand of the people. However, everyone desires justice, but few implement it.

Justice has several meanings: It is an ethical principle in social life based on recognizing and respecting the rights of others. This right may be natural, in which case it is called fairness, or it may be established, in which case it is called law. It is the ability to take action aimed at enforcing recognition and respect for individual rights. (In Arabic, justice means "justice," meaning what is right in the soul, and is the opposite of generosity. Justice is the name of the Creator. The origin of the word "justice" in French comes from the Latin word "justicia," which comes from "juris," meaning right, and means permission in the religious sphere.) The most important philosopher who analyzed and theorized the concept of justice was the Greek philosopher Aristotle, in his famous book, "Nicomachean Ethics," where he distinguished between distributive justice and corrective justice. The former manifests itself in the distribution of honor, property, and anything else in which shares are distributed among individuals belonging to a particular community, because in such cases, people may receive equal or unequal shares compared to others. Where shares are

distributed among individuals on the basis of proportionality and entitlement between individuals and between things, he adds that injustice occurs when the principle of proportionality is not respected[1]

As for the second type, justice applies to transactions of a private nature, or as he called them, voluntary transactions in which all parties participate voluntarily, such as selling, borrowing, and leasing. This description is closer to justice in the field of contracting today, such that ancient justice is no different from the concept of justice today. The difference, however, lies in the lived circumstances. Transactions in the past, despite their simplicity, required justice, just as transactions today, with their complexity, require justice.

Most modern legislation has adopted the principle of justice as a general basis for its laws, making it the essential goal it seeks to achieve, especially in the field of contracts. However, this approach is counterbalanced by a dedication to the principle of freedom and the authority of the will, whereby individuals establish their own laws. However, absolute freedom, if left unchecked, may degenerate into tyranny and exploitation, which raises the question: What justice can we achieve in this case? For "when everyone has the right to do as they please, no one has the right to do as they please. Where there is no master, everyone is a master, and where everyone is a master, everyone becomes a slave." Thus, Freedom in the field of transactions was embodied through the principle of the sovereignty of the will, which was widely welcomed upon its emergence. However, its unchecked launch led to the emergence of what is known as the "contract crisis," necessitating the imposition of limits and guarantees to ensure balance and fairness. The principle

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of the sovereignty of the will resulted in several rules, including the rule that the contract is the law of the contracting parties, which makes the contract the law for its contracting parties and the judge. The will creates its own law, which it applies to the letter and the end[2] .

Justice has a broad concept, carrying multiple meanings, being given several names, taking on several forms, and performing several roles, according to the visions of the schools that adopted it with the development of human thought and the changing political, social, and economic circumstances. Therefore, the issue of defining and specifying its concept was left to the opinions of jurists. Justice in general, or according to its philosophical concept, as the philosopher Plato states, is "that each person receives what is equal to his crown and performs the work that is appropriate to his nature and ability to give justice, and provides what is equal to what he receives for this effort"[3] .

Or as jurist Ulpianus states: "It is a permanent, perpetual will to give everyone their due"[4]. Jurist Jacques Gastan defined it as "protecting the contractual balance between its parties, with each contracting party obtaining the intended material benefit, commensurate with the performance they have provided to the other party, and in accordance with the principle of good faith"[5] .

One jurist said, "Justice is the pole star of every legal formation." An Arab commentator described it as a moral sense present in the social conscience whose function is to harmonize the legal rule with a specific relationship with the aim of regulating that relationship. It has also been described as the justice that requires that a contract is not valid unless it is free of a clear imbalance between reciprocal

rights and obligations"[6]. Others have defined it as "each party to the contract obtaining..." "On the intended benefit thereof, in proportion to what the other party obtains." It can be said that the concept of justice, as expressed by Dr. Hamdi Abdel Rahman, "is always at the top of the legal pyramid"[7] .

It is clear from this that contractual justice is the basis of obligation, meaning that it has become, along with the will, the binding force of the contract. Justice is the foundation of the theory of obligation, and this foundation permeates the life of the contract to correct the doctrine of will. If the will plays a role in creating and modifying the contract and terminating the contractual bond, then this will is not sovereign, and the law does not tolerate its use in ways that contradict justice and harm the interests of society. Justice is above the will. Freedom is not granted to individuals except in accordance with the achievement of justice. The will is the instrument of serving justice within the scope of the contract. Thus, with the presence of contractual justice, the contract becomes a harmonious and non-conflicting arrangement of goals and interests[8].

- Pillars of Contractual Justice:

1- The intended benefit of the contract:

The difference in the concept of benefit among the contracting parties led to the emergence of two concepts of benefit. The first is individual benefit, which is the amount of benefit a person derives from their contract, regardless of the impact of their actions on others. The second is public benefit, which is the amount of benefit achieved by achieving happiness for the largest number of people, by increasing the happiness of the group whose interest is in

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question. Individual benefit is imbalanced when the contracting party does not obtain, through the implementation of the contract, a benefit commensurate with the performance they are required to perform. As for public benefit, the exchange between contractual values must be socially beneficial and consistent with the public interest, which is protected by public order[9]

Contractual benefit refers to the benefit that the contracting party obtains from the obligation, which must be legitimate. It may take one of two forms: the first is material, which is the economic benefit that the person obtains as a result of concluding this contract, or a moral benefit determined by the nature of the obligation. As for the proportionality between the obligations of the contracting parties, it does not mean complete matching, but only the equivalence between what the person provides and what he obtains. Proportionality is objective and not personal, meaning that the content of the contract takes into account the general provisions of the obligation[10]. To achieve reciprocal justice, the intended benefit of the contract must be achieved. A contract is not binding on its two parties unless it is beneficial or if it does not respect contractual justice. The contract's primary function, as the primary instrument for the exchange of funds and services, requires that each party receive an equivalent of what the other party received, based on a close connection between obligations, each of which serves as a cause for the other. Neither party may fulfill their obligation without the other party fulfilling theirs, otherwise, this would constitute a violation of the contract's content. Justice requires the permanence of the cause of the obligation during the implementation phase. If

the contract is flawed during this phase, amending it is more appropriate than nullifying it. The amendment achieves the principle of stable transactions[11].

The contract must be capable of fulfilling its intended purpose, such that its objective is consistent with its benefit, achieving the desired interest from its conclusion. Jurisprudence distinguishes between the concepts of benefit and utilization. Benefit is understood as the ability of a thing to satisfy a specific need, while utilization represents the means or actions that enable that benefit to be actually and realistically obtained. Thus, benefit in itself is of no use unless it is translated into utilization. The contract, in essence, has the ability to satisfy the needs of the contracting parties. However, this satisfaction is only achieved through utilization, which is a process external to the benefit itself[12].

2- Proportionality between performances:

Defining the principle of proportionality is not difficult. A contract is proportional whenever the contracting party receives consideration equivalent to what it has granted in the contractual terms. This leads to a dual meaning according to legal terminology. On the one hand, it expresses an existing mathematical (arithmetical) relationship, while on the other hand, it expands to measure the principle of suitability or moderation.

Perhaps the interest of comparative jurisprudence, particularly French law, in the principle of proportionality finds significant consecration in various writings, which have helped to present it as a tool for restoring contractual balance in an unbalanced situation, almost as a metaphor for the task assigned to the principle of equity, which makes it a

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tool for the judge to monitor the balance of interests of the contracting parties[13].

Proportionality expresses consistency and harmony, and in a contract, proportionality between the clauses is required to achieve contractual balance. Each clause must be necessary and not overly specific. Therefore, the purpose of including the clause must be studied. For example, a clause for rescission of a contract aims to punish non-performance attributed to the debtor. If its inclusion is necessary, it should not be overly specific. If there is a minor non-performance of a contract, offset by a minor non-performance of the contract, and a desire on the part of the creditor to rescind the contract, this clause should not be applied based on the necessity of implementing the contract in accordance with its provisions. A method consistent with good faith, for example, the application of the dissolving condition may cause great harm to the debtor and become a source of contractual imbalance, as the dissolving condition is not proportionate to the simple non-performance[14].

Section Two: Definition of Special Justice

Special justice in administrative contracts refers to the justice derived from private law, particularly civil law, where the idea of formal equality prevails between the parties. The contract is based on the principle of the sovereignty of the will, which grants freedom to contract and define obligations. Thus, it reflects a theoretical conception that makes the contract a tool for satisfying individual interests without regard to public utility considerations or administrative privileges. However, this justice is insufficient to explain the nature of public

contracts, given the lack of a real balance between the administration and its contractor[15].

Although special justice is based on the principle of formal equality, administrative contracts reveal that the administration is not on an equal footing with the contractor. It enjoys exceptional privileges, such as the power to amend and impose unilateral penalties. This renders special justice incapable of ensuring contractual balance. Therefore, administrative jurisprudence emphasizes that contracts that include exceptional conditions or relate to the management of a public utility cannot be subject only to special justice, but must be subject to other principles that guarantee the protection of the contractor[16].

Since the 1912 ruling of the Société des granits porphyroïdes des Vosges, French administrative law has demonstrated that mere compliance with the rules of private law is not sufficient to confer administrative status on a contract. Rather, it must include exceptional conditions or be linked to a public utility. Here, the distinction between private justice, which is limited to formal equality in civil contracts, and contractual justice, which aims to restore contractual balance in the face of imbalanced positions between the parties[17], becomes apparent.

Section Three: The Fundamental Differences Between the Two Concepts and Their Impact on Administrative Contracts and Public Procurement

Private justice is a reflection of the idea of formal equality between the parties, whereby the contract is subject to the principle of the sovereignty of the will, similar to that applied in civil contracts. Contractual justice, on the other hand, goes beyond this concept to take into account the

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specificity of administrative contracts concluded by the administration as a public authority with exceptional privileges related to the management of a public utility. Private justice is based on formal equality, meaning that all parties to a contract are equal in rights and obligations. Contractual justice, on the other hand, is based on contractual balance, whereby the administrative judge seeks to restore balance whenever it is disrupted by the administration's exercise of its prerogatives, such as the power to amend or emergency circumstances that impose unexpected burdens on the contracting party.

Private justice seeks to protect the individual interests of the contracting parties, considering the contract a means of achieving personal gain. Contractual justice, on the other hand, strikes a balance between protecting the rights of the individual contracting party and ensuring the public interest associated with the smooth and steady functioning of the public service. Hence, contractual justice has a dual dimension: individual and collective, unlike private justice, which remains individual in nature[18].

Private justice relies on traditional mechanisms for contract enforcement, such as specific performance or compensation, mechanisms derived from civil law. Contractual justice is based on specific mechanisms developed by administrative judiciary, such as the theory of the prince's act, the theory of emergency circumstances, and the concept of financial balance in the contract. These mechanisms all aim to restore contractual balance and protect the contracting party from unexpected burdens[19]

It can be said that private justice reflects an initial stage in understanding administrative contracts and public

procurement, but it is insufficient to ensure true balance. Contractual justice, on the other hand, is a modern development that seeks to achieve realistic justice that takes into account the specificity and privileges of the administration, on the one hand, and the protection of the contracting party, on the other. This distinction reflects the dual nature of public procurement: they are contracts in form, but in essence, they are a tool for managing the public service[20]

Second Requirement: Adapting the Terms of Public Procurement in Algerian Legislation

Public procurement is one of the most important legal means relied upon by the administration, as a public authority, utilizing the privileges granted to it by law in this capacity. It resorts to this tool when administrative decisions fail to fulfill some of their objectives in satisfying public needs. It thus occupies a significant part of the state's work.

Section One: Definition of public procurement in Algerian law and its characteristics.

According to Article 2 of Law 23-12, public procurement is "a written contract concluded, in exchange for consideration, by the public purchaser (the contracting authority) with one or more economic operators (the contracting operators) to meet the needs of the contracting authority in the field of works, supplies, services, and studies, in accordance with the conditions stipulated in this law and in applicable legislation and regulations"[21].

Article 2 of Presidential Decree No. 15-247 regulating public contracts and public service concessions defines a public contract as "written contracts concluded by economic

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operators in exchange for a financial consideration to carry out public requests to meet the needs of the contracting authority. Public requests include the completion of works, the supply of materials and supplies, the provision of services, or the preparation of studies.

The Algerian legislator has established the written nature of contracts, which represents the formal standard for defining public contracts, as evidence of the importance of formal elements in the substance of public contracts"[22].

Administrative jurisprudence has shown that the theory of the administrative contract is a judicial theory, the principles and provisions of which were established by the French administrative judiciary, represented by the Council of State, through its interpretations of the cases and disputes presented to it[23] .

Jurisprudential definitions of public contracts have been provided, including what was adopted by the French jurist André Deleu Badier, which is "the agreement of two administrations to create an obligation, and not every agreement is considered a contract." He denies the contractual nature of individual actions with a contractual appearance carried out by the administration[24].

He also defined it as: "Contracts by virtue of which the contractor undertakes to perform work for the benefit of the public administration in exchange for a specified price." Another definition states that the public contract is "a written contract between one or more parties in which the parties undertake to implement what was agreed upon." Jurisprudence has also defined it as "a contract concluded by a person of public law with the intention of managing a public facility or on the occasion of its management, and in

which his intention to adopt the method of public law is evident by including a condition or Unusual conditions in private law contracts"[25]

From the previous definitions of public contracts, a set of characteristics can be deduced that distinguish it from other legal contracts, namely:

1- A public contract is a written contract: The requirement of writing in a public contract is considered an essential condition for its conclusion. The exception is in the case of urgent necessity, based on an imminent danger threatening a property or investment, or the existence of a danger threatening the property or investment of the contracting authority or public security, and the contract cannot be adapted to the deadlines for concluding public contracts, provided that the contracting authority did not anticipate the circumstances causing the state of urgency and that it is not the result of procrastination maneuvers on its part. The official of the public body, the minister, the governor, or the president of the relevant municipal council may authorize, by a reasoned decision, the commencement of the implementation of services before concluding the contract, provided that the services are as necessary to address the preceding circumstances[26]

However, the contract must be concluded within six months from the date of signing the decision if the transaction exceeds the financial thresholds set for public contracts stipulated in Article 13 of Presidential Decree 15-247 and submitted to the body responsible for external oversight of public contracts.

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2- The scope of the public contract is specific:

To be considered a public contract, the service provided by the contracting operator must be one of the operations specified in Article 29 of Presidential Decree 15-247, namely, the completion of works, the acquisition of supplies, the provision of services, and the completion of studies.

3- The financial threshold of the contract:

The contracting authority must follow the conclusion methods stipulated in the Public Procurement Law and its procedures if the value of the contract to be concluded exceeds, according to the estimated amount of administrative needs, 12,000,000 DZD for works and supplies contracts and 6,000,000 DZD for studies and services contracts[27]

In this case, the contracting authority is obligated to follow the conclusion procedures stipulated in the Public Procurement Law if its estimated amount exceeds the value specified above, while if the value of the transaction is equal to or exceeds the value of the amount specified above, it does not require following the formal procedures stipulated in the Public Procurement Law. Therefore, the contracting authority has internal procedures that it determines for concluding requests. If it chooses one of the procedures stipulated in the Procurement Law, it must continue with this procedure to conclude requests.

4- Respecting the terms and conditions related to the public contract:

One of the most important characteristics of a public contract is that it is subject to predetermined procedures,

which both parties are required to respect, adhere to, and comply with throughout the process of concluding and executing it. In the event of a violation, the contract is deemed illegal and will not receive the approval of the Procurement Committee within the framework of external oversight of contracts, which the contract is subject to after its conclusion and the selection of the contracting party to begin implementation[28].

Section Two: Classifying Public Contracts as Administrative Contracts Subject to the Requirements of the Public Interest

The concept of a public contract has been linked to administrative contracts for a period of time, to the point that it is considered one of the most well-known applications of administrative contracts. However, the regulation of public contracts does not indicate at all that the public contract is an administrative contract.

An administrative contract is considered a public contract based on its form and subject matter, as the spontaneous criterion alone is not sufficient to give it an administrative character and, consequently, subject it to the Public Contract Law.

First: The form of a public transaction

The form of a public transaction means that it must be written, and that the administrative body must reveal its desire to use the common law method when concluding its contract, or what is known as including exceptional, unusual conditions in the contract.

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1- The requirement of writing:

Referring to the definition of public contracts contained in Article 1 of Order 70-90, Article 4 of Decree 82-145, Article 3 of Executive Decree 91-434, as well as Article 3 of Presidential Decree 02-250, Article 4 of Presidential Decree 10-236, as amended by Presidential Decree 12-23, and finally Article 2 of Presidential Decree 15-247 regulating public contracts and public service concessions, we find that these texts are based on a single principle: public contracts are written contracts, i.e., formal contracts, where they are drawn up in writing based on, or through, specifications established in advance by the competent administrative body in accordance with the requirements of administrative work. Contracts concluded by the administration are governed by the principle of formality, as they are expressed in written form[29].

Perhaps the secret behind the requirement of writing and its emphasis in various public procurement laws in Algeria is due to the following:

• Public procurement is a tool for implementing national and local development plans and various investment programs. Therefore, from this perspective, it is imperative that it be in writing.

• Public procurement is financially burdened by the public treasury. The huge sums spent on public procurement for a central or local agency, a service, or an independent body are borne by it[30]. Therefore, it is imperative that public procurement be in writing[31].

• **A written contract is dated.**

• The contents of administrative contracts cannot be denied except through forgery.

• Furthermore, the requirement to be in writing distinguishes public procurement from some civil contracts.

A public contract consists of the contract itself, which sets out the agreement between the administration and its contractor, and the terms of reference that define the contract's elements, including the basis of the contract's subject matter, the contract's duration, and the rights and obligations of both the administration and its contractor[32] .

2- The Unusual Condition in a Public Contract:

One aspect of the contract adds the criterion of an unusual condition to the public contract, considering it an administrative contract whose disputes are settled by the administrative judge. This condition is embodied in the transfer by the administration of a set of powers and privileges that are unparalleled in the realm of private law, at the expense of the contracting party. This condition is based on the premise that an exceptional condition grants the contracting parties rights or imposes obligations that are inherently alien to those that would be accepted from a contract within the scope of civil or commercial rules[33]

- The contracting authority's power to monitor and supervise:

In reality, there is nothing in the public procurement regulations that establishes the contracting authority's power to monitor and supervise. However, the administration has full authority to direct and supervise the implementation of the contract in the absence of an explicit

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clause in the contract stipulating this. The general rule is that the administration's power to monitor and supervise is a matter of public order and cannot be violated, nor can the administration waive it. This is because it constitutes the most important aspect of the exceptional, unusual condition that distinguishes administrative contracts from civil contracts[34] .

This oversight takes place either through physical actions, such as the administration's examination of certain documents, investigations, or receiving and adjudicating beneficiary complaints, or through legal actions, such as the administration issuing orders obligating the contractor to implement the contract, while reserving the right to appeal. This type of oversight is evident in public works contracts[35].

- The contracting authority's authority to amend the contract:

The administration has the authority to unilaterally amend the terms of the contract. This distinguishes an administrative contract from a civil contract, which can only be amended by agreement of the contracting parties.

The Public Procurement Law has recognized this authority for the contracting authority through the "Annex," pursuant to Articles 135 and 136 thereof, within the framework of its provisions. This annex constitutes a contractual document attached to the contract and is concluded in all cases if its objective is to increase or decrease services or amend one or more contractual clauses in the contract. The services subject to the annex may cover new operations that fall within the overall subject of the contract.

Second: The Subject Matter in the Public Procurement Contract

The subject of a public contract is intended to relate to the management and operation of a public facility. The latter can be defined from two perspectives: the first relates to the organic criterion, which considers any entity that performs a service or satisfies a public need to be a public facility. The second is its material meaning, which refers to any activity undertaken by a public person intended to satisfy a public need[36]

1- Works Contract:

This refers to a facility or construction or civil engineering works undertaken by a contractor, while respecting the needs determined by the contracting authority that owns the project. A facility is considered a set of construction or civil engineering works that fulfill an economic or technical function.

If a public contract stipulates the provision of services and the primary subject of the contract relates to the completion of works, the contract is a works contract. This contract is considered the most important contract in terms of financial allocations. It concerns real estate, whether by nature or by nature, and movable property, even if owned by the administration. Its purpose is to achieve the public benefit.

2- Services Contract:

A public supplies contract aims to acquire, lease, or sell on hire purchase, with or without an option to purchase, equipment or materials, regardless of their form, intended to meet the needs related to its activity from a supplier. If the

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lease is accompanied by the provision of a service, the public contract is a services contract.

A service contract is based on a voluntary contribution to a public benefit project. An individual, such as an owner, may approach the administration offering to contribute to the costs of constructing a road leading to his property, or a public legal entity, such as a chamber of commerce, may offer to contribute to the costs of constructing a railway station, etc.

3- Supplies Contract:

If the work to install and maintain supplies is included in the public contract and the amounts do not exceed the value of these supplies, the public contract is considered a supplies contract[37]

If the subject of the public contract is services and supplies, and the value of the supplies exceeds the value of the services, the public contract is considered a supplies contract.

4- Studies Contract:

The public studies contract aims to provide intellectual services. When concluding a public contract, the public studies contract includes, in particular, technical or geotechnical monitoring tasks, supervision of work completion, and assistance to the project owner[38]

Although public contracts are designed as administrative contracts subject to public interest requirements, jurisprudence and the judiciary have permitted the inclusion of clauses of a "civil" or "private" nature, with the aim of

protecting the contractor and ensuring a minimum level of private justice.

These clauses include:

- **Emergency circumstances clause**: This guarantees the contractor partial compensation in the event of exceptional events that upset the economics of the contract.
- **Force majeure clause**: This exempts the contractor from liability in the event of unforeseen events that make implementation impossible.
- **Flexibility clauses**: These allow for the modification of deadlines or terms according to the economic or social circumstances of the contractor[39]

The inclusion of such clauses does not deprive the contract of its administrative character; rather, it serves as a tool to mitigate the privileges granted to the administration and achieve a minimum level of contractual balance. They allow the contractor to not merely be an implementer subject to the will of the administration, but rather a party whose particular circumstances and conditions are taken into account. This trend reflects the desire of jurisprudence and administrative judiciary to reconcile the requirements of the public interest and private justice, thus enhancing the stability of contractual transactions and encouraging private parties to enter into public transactions[40] .

Section Two: Challenges of Achieving Private Justice in Public Procurement

Public procurement raises complex issues related to how to reconcile the logic of public law, which governs the administration's activities and imposes specific obligations on it to ensure the protection of the public interest, with the

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logic of private justice, which requires respecting the contractual balance between the parties and protecting the rights of contracting parties. This overlap makes it difficult to establish balanced private justice given the nature of public procurement, which is characterized by strict procedural and regulatory rules, while economic parties desire flexibility and independence.

First Requirement: The Difficulty of Balancing the Requirements of the Public Interest and the Tendency toward Contractual Independence

Public procurement raises a central issue: how to reconcile considerations of the public interest, which the administration seeks to protect by imposing strict rules, with the requirements of private justice, which require granting contracting parties flexibility and independence in formulating their obligations. This tension reflects the dual nature of public procurement: on the one hand, they are administrative contracts bound by the principles of public law, and on the other, consensual contracts subject to the rules of private law.

Section One: Requirements for Protecting the Public Interest and Public Funds

Protecting the public interest and public funds is the cornerstone of everything related to public procurement. This is because the administration does not dispose of its own funds, but rather the funds of the state, the local community, or a public institution. These funds are originally allocated to meet the needs of society. For this reason, the Algerian legislature has imposed a set of mandatory rules that cannot be violated, as they represent

an expression of the public financial order, which transcends individual considerations.

Presidential Decree No. 15-247 of September 16, 2015, regulating public procurement and public service concessions, stipulates the obligation to follow strict and transparent procedures when concluding contracts. These include: announcing a tender, opening the door to all eligible contractors, and submitting to preliminary review by the relevant procurement committees and financial bodies[41].

The most prominent of these requirements are as follows:

1- Rigidity in technical and financial conditions

The administration establishes precise specifications that clearly define the specifications of the project or service required, and the technical and financial obligations that must be met. Any bid that does not meet these conditions will not be accepted, reflecting the legislator's desire to ensure quality and the proper use of public funds[42] .

However, this rigor may have negative effects, such as the exclusion of some bidders who have offered innovative or less costly solutions that do not fully comply with the specifications. Thus, the question arises as to the extent to which it is possible to balance strict protection of the public interest with encouraging contractual flexibility.

2- The necessity of respecting the principle of equality among bidders

The principle of equality before competition is a fundamental principle in public procurement. It means that all bidders have the same opportunities and rights to bid,

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without discrimination based on nationality, financial status, or relationship with the administration[43]

This principle aims to:

Ensure transparency in public spending.

Promote fair competition.

Prevent favoritism or administrative corruption.

French administrative courts have enshrined this principle in numerous decisions, including the 1950 Stein Conseil d'État ruling, which affirmed the necessity of treating all bidders equally. The Algerian legislator was inspired by this approach and explicitly included it in Article 5 of Decree 15-247.

3- Administrative Intervention by the Prerogative of Public Authority

In public procurement, the administration enjoys exceptional powers not available to contractors under private law. It can:

Unilaterally amend the contract if the public interest so requires, provided the amendment does not alter the nature of the basic obligations.

Unitedly, terminate the contract without the contractor's consent, in the event of a serious breach or if the public interest requires it[44]

Continuously monitor the implementation of the contract, whether through monitoring committees or specialized technical services.

These privileges, while ensuring the protection of public funds, clearly demonstrate the contractual imbalance in favor of the administration, making it the stronger party.

This may weaken the application of private justice, which is based on equality between the parties.

From the above, it is clear that protecting the public interest and public funds in public contracts is a top priority for the Algerian legislator, which justifies the imposition of strict restrictions on both the administration and contractors. However, these restrictions often marginalize the concept of private justice, as the private contractor remains bound by substantive and procedural constraints that prevent him from enjoying contractual independence. This calls for a search for compromise solutions that protect public funds without sacrificing the principles of balance and fairness.

Section Two: Contractors' Privacy and the Need for Contractual Independence

While the administration imposes strict restrictions on the conclusion and implementation of public contracts to protect the public interest and public funds, private contractors find themselves facing practical and legal challenges that compel them to demand greater contractual independence. A contractor or subcontractor entering into a contractual relationship with the administration seeks not only to fulfill their obligations, but also to achieve a legitimate economic interest that enables them to ensure the continuity of their activity.

However, the rigidity that characterizes public contract contracts, as a result of their being subject to strict formal and substantive procedures, often leads to real difficulties during implementation. These difficulties become particularly evident when unforeseen events occur that affect the financial balance of the contract or make implementation more difficult than expected. This raises the

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question of the extent to which the privacy of contractors can be respected by adopting flexible legal mechanisms that protect their rights and limit contractual imbalances.

1- The Principle of Contractual Balance and Unforeseen Circumstances

Administrative jurisprudence and jurisprudence have recognized the principle of contractual balance as a tool to ensure a minimum level of private justice in public procurement. This principle embodies the idea that the private contractor should not bear the burdens resulting from an imbalance due to circumstances beyond their control.

In this context, the theory of unforeseen circumstances (Théorie de l'imprévision) emerged, which emerged in French administrative law since the ruling of the Conseil d'État, 1916, Compagnie générale d'éclairage de Bordeaux. The French Council of State ruled that the administration is obligated to partially compensate the contractor for losses incurred due to exceptional, unforeseen events that made the implementation of the contract burdensome, but not impossible[45]

The Algerian legislator implicitly adopted this idea within the framework of the principle of "financial balance of the administrative contract," allowing the contractor to request a price review or compensation in the event of exceptional market fluctuations or unforeseen economic conditions that affect the actual cost of implementation[46].

2- The Principle of Fair Compensation upon Contract Termination

Alongside the theory of emergency circumstances, the principle of fair compensation has emerged, recognizing the private contractor's right to compensation upon unilateral termination of a contract for considerations related to the public interest. French administrative jurisprudence has established the rule that, despite the administration's unilateral power to terminate a contract, it remains obligated to compensate the contractor for the direct damages incurred as a result of such termination[47].

This compensation is based on a dual logic:

Protecting the contractor from unjust losses that they did not cause.

Not impeding the administration from exercising its exceptional powers necessary to protect the public interest.

In Algeria, the Supreme Court has adopted this principle in several decisions, ruling that the contractor must be compensated for damages resulting from the termination of a contract for reasons attributable to the administration, provided the contractor has fulfilled his obligations in good faith[48]

3- Searching for Compromises

Despite the relative recognition of the principle of contractual balance, private justice in public procurement remains limited. This is because the administration remains the stronger party with its exceptional privileges, while the contractor remains the weaker party, albeit enjoying compensatory rights. Therefore, a middle ground approach is required that simultaneously takes into account:

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The privacy of contractors and their right to relative independence;

The requirements of protecting the public interest, which remains a top priority.

Jurisprudence has suggested that this can be achieved by including contractual flexibility clauses such as periodic renegotiations, price reviews, or resorting to arbitration to settle disputes. These are mechanisms capable of achieving a degree of private justice without compromising the fundamental principles of public procurement[49].

The analysis shows that private justice in public procurement is not an absolute concept, but rather a relative one, achieved through the principle of contractual balance and compensation mechanisms. While the administration maintains its exceptional powers to protect the public interest, contractors seek guarantees that protect their economic interests and prevent them from financial collapse. Hence, the need for compromise solutions that strike a balance between public order considerations and the requirements of private justice.

Second Requirement: The Conflict Between the Principle of Private Justice and Contractual Balance

Public transactions raise a delicate issue regarding how to achieve private justice that is, balance the rights and obligations of each party in a fair manner while simultaneously ensuring contractual balance, which requires reconsidering certain conditions or compensating for damages to maintain the continuity of the contract. This issue stems from the dual nature of public contracts: they are contracts subject to the rules of administrative law, yet at the

same time contain elements of civil and commercial contracts.

Section One: Challenges Facing the Administration in Reconciling Legal Neutrality with the Requirements of Private Justice

The administration is considered the most powerful party in public contracts. It operates based on the logic of the public interest and the protection of public funds, which prompts it to adhere to fundamental legal principles such as equality among bidders, transparency in competition, and publicity in procedures. These principles enshrine what is known as the legal neutrality of the administration, i.e., refraining from favoring one economic operator over another and ensuring that selection is based on purely objective criteria such as price or technical efficiency[50].

However, this over-emphasis on neutrality and legal rigor can lead to counterproductive results, as it often ignores the circumstances of private contractors facing economic or technical difficulties. For example, in times of economic crises, inflation, or natural disasters, fulfilling obligations under the same original terms may become impossible or extremely burdensome, yet the administration sometimes refuses to amend the contract under the pretext of protecting public funds. This attitude reflects a kind of formal justice, where rules are applied literally without regard for the specifics of individual cases[51].

French administrative jurisprudence has argued that contractual justice is not achieved simply by applying rigid legal rules, but also requires interpretive flexibility in dealing with administrative contracts. In exceptional circumstances, the administration must strike a balance

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between the public interest and the rights of the contractor, ensuring the continuity of the contract and preventing the burden from being entirely placed on the private party[52]

This tension poses a real challenge:

On the one hand, the administration is obligated to act in accordance with the rules of neutrality and transparency, which ensure citizens' confidence and protect public funds.

On the other hand, private justice requires acknowledging the contractor's circumstances and enabling them to continue implementing the contract without incurring significant losses, especially if the breach of contract was not due to their fault.

Some researchers argue that strict adherence to legal neutrality may undermine confidence in public procurement, as economic operators hesitate to participate in tenders if they feel the administration is not taking their economic and practical realities into account[53]. Therefore, reconciling the requirements of legal neutrality and private justice remains one of the most difficult challenges facing modern administration in the field of public contracts.

Conclusion

From the above, it is clear that public procurement, although contracts in the legal sense, is a special contract that transcends the traditional framework of the meeting of two free wills. It is a tool for achieving the public interest above all else, which necessitates a reconsideration of the classical concepts of contractual justice and special justice.

The analysis has shown that special justice, which is based on formal equality between parties and the application of civil law principles, may not be sufficient in the field of public procurement due to the extensive privileges enjoyed by the administration. This justifies the presence of contractual justice, which is based on restoring the balance between the two parties whenever it is disrupted by these privileges or as a result of emergency economic and financial circumstances.

It has also become clear that the Algerian legislator, through the texts regulating public procurement, has attempted to reconcile these two types of justice: on the one hand, it has enshrined the principles of free competition and equality between competitors (special justice), and on the other hand, it has established mechanisms for amending the contract or compensating the affected contractor in order to ensure the continuity of the public service (contractual justice). However, reality reveals some shortcomings, particularly regarding the absence of adequate practical mechanisms for settling disputes and ensuring their prompt resolution, as well as the weak contractual culture among some economic operators.

Thus, it can be said that achieving justice in the field of public procurement remains dependent on the extent to which the logic of public law and the logic of private law are reconciled, along with the requirements of protecting the public interest and guaranteeing the rights of contracting parties with the administration.

Recommendations

Strengthen the legislative framework by reviewing and updating the legal texts regulating public procurement to

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ensure greater clarity in contract terms and establishing balanced mechanisms to restore contractual balance in the event of an imbalance.

Establish alternative dispute resolution mechanisms: Encourage recourse to mediation and arbitration in public procurement disputes, rather than relying solely on the administrative judiciary, which can be slow.

Develop the capacities of the administration and economic operators through specialized and ongoing training in the field of public procurement, both for the benefit of administration managers and for the benefit of private contractors, ensuring a solid contractual legal culture.

Activate digitization at all stages of the contracting and implementation process, ensuring greater fairness and reducing the chances of deviation and corruption.

Establish contractual justice as a balancing mechanism by explicitly stipulating the cases in which contract terms may be amended or the private contractor may be compensated, thus ensuring continuity without infringing the rights of all parties.

The necessity of developing the jurisprudence of administrative judiciary in Algeria to keep pace with legislative developments and practical practices in the field of public procurement, in order to achieve legal security and enhance confidence in justice.

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