



Modes of Tendering in Accordance with the New Law No. 23-12 Setting the General Rules Relating to Public Contracts Bouaroura Roumila *

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Abstract:

The allocation of public contracts fundamentally relies on various awarding methods as delineated by public procurement regulations. Predominantly, the formal call for competition constitutes the general rule, with the negotiated procedure acting as an exception. The integrity of the contract management system is deeply intertwined with procurement methods that necessitate different levels of competition, which, in turn, require a robust justification for the chosen contracting structure.

Keywords: Mode of Procurement; Tender; Contracts; Negotiated Procedure; Choice; Contracting Service.

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Introduction:

To effectively meet economic needs in terms of both nature and quantity, and informed by detailed technical specifications anchored in standards or required performance levels, the contracting authority must pinpoint the most apt contractual strategy to realize the projected operation under optimal conditions of quality, cost, and time.

In this context, the selection of a tendering method, which lies within the discretionary purview of the contracting authority, is pivotal to the success of the process. Recent legislation establishing general rules pertaining to public contracts introduces two principal methods for concluding public contracts: the general rule, which involves contract acquisition through a tendering process encompassing various forms; and the exceptional rule, which permits contract award via a negotiated procedure,¹ with or without prior publicity. Moreover, the contracting authority may employ specific and exceptional frameworks.

It is crucial to acknowledge that the choice of tendering method is inherently discretionary for the contracting authority, which must, under scrutiny, substantiate and defend its strategy in adherence to prevailing regulatory norms.²

This study will delve into two primary facets: open competition and the negotiated procedure. It is, however, relevant to note that the public buyer is required to justify the choice of procurement method selected by providing a detailed report that carries an objective analysis on the relevance of the chosen method in terms of the efficiency and effectiveness in meeting the expressed need. This prompts us to question the various procurement methods that the contracting structure might choose to handle the diversity of contracts to be executed.

Are there specific aspects of procurement methods you're particularly interested in exploring further, such as their application in different sectors or comparisons between methods in terms of cost-effectiveness?

I. Open Competition:

Recent legislation concerning public contracts mandates that open competition be executed based on the amount and nature of the operations, following one of the procedures: consulting suppliers, tendering, or employing specific procedures.³

An effective, efficient, and honest public procurement system must ensure equitable access to public market opportunities for suppliers of all sizes. Access to public procurement is ensured by: i) coherent, simple institutional, legislative, and regulatory frameworks; ii) explicit, concise, standardized tender documents tailored to the demands; and iii) the use of competitive procedures and the restricted solicitation of sole sources.

It should be noted that the new law 23-12 has not brought significant changes to the various modes of conducting the competitive process, however, it is important to mention that the term "adapted procedure" has been replaced by "specific consultation procedure" as well as the elimination of the term "formalized procedure."

In this context, it is important to specify that these thresholds must be carefully determined, taking into account several criteria, including: the administrative costs of the tender, and the average amount of the contracts observed.

I.1. The Consultation Procedure:

The contracting authority is authorized to consult suppliers for any operation where the estimated cost does not exceed a defined threshold, specifically:

- _ Twelve million dinars for works or supplies (12,000,000 DA).
- _ Six million dinars for consulting or service contracts (6,000,000 DA).⁴

In this context, it should be emphasized that these thresholds must be determined with care, considering multiple criteria, including: the administrative costs of the tender and the average amount of contracts observed.

For this, we believe that the legislature must ensure that the thresholds for initiating formalized procedures truly encourage proper competition, while also considering the costs associated with these formalities.

In the same vein, we suggest planning a manual regarding the process for consulting suppliers as has been developed by several countries, especially since the legislator has left the precision of application modalities

for adapted procedures to be defined in an internal procedure developed by the contracting entity, to the Minister of Finance. However, to date, no decree has fully elaborated or detailed this point.

The process involves issuing consultation invitations through an electronic portal to economically qualified operators who are listed as pre-qualified suppliers or providers. This system, established by the legislator, aims to enhance the dematerialization of the tendering process and integrate advanced information and communication technologies effectively.⁵

Mastery of digitalization rules and a thorough risk analysis are imperative for the success of this initiative⁶. Nevertheless, it has been noted that the implementation on the ground is markedly slow, as many entities lack a robust electronic system and fail to adequately distinguish between confidential information and that which is suitable for sharing and publication.

The creation of an electronic public procurement system demands the formulation of a tailored strategy. The consultation dossier, transmitted by the contracting authority to potential candidates, must encompass a detailed description of both qualitative and quantitative needs, along with specific delivery or execution timelines, and must be directed to at least three suppliers unless a justifiable impossibility prevents this.

On the other hand, any fragmentation of operations with the intent of avoiding tenders is prohibited. However, by exception, consultations may be used for certain services regardless of their amount, such as for transportation, hotel and restaurant services, or even legal and financial services⁷.

In exceptional cases, adapted procedures may be employed for various services, irrespective of their monetary value, such as transportation, hospitality, and legal or financial services. Within the framework of promoting national and local economic development, it is essential that the contracting authority ensures that the conditions and criteria do not inadvertently exclude small and very small enterprises and must, by regulation, reserve a designated portion of public procurement, not exceeding 20% of the total, exclusively for these enterprises.⁸

However, the practical implementation of this advantage is complex due to the authority responsible for setting the 20% rate for public contracts, as well as the processes and methods of applying this opportunity. It would

be prudent for the legislator to further clarify this provision during the establishment of regulatory texts under Law 23-12.

I.2. The Tendering Process:

The tendering process is structured to elicit bids from multiple bidders, awarding the contract to the bidder who presents the most advantageous offer, as determined by the contracting authority, based on predefined criteria and performance specifications in the tender documents. The selection process by the contracting authority is conducted within a competitive framework, which is the standard procedure.

The tendering process can be categorized into one of the following types:

1. Open tendering.
2. Tendering with minimum capability requirements.
3. Restricted tendering.
4. Competitive dialogue.⁹

Open tendering occurs when the procedure permits any candidate to submit a bid, provided they fulfill the requirements set forth in the specifications. This method is considered open exclusively to candidates who satisfy specific minimum eligibility conditions predetermined by the contracting service. Essentially, only operators who meet these qualifications may submit bids.

In pursuit of optimally addressing the expressed needs in terms of quality, cost, and implementation time, the contracting structure tends toward imposing restrictions related to qualifications, classification, and professional experience, which must be validated by certificates of good performance.

However, such restrictions must remain proportionate to the nature, complexity, and importance of the operation and should never restrict access to companies governed by Algerian law under any circumstances. In this context, we note that the contracting entity possesses excessive leeway due to the lack of specifics regarding the establishment of this list, which merits clarification by the legislator.

The contracting service may engage in restricted tendering by creating a shortlist of economically qualified operators following a preselection process. Restricted tendering can be conducted in either one or two stages:

_ The first stage is typical when the contracting structure is able to specify the detailed technical characteristics of the operation to be initiated.

_ The second stage occurs when the contracting service is unable to precisely define the technical means necessary to meet its requirements.

The first phase of the two-stage process entails publishing a notice of restricted tender, detailing the participation conditions and the preselection procedures for candidates.

The second phase involves inviting bidders, whose technical offers conform to the specifications, to submit a financial proposal for the subsequent stage. In the single-stage process, the envelopes containing both technical and financial offers are sequentially opened by the bid opening and evaluation committee.¹⁰

Tendering, in all its forms, strives to select the most economically advantageous offer for the contracting structure, aligned with the market's objectives. These include the cost of use, technical value, execution time, aesthetic and functional qualities, profitability, after-sales service, and technical support, as well as the delivery date and schedule, service pricing, and other criteria relevant to the market's purpose or conditions of execution.

For operations that incorporate specific technical, economic, aesthetic, or artistic elements, the contracting service adopts competitive dialogue to facilitate a contest among experts in fields such as architecture, engineering, and data processing. The competition specifications must outline the modalities for preselection.

The competition may be open with a requirement of minimum capabilities or restricted based on the scope and complexity of the subject matter. In a restricted competition, candidates are initially invited to submit only their application dossier. In the second phase, only those candidates who have been preselected are invited to present their technical offer dossiers and financial proposals.

Unlike open tendering, where candidates submit only the application dossier and technical offer, in a competitive dialogue with minimum capability requirements, participants are required to submit the application dossier, technical offer, service envelope, and financial offer all at once.

The submissions in this competitive format are assessed by a jury composed of experts who are both qualified in the relevant field and

independent of the candidates. The contracting authority is tasked with ensuring the anonymity of the submissions received.

The jury reviews the projects without knowing the identities of the submitters; if further clarification on specific aspects is needed, the jury records minutes that are signed by all members, noting the clarifications needed and the questions to be posed to the candidates.

Once the minutes are conveyed to the contracting service, this body reaches out to the involved participants in writing to solicit the required clarifications. The responses from the participants, documented in writing, then become an integral component of their final offers. The competition's winner is selected based on these comprehensive jury minutes, which are supplemented by a reasoned opinion from the jury.¹¹

Additionally, the contracting service may bestow awards upon the competition winners, following the guidelines set out for the competition.

I.3. Specific Procedures:

The contracting service may, in certain cases, deviate from the usual procurement processes. These applicable procedures include:

- _ In cases of compelling urgency.
- _ For the importation of specific products.

A-Compelling Urgency:

In instances of compelling urgency prompted by imminent danger to an asset, an investment materialized on the ground, a peril threatening an investment, property, or individuals, or an incident and/or natural disaster that has taken place and cannot conform to the standard procurement timelines, provided that these circumstances could not have been anticipated by the contracting structure, the competent authority may issue a motivated decision, encapsulating all arguments pertinent to the urgent situation, to authorize the initiation of works, services, or the acquisition of supplies prior to contract finalization.¹²

The execution of these services must be constrained to the bare minimum necessary to manage the emergency effectively.¹³ A regularization contract is then required to be formalized within six months from the date of the decision, which must be drafted in the legal format and a copy of which should be forwarded to both the Court of Accounts and the Ministry of Finance.¹⁴

In this regard, we question the control mechanisms put in place to ensure compliance with the requirements for establishing regularization contracts by contracting services; given that these contracts are solely based on their assessments and are not subject to prior control by compliance control commissions.

B- Importation of Certain Products:

According to Article 22 of Law 23-12, which sets the general rules relating to public contracts, contracts based on the importation of products that require rapid decision-making by the contracting entity due to changes in price, nature, or availability of these products are exempt from adhering to the established procurement rules.

However, the contracting service is obligated to carefully select the contracting partner and to conduct negotiations through an ad-hoc inter-ministerial commission composed of members qualified in the field of import operations. Furthermore, the regularization market is subject to a compliance check by the competent market commission within a three-month period from the date of the issuance of the service order (ODS), marking the beginning of service execution.

Given that no ministerial decree has yet been issued to define the list of these products and services in accordance with the provisions of Presidential Decree 15-247, especially Article 23, the legislator should consider addressing this gap.

II. The Negotiated Procedure

The negotiated procedure is a method in which the contracting service awards a contract to a partner without initiating a call for competition, a practice previously known as "single-source procurement," revised following the enactment of Law No. 23-12.

This procedure may be executed in two forms: the direct negotiated procedure or the negotiated procedure after consultation. The negotiation concentrates on pricing and the terms of contract execution and must be conducted by a negotiation committee, appointed by the head of the public institution through a formal decision.

The contracting service must ensure the traceability of the negotiation process, documented in minutes signed by the chairperson and members of the negotiation committee.

II.1. The Direct Negotiated Procedure

This specific procedure is employed in exceptional circumstances and limited to the following scenarios:

_ When the contract can be executed exclusively by a single contracting partner who either maintains a monopolistic stance, uniquely possesses a technological process, or is selected due to specific technical, cultural, or artistic considerations.

_ When it aims to promote labeled startups or service providers in the digital technology and innovation sector, provided that their solutions are unique and innovative.¹⁵

_ A startup is defined as a recently established company that leverages new technologies in an innovative area, demonstrating substantial growth potential that facilitates swift development, and must comply with specific criteria outlined in Executive Decree No. 20-254 dated September 15, 2020¹⁶. Regrettably, the Algerian legislator has yet to formalize a definition for startups.

_ When operations must be conducted urgently and cannot accommodate the typical delays associated with a tendering process, assuming that the circumstances precipitating this urgency were unforeseeable by the contracting service and not due to any dilatory tactics by it. In such instances, the use of the direct negotiated procedure is warranted due to the protracted nature of the tendering process.

_ This urgency arises from a threat to an asset owned by the contracting service, manifested either on the ground or as an imminent risk due to natural disasters, technological failures, or a health crisis.

_ In situations of urgent procurement aimed at preserving the vital needs of the population, provided that the causes of such urgency are unpredictable and not a result of any dilatory manipulations by the contracting authority.

_ When dealing with a priority project of national significance where the stringent deadlines for completing these operations preclude the use of formalized procedures, which require substantial time to produce results, thereby adversely affecting the project's execution and completion. The deployment of this exceptional mode, in this instance, is contingent upon prior approval from the Council of Ministers or the government, depending on the contract's value.¹⁷

_ In scenarios aimed at promoting the national production tool, subsequent to receiving prior approval from the Council of Ministers or the government, as applicable.

_ When a legislative or regulatory text endows a public institution, which operates under commercial regulations and carries out operations financed entirely or partially by the state, with an exclusive right to undertake a public service mission, or when this entity conducts all its dealings with public legal persons.

The contracting service employs the direct negotiated procedure solely in scenarios delineated by Law No. 23-12. It is mandated to organize the negotiation through a committee specifically appointed for this purpose, ensuring that the economic operator's capabilities are assessed based on a pricing reference. Consequently, the technical and financial performances of the company must align with the stipulated contract execution requirements.

It should be noted that some cases in the comprehensive list are not sufficiently defined, which could lead to a risk of abuse, hence the need for better regulation to combat corruption.

II.2. The Negotiated Procedure After Consultation:

In the negotiated procedure after consultation, the contracting service is authorized to consult identified bidders, with the stipulation that the number of bidders cannot be fewer than three (03), unless the pool of competitors who have responded favorably is deemed insufficient.

The negotiation encompasses various criteria such as price, execution or delivery time, warranty, after-sales service, and related services. Crucially, it must not involve discussions concerning the subject and scope of the market. This procedure is typically employed in the following scenarios:

_ When the tender process has been declared unsuccessful for the second time. In such cases, the contracting authority extends invitations to bidders who have previously withdrawn the tender dossier by sending a consultation letter based on the same specifications and may extend the consultation to include companies that did not initially participate in the tender.

_ The contracting service benefits from exemptions from specific tender process provisions. This exemption facilitates the withdrawal of

specifications at no cost and negates the requirement for publication in the official public procurement bulletin (BOMOP) and the press; advertising through an electronic portal is deemed sufficient. This approach aims to streamline the procedure and enhance the likelihood of awarding the contract to the partner who presents the most advantageous offer in the shortest timeframe.

_ Should there be a need to alter certain provisions of the specifications that directly impact competition conditions, these specifications must be resubmitted for compliance verification by the appropriate commission.

_ Applicable to contracts involving studies, supplies, and specific services where the unique characteristics related to their subject, the low degree of competition, or the confidential nature of these markets do not justify the implementation of a formalized procedure.

_ Pertinent for construction contracts that involve matters of state sovereignty.

_ Relevant for contracts that have been terminated and where the timelines for resumption or the nature of the contract are not compatible with the delays typically associated with a new tender.

_ Applicable to services conducted under the government's collaboration plan or through mutual concessional financing agreements, debt-to-development project conversions, or donations, as specified by such agreements. In these instances, consultation is limited solely to companies from the involved or funding countries, as applicable.¹⁸

Generally, the provisional award of a contract under this negotiated procedure should be made public unless the contracts necessitate confidentiality. In such cases, simply notifying the consulted operators will suffice.

Bidders who wish to contest the choice made by the contracting service are entitled to file an appeal within specific deadlines, namely, within ten (10) days from the first publication of the notice of provisional award in the official public procurement bulletin, the press, or the public procurement portal.

Conclusion

Public contracts are inherently bound by formalism as they are predicated on prior competition; the selection of a procedural approach is critical because it shapes the rules governing competition and transparency. The core principle of competition is designed to ensure equitable opportunities for all participants in crafting their proposals, which must adhere to uniform parameters and analytical conditions. This equality of treatment aims to foster robust and effective competition and acts as a strategic tool to enhance the competitiveness of economic operators, thus broadening the diversity of profiles and intensifying the competitive landscape.

Through such mechanisms, the contracting service can access a variety of companies for its projects. Nonetheless, the contracting service often views competition as a cumbersome duty rather than a beneficial asset, leading to a dependency on concepts such as urgency, technical specifications, and thresholds that may dilute the essence of competition.

The concept of compelling urgency, in particular, is often ambiguously defined, and its sovereign assessment by the contracting service can verge on creating undue constraints. This scenario underscores the need for judicial oversight, emphasizing the deficiencies within the public procurement code in addressing these challenges.

The direct negotiated procedure, although an exception, fails to align with the fundamental principles of transparency and equality. It tends to represent a covert form of favoritism, legitimizing a process that undermines the principle of equal access.

Although market regulations might permit contracts devoid of formalities or devoid of public disclosure and competition, they do not relieve the contracting service of its duty to adhere to general legal principles, nor do they permit arbitrary decisions regarding the utilization of public funds. A market devoid of competition is not devoid of legal oversight.¹⁹

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⁷ Article 19 of Law No. 23-12 setting the general rules relating to public procurement.

⁸ Article 58 of Law No. 23-12.

⁹ Article 39 of Law No. 23-12, setting the rules relating to public procurement.

¹⁰ Jacques Pictet, Dominique Bollinger, *Adjudicating a Contract to the Most Advantageous Bidder*, Polytechnic and University Press of Romandy, Lausanne, First Edition, 2003, p. 15.

¹¹ Ministry of Finance, Public Procurement Guide, 2021 Edition, p. 45.

¹² Article 21 of Law No. 23.12, aforementioned.

¹³ Ministry of Finance, op. cit., p. 54.

¹⁴ The regularization contract must be submitted for approval to the public procurement commission and the filing date before the expiration of the six months from the date of the motivated decision.

¹⁵ Article 41 of Law No. 23-12, aforementioned.

¹⁶ Article 11 of Executive Decree No. 20-254 of September 15, 2020, establishing the national committee for labeling "start-ups," "innovative projects," and "incubators," and defining its missions, composition, and operations (JORA No. 55 of September 21, 2020). It states "is considered a 'start-up' each Algerian law company meeting the following criteria: -the company must not have been in existence for more than eight (8) years. -the company's business model must rely on innovative products, services, or business concepts. -the annual turnover must not exceed the amount set by the national committee. -At least 50% of the capital

must be owned by natural persons... The growth potential... large... the company must not have more than 250 employees.

¹⁷ Recourse to this exceptional procurement mode must be subject to prior approval by the Council of Ministers if the contract amount is equal to or greater than ten billion dinars and to prior approval then in a government meeting if the contract amount is less than the aforementioned amount Article 41 Law 12-23.

¹⁸ Article 42 of Law No. 23-12.

¹⁹ Mossa Zahia, "Judicial Review of Competition in Public Procurement," p. 5.