Contemporary Readings in Law and Social Justice
ISSN: 1948-9137, e-ISSN: 2162-2752
Vol 17 (01), 2025
pp. 802 - 811

Negotiation Method as an Exception to Concluding Public Contracts in the Algerian Public Procurement Law

Kantaoui Abdellah [1], Bakhadda Djelloul [2]

[1] University of Adrar-Algeria. Email:kantaoui.abdellah@univ-adrar.edu.dz; Orcid: 0009-0005-6964-2137

[2] University of Adrar-Algeria, Email:bakhadda.djelloul@univ-adrar.edu.dz; Orcid:0009-0007-4585-5714

Abstract:

Contracting within the framework of public procurement is conducted in two methods, stipulated by the Algerian legislator in the Public Procurement Law. The first is the request for proposals method, which constitutes the general rule, whereby the contracting authority is bound by the procedures for advertising and inviting bids. The second is the negotiation method, which constitutes the exception, whereby the contracting authority is given a degree of freedom in selecting the contracting party. However, it is only resorted to if one of the following conditions is met: direct negotiation or post-consultation negotiation.

Keywords: Public procurement, negotiation method, direct negotiation, post-consultation negotiation.

Received: 11-10-2024 **Accepted:** 12-06-2025 **Published:** 16-07-2025

Introduction.

Public procurement is an administrative contract concluded by a public buyer, known as the contracting authority, with one or more economic operators to meet their needs for works, supplies, studies, and services. These needs, under which public procurement is concluded, are considered one of the means by which public funds are spent.

Accordingly, Law No. 23-12 of 5 August 2023, which sets the general rules relating to public procurement[1], stipulates the principles governing the conclusion of public procurement and specifies the contracting procedures to which the contracting authority must adhere. The Algerian legislator has made the request for proposals the general rule for concluding public procurement, guaranteeing the right to participate for all bidders and opening the door to competition through advertising procedures, invitations to tender, and free access to public procurement. However, for objective reasons, the administration has been granted exceptional powers to select its contracting party under specific circumstances and conditions without resorting to these procedures. This is known as the negotiation method in concluding public procurement.

This is the topic that will be studied and analyzed in this research paper, which begins with the following question: What is meant by the negotiation method as an exception to the conclusion of public contracts? And in what cases is it resorted to?

To answer this question, we will rely on both analytical and descriptive approaches, in keeping with the nature of the topic. The study is divided as follows:

Section I: The concept of negotiation as an exception to the conclusion of public contracts.

Section II: Cases of resorting to negotiation.

Section I: The concept of negotiation as an exception to the conclusion of public contracts.

A. Definition of negotiation.

Negotiation is a method for concluding public contracts. This term was used only during the procedural phase, which characterized consensual methods of concluding contracts in previous regulations. However, in Public Procurement Law 23-12, the term now refers to both a procedure and a method of concluding contracts.[2]

On this basis, it can be said that the negotiation procedure is a formula based on discussion and negotiation in concluding contracts, through which the administration is exempted from being subject to some procedures and formalities for objective reasons. This is the term used by the Algerian legislator in the new Public Procurement Law 23-12, after the term "mutual consent" was used in the public procurement regulations that preceded it. It may have different names in comparative legislation, as it is called a direct agreement, as is the case in Egyptian legislation. It is also called direct purchase, direct order, or mutual agreement for the Lebanese legislator, and the French legislator has used the term "direct negotiation."

Negotiation is considered an exceptional method for concluding contracts, whereby the contracting administration concludes the public transaction with a single economic operator, once their wills coincide on the subject matter, in accordance with a specification book drawn up in advance by it, without resorting to any type of advertising or call for competition. This description is consistent with the direct negotiation procedure, in which everything related to competition is absent, while maintaining the application of its principles.[3]

Negotiation is defined as: "that exceptional method of contracting, which the contracting authority undertakes without being bound by the formalities of a request for proposals, within a framework of open competition with the candidates for the contract, while maintaining complete freedom in the appropriate contract, provided that the rules regulating this method are adhered to. In this case, the contracting authority, like any ordinary individual, discusses and negotiates with complete freedom and chooses what it wants."[4]

This definition has made it clear that resorting to negotiation to conclude public contracts gives the contracting authority freedom to choose who it wants to contract with and to be able to negotiate with him.[5]

As John Rivero defines it: "Negotiation is one of the methods used to conclude public contracts by the competent authority without the need to resort to advertising or publicity, which means not holding competition."[6]

The Algerian legislator has defined the negotiation method in all public procurement regulations. These definitions are close in terminology and similar, but the term has shifted from agreement to negotiation, a term used in the new Public Procurement Law 23-12. Article 40 of this law defines it as: "The procedure of allocating a contract to a single contracting operator without a formal invitation to compete..."[7], The formal invitation to compete refers to the procedures for requesting bids, since competition exists in principle, but in a reduced form.

On this basis, it is possible to differentiate between the method of requesting proposals as a general rule for contracting, and the method of negotiation as an exception, given that the method of requesting proposals gave the legislator the freedom to the contracting authority to choose the subject of the deal and the method of contracting, but restricted it to the choice of the contracting operator. Conversely, the legislator gave the contracting authority the freedom to choose the contracting operator in the method of negotiation, but restricted it to the subject and method of contracting. The contracting authority cannot contract using the method of negotiation unless one

or more of the cases exclusively stipulated in this law are available, which will be explained and detailed later.

The Algerian legislator did well to replace the term "mutual consent" with "negotiation" as an exceptional method for concluding public contracts. Mutual consent, or lack of consent, is an inevitable result of negotiation, as this method is fundamentally based on negotiations between the contracting authority and the economic operator regarding prices and terms of implementation of the public contract, as stated in the second paragraph of Article 40 of the Public Procurement Law 23-12. On the other hand, the request for proposals method, which is considered the general rule for concluding public contracts, requires the contracting authority to award the contract without negotiation to the economic operator who presents the best offer in terms of economic advantages, after undergoing the mandatory substantive procedures stipulated in the current Public Procurement Law. If awarding a public contract without negotiation is the general rule, then the more appropriate term for the exception is negotiation, not mutual consent.

B. Negotiation Forms.

Among the concluding methods stipulated in the current Public Procurement Law is the negotiation method, which takes two forms: direct negotiation and post-consultation negotiation. Direct negotiation is considered a unique negotiation method in which a specific individual is consulted. Post-consultation negotiation is another negotiation method that shares elements of competition with the request for proposals through consultation directed at a group of economic operators. It differs from the request for proposals in that it allows for negotiation regarding the terms, conditions, and implementation modalities of the deal, a feature that is absent in the request for proposals.[8]

This is what Article 40 of Public Procurement Law 23-12 stipulates: "...negotiation may take the form of direct negotiation or negotiation after consultation."

The details are as follows:

1. Direct Negotiation.

Direct negotiation is one of the negotiation methods used in concluding public contracts. It is considered an exception with its own conditions and reasons. Direct negotiation has long been considered a fertile ground for corruption due to the contractual flexibility it provides, particularly in terms of conclusion procedures. This has prompted the legislator in the Public Procurement Law to emphasize its exceptional nature and specify specific cases that permit its use exclusively.

Direct negotiation is based on special principles that reflect it as an exception in concluding public contracts, due to its flexibility in procedures and speed in contracting. The latter is based on credit, which is guaranteed by the economic operator's good implementation of its prior contractual obligations with the contracting authority[9]. It places the contracting authority in a comfortable position, and saves it effort and time in concluding its contracts and completing its projects. In other words, it facilitates the work of the contracting authority by giving it a degree of freedom and exempting it from complicated procedures.

From this perspective, direct negotiation can be defined as a method in which negotiations are conducted with a specific person and not with others. It is a flexible method that the contracting authority resorts to in order to contract with the contracting party it freely chooses, without the need to use the procedures and formalities of competition, or even to conduct prior consultation. Rather, the agreement is reached directly between the two parties to the transaction.[10]

2. Negotiation after consultation:

Negotiation after consultation is considered one of the negotiation methods and approaches, and is an exception to the general rule in concluding public contracts. Its purpose is to save time and add flexibility to the contracting processes of administrative bodies, for objective reasons that make resorting to the general rule meaningless and merely a waste of time and public funds.

On this basis, post-consultation negotiation can be defined as the procedure that allows a contract to be concluded based on a simple, specific consultation, using written, dedicated, and prepared means, without any other formalities. This consultation is only for qualified or accredited institutions that meet the conditions for achieving the contract's objectives, in terms of human, financial, or material resources. Consultation also refers to the set of legal techniques used by the contracting authority that allow it to communicate with bidders.[11]

Or it is the method by which the contracting authority concludes its deals by holding a competition between candidates specifically invited to compete. The contract subject is presented to institutions with the required expertise through written means, without resorting to formal procedures. In other words, the contracting authority is free to communicate with economic operators and is exempt from the lenient procedures of the competition.[12]

One of the advantages of this approach is that it enables the contracting authority to limit its consultations to a list of institutions extracted from the economic operators' cards. It also provides simpler procedures compared to requests for proposals, making it more responsive and appropriate for situations of relative urgency where it is difficult to apply the general contracting rule.[13]

However, it is criticized for the lack of framework and the wide discretionary power of the contracting authority. In most cases, economic operators are known in advance, which may lead the contracting authority to act arbitrarily by consulting certain economic operators and not others, based on subjective, discriminatory considerations, rather than objective considerations that achieve the public interest. This may undermine the principle of competition, to achieve personal goals and create monopolistic situations, through the exploitation of public funds and misuse of office.[14]

Section II: Cases of resorting to negotiation:

The legislator has exempted the contracting authority, when resorting to contracting through negotiation, from the formal procedures imposed by the request for proposals method in order to conclude its contracts. However, it has restricted it and obligated it to rely on it when one of the conditions mentioned in Article 41 of the current Public Procurement Law applies, if it concerns direct negotiation, and in Article 42 if it concerns negotiation after consultation, as follows:

A. Cases of resorting to direct negotiation.

Cases in which negotiations may be resorted to after consultation:

The contracting authority may resort to negotiations after consultation when one of the cases stipulated exclusively in Article 41 of the current Public Procurement Law 23-12 exists, as follows:

• The case of a monopoly of the contracting operator over the subject matter of the transaction.

This is stipulated in the first paragraph of Article 41 of Public Procurement Law 23-12, which states that when operations can only be carried out by a single economic operator that occupies a monopoly position, or to protect exclusive rights, or for technical, cultural, or artistic considerations, the operations concerned

by cultural and artistic considerations must be clarified based on a joint decision between the relevant minister and the Minister of Finance.[15]

• The status of start-ups bearing the label.

This status is stipulated in the second paragraph of the same article when it comes to promoting start-ups bearing the label, as defined under applicable legislation and regulations, that provide services in the field of digitization and innovation, provided that the solutions provided are unique and innovative.[16]

This new status, introduced by the new Public Procurement Law 23-12, allows start-ups bearing the label and providing digital solutions to negotiate directly with public institutions. This, on the one hand, enhances economic groups' access to technology and digital solutions, and, on the other hand, opens new horizons for start-ups, expanding their activity and presence, as well as developing their capabilities within the Algerian economic fabric.[17]

• State of urgency and emergency.

This is stipulated in the third paragraph of Article 41 of the same law, which stipulates that the contracting authority may resort to direct negotiation in cases of urgency based on the existence of a risk threatening an investment or property of the contracting authority or public order, or an imminent threat to property or investment that has materialized in the field, or in cases of emergency related to health crises or technological or natural disasters. The contracting authority is unable to adjust to the deadlines for concluding public contracts, provided that the contracting authority was unable to anticipate the circumstances causing the state of urgency and that it is not the result of procrastination maneuvers on its part.

• An emergency supply case intended to ensure the provision of the population's basic needs.

This case is the subject of Paragraph 4 of Article 41 of the same law, when it concerns emergency supply cases to ensure the provision of the population's basic needs, provided that the circumstances necessitating this emergency were unforeseen and not taken into account by the contracting authority, and were not the result of procrastination maneuvers on its part.[18]

• In the case of a priority project of national importance that is urgent.

This is stipulated in the fifth paragraph of Article 41 of the same law. Contracting by negotiation is permitted by the contracting authority when it concerns a priority project of national importance that is unknown to the contracting authority and is urgent in nature, and cannot be adapted to the deadlines for concluding public contracts. This is provided that the circumstances necessitating this urgency were not unexpected by the contracting authority and were not the result of procrastination on its part. Prior approval of the Council of Ministers is required in this case if the contract value is equal to or exceeds ten billion Algerian dinars, and prior approval is required during a government meeting if the contract value is less than the previous amount.[19]

• The case of upgrading production and/or the national public production tool.

The rationale behind including this case is to enable the relevant contracting authority to conclude the contract in record time, with the aim of upgrading the national production tool and promoting national production[20], as stated in the sixth paragraph of Article 41. However, resorting to this case requires the prior approval of the Council of Ministers if the contract amount equals or exceeds ten billion Algerian

dinars, and prior approval during a government council meeting if the contract amount is less than that amount.[21]

• Exclusive right to perform a public service mission.

Pursuant to the seventh paragraph of Article 41, the contracting authority may resort to concluding a public contract through direct negotiation with a public institution subject to commercial rules regarding the implementation of an operation directly financed, in whole or in part, from the state budget or local authorities, when the law or regulation grants the public institution of an economic nature (industrial or commercial) the exclusive right to perform a public service mission, or when this institution carries out all of its activities with legal persons subject to public law, in accordance with the provisions of Article 9 of this law.[22]

B. Cases in which negotiations may be resorted to after consultation:

The contracting authority may resort to negotiations after consultation when one of the cases stipulated exclusively in Article 42 of the current Public Procurement Law 23-12 exists, as follows:

• When the second call for proposals is declared ineffective.

This case is stipulated in the first paragraph of Article 42 of the Public Procurement Law.

In the context of this law, the ineffectiveness of a call for proposals means that the contracting authority, as a general rule, initially chose a call for proposals as the method for concluding a public contract and then moved to negotiations after consultation, when one of the cases specified in Article 40, paragraph 2, of Presidential Decree 15-247 in force occurs, as follows:

- When no bid is received.

- When, after evaluating the bids, no bid is declared compliant with the subject of the contract and the content of the specifications.

- When funding for the needs cannot be guaranteed.

This means that the contracting authority has followed the general rule in concluding public contracts, which is the request for proposals method, and has followed all the necessary formal procedures to do so, but in return it has not received any proposal, so it is faced with zero proposals, or that the proposals it has received, none of them respond to the subject of the contract and the content of the specifications, so these proposals are excluded, or that the needs to be met cannot be financed because it does not have the financial credit necessary to pay the financial consideration to implement the contract, and it announces a new request for proposals with the same forms and procedures that it adopted the first time, so if it finds itself in the same situation for the second time and in the same circumstances, then it must declare the futility of the request for proposals for the second time, and this justifies its resorting to the method of negotiation after consultation.[23]

Here, the contracting authority is already aware of the stakeholders involved in the service or project, and it is assumed that their number is small, as it does not resort to the delegation procedure after consultation except after resorting to a request for proposals.

• The case of contracts for studies, services, and supplies whose nature does not require a request for proposals.

This is addressed in the second paragraph of Article 42 of the current Public Procurement Law, which states that the contracting authority may resort to negotiation after consultation in the case of contracts for studies, supplies, and special services whose nature does not require a request for proposals. The

specificity of these contracts is determined by their subject matter, the low level of competition, or the confidential nature of the services. It is clear from the text that a works contract is not covered by this case because it is not mentioned, unlike the subjects of other contracts mentioned in the article.[24]

The special nature of such transactions requires the contracting authority to conduct post-consultation negotiations. The legislator has also identified the specificity of the transactions in question, which leads to this method being used: the subject of the transaction, the low level of competition, or the confidential nature of the services. The legislator has sought to be more precise and restrictive in this regard.

It is worth noting that when the contracting authority resorts to post-consultation negotiations in this case, it is required to justify its position and choice by departing from the general rule in concluding public contracts and highlighting the specificity of this transaction. Although the contracting authority is required to justify its choice of any of the concluding procedures, as stipulated by the law, the reference to this in this case stems from the possibility of evading its failure to adopt the request for proposals by claiming weak competition regarding the subject of the transaction, which violates the principle of competition.[25]

• The case of public works contracts related to the exercise of sovereign functions by state-owned institutions.

This is stipulated in the third paragraph of the same article of the same law. Public works contracts are contracts that require a long period of time to conclude and are subject to the principles of openness, clarity, publicity, and lengthy procedures as a general rule. They are not contracts characterized by secrecy and mutual consent. However, when the legislator included this case in the context of negotiations conducted after consultation, this was intentional, given its association with operations characterized by precision and confidentiality, which concern the most important sovereign state facilities, such as security and national defense. This type of contract is characterized by its confidential nature, which contradicts the principle of publicity in the request for proposals. This case grants the contracting authority a degree of freedom to consult with trusted economic operators, particularly national institutions.[26]

The works covered by this section are determined by a decision issued by the sovereign public authority of the state, the official in charge of the public authority, or the relevant minister, after consulting the public authority's procurement committee or the sectoral procurement committee, as stipulated in paragraph 4 of Article 52 of Presidential Decree 15-247 regulating public procurement and public service concessions.

It should be noted that the legislator included this case in an absolute manner, without specifying or defining it. His intent does not appear clear or precise, as he did not specify which sovereign institutions are involved in this procedure, nor did he exempt the state from the request for proposals method in concluding contracts, instead relying on negotiations after consultation. It is likely that the institutions concerned are those affiliated with the Ministry of Defense, but it is also possible that they are affiliated with the finance, foreign affairs, or justice sectors, as these are sovereign sectors.

Hence, it can be said that when the legislator included this case among the cases of conducting negotiations after consultation, due to the confidentiality required by the transactions of these sovereign national institutions, these institutions aim primarily to protect public order, and it is clear that this is the description that suits national security and defense institutions.[27]

• The case of awarded contracts that were subject to termination and whose nature did not comply with the deadlines for a new call for proposals.

This is an objective case that justifies resorting to contracting through the negotiation method after consultation, especially since the contracting authority first went through contracting procedures via a call

for proposals, which is the general rule. Through this, the contract was concluded with the economic operator in accordance with the Public Procurement Law and the provisions of Presidential Decree 15-247. The contract was signed by the competent authority, and the implementation phase began[28]. However, due to objective reasons, the termination occurred. However, the aforementioned termination formula was general, as the legislator did not differentiate between unilateral termination, contractual termination, partial termination, or total termination. This situation may occur when a dispute arises between the contracting authority and the contracting operator, or for other circumstances that necessitate the termination of the agreement. However, it must be noted that the termination of the contract before implementation begins or before the order for its implementation is given does not justify resorting to this exception, as the intent here is to cancel the temporary award of the contract, not to terminate it.[29]

Professor Al-Nawi Kharshi criticized this situation, saying that a fictitious agreement could arise between the two parties if the contracting party does not proceed with the transaction in order for someone else to benefit from continuing to implement it.[30]

The unilateral termination of an agreement without fault on the part of the contracting party as a basis for resorting to post-consultation negotiations may constitute a loophole that allows the contracting authority to evade the tender process and undermine the principle of competition. In addition, the risk increases by granting the contracting authority discretionary power to decide that the nature of the transaction is not compatible with the deadlines for a new tender.[31]

• The case of transactions concluded within the framework of a government cooperation strategy or within the framework of bilateral agreements related to concessional financing and the conversion of debts into development projects or grants.

This case is stipulated in Paragraph 5 of Article 42 of the Public Procurement Law, which stipulates that contracts shall be concluded through negotiation after consultation in the case of transactions concluded within the framework of a government cooperation strategy or within the framework of bilateral agreements related to concessional financing and the conversion of debts into development projects or grants, when the aforementioned financing agreements stipulate this. In this case, the contracting authority may limit consultation to institutions of the country concerned only in the first case, or to the country providing the funds in the other cases.[32]

The rationale for including this case among the contracting cases under the negotiation procedure after consultation is to establish and respect the state's external obligations. Among the agreements that embody this case is the agreement between the Algerian Republic and the Government of Italy, whereby an agreement was ratified by decree dated 11 December 2011, which includes the modalities for embodying the conversion of debt into development projects, signed in Algeria on 12 July 2011.

The criticism of this provision is that it was presented with ambiguity. It did not specify what was meant by concessionary financing, nor did it outline the method by which debts would be converted into development projects or grants. The question that arises is how this would be converted into public contracts? And what are the areas for which it would be allocated? This question may be left to the upcoming regulations.

The legislator's failure to clarify these cases by clarifying and regulating the conditions for their application provides the contracting authority with an opportunity to circumvent the application of the Public

Procurement Law, which would eliminate the exceptional nature of conducting negotiations after consultation as a second method for choosing the contracting party.[33]

Conclusion.

In conclusion, this study can be concluded by stating that the negotiation method in the public procurement process was stipulated by the Algerian legislator as an exceptional method of contracting. This method grants the contracting authority a degree of freedom in selecting the contracting party, without resorting to the formal procedures of inviting competition, even if in a reduced form. This is done when one of the circumstances requiring such a method is met, as stipulated exclusively by the Algerian legislator in the current Public Procurement Law, whether related to direct negotiation or negotiation after consultation. Based on this, a set of conclusions was reached, which are presented as follows:

1- The negotiation method is an exceptional method of contracting.
2- In the negotiation method, the Algerian legislator granted the contracting party a degree of freedom to select the contracting party.
3- The contracting party does not resort to contracting using the negotiation method unless one of the exclusively stipulated circumstances is met.

4- In the negotiation method, the Algerian legislator has given a degree of importance to development and promotion of national production, serving the national economy. It is no longer limited to urgent cases and monopoly cases.

Footnotes:

1- Law No. 23-12 of August 5, 2023 establishing the general rules relating to public procurement, Official Gazette No. 51.

2- Mounira Maghni, Concluding Public Contracts According to the Negotiation Procedure in Light of Law 23-12, New University Publication, Algeria, 2024, p. 13.

3- Mounira Maghni, op. cit., p. 14.

4- Siham Ben Addas, The Contracting Operator Under the Legal System of Public Procurement, Master's Thesis, Department of Administrative Law and Constitutional Institutions, Faculty of Law, Department of Public Law, Badji Mokhtar University, Annaba, 2005, p. 45.

5- Mounira Maghni, op. cit., p. 14.

6- Mounira Maghni, op. cit., p. 15.

7- Article 40 of the current Public Procurement Law.

8- Mounira Maghni, op. cit., p. 18.

9- Mohamed Ben Mohamed, Halimi Manal, Consensual Contracts in Algeria: A Special Conclusion Method with Ambiguous Legal Controls, Journal of Political and Legal Notebooks, University of Ouargla, Issue Thirteen, June 2015, p. 177.

10- Mounira Maghni, op. cit., p. 19.

11- Mounira Maghni, op. cit., p. 22.

12- Mounira Maghni, op. cit., p. 22

13- Mounira Maghni, op. cit., p. 23.

14- Nadia Tiab, Mechanisms for Combating Corruption in Public Procurement, PhD Thesis, Faculty of Law and Political Science, University of Tizi Ouzou, 2013, p. 102.

15- Article 41/1 of the current Public Procurement Law.

16- Article 41/2 of the current Public Procurement Law.

17- Mounira Maghni, op. cit., p. 49

18- Article 41/3/4 of the current Public Procurement Law.

19- Article 41/5 of the current Public Procurement Law.

20- Mounira Maghni, op. cit., p. 57.

21- Article 41/6 of the current Public Procurement Law.

22- Article 41/7 of the current Public Procurement Law.

23- Mounira Maghni, op. cit., p. 63.

24- Article 42/2 of the current Public Procurement Law.

25- Mounira Maghni, op. cit., p. 65.

26- Amar Boudiaf, Explanation of the Organization of Public Procurement, Part One, Fifth Edition, Josoor Publishing and Distribution, Algeria, 2017. p. 234.

27- Mounira Maghni, op. cit., p. 67.

28- Amar Boudiaf, op. cit., p. 315.

29- Mounira Maghni, op. cit., p. 68.

30- Al-Nawi Kharshi, Public Transactions, Dar Al-Huda for Printing, Publishing and Distribution, Algeria, 2018, p. 197.

31- Mounira Maghni, op. cit., p. 68.

32- Article 42/5 of the current Public Procurement Law.

33- Mounira Maghni, op. cit., p. 69.