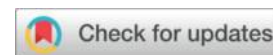




The Penalty of Deleting the Name of the Economic Operator in Algerian Law

Dr. Serdouk Hiba, Lecturer A



Badji Mokhtar-Annaba University

hiba.serdouk@univ-annaba.dz

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Abstract:

Public Procurement Law No. 23-12 regulated the penalty of deleting the name of the economic operator and established this penalty through two important mechanisms. The first consists in exclusion from participation in public procurement, while the second is the prohibition from participating in public procurement after the issuance of the decision to register in the list of persons prohibited from participating in public procurement. Consequently, this economic operator is forbidden from applying for public procurement announced by the public purchaser, and the contracting authority is required to verify the integrity of the economic operator and ensure that he is not excluded due to his registration in the list of economic operators prohibited from participating in public procurement.

Keywords: public purchaser – contracting operator – public procurement – exclusion – prohibition.

Introduction:

Public procurement holds great importance due to the pivotal role it plays in driving the national economy and the Algerian legislator's strong reliance on it in the implementation of state policies, the achievement of various projects, and the activation of sustainable development in different social, economic, and environmental fields, etc. The importance and effective status of public procurement also appear through its fundamental link with meeting the needs of public utilities and the civil and criminal protection afforded to their funds in order to preserve them and ensure their continuous allocation for the public interest and the service of public utilities or the direct use by the public. On the one hand, the protection of national property aims at combatting administrative corruption and deterring attacks on such property through looting, theft, waste, sabotage, and embezzlement.

The Algerian legislator has been keen to create methods and mechanisms that ensure achieving an important balance consisting of maintaining the continuous proper functioning of the public utility while guaranteeing the best economic conditions to achieve the efficiency of public procurement. Thus, the procedures for awarding and executing public procurement have embodied this aim and confirmed the legislator's determination to achieve it.

When the contracting authority declares its desire to contract, it faces a set of major and serious challenges arising from the need to secure what the public utility requires and the need to avoid

wasting public funds—from the moment the call for tender is announced until the delivery of the public procurement.

The first issues that must be confronted and avoided are the possibility of bidders or offerors withdrawing their commitments before adjudication. The contracting authority also requires guarantees to protect it against the possibility that the provisional awardee may refuse to complete the final contracting procedures and begin executing the subject of the public procurement. The largest challenge facing the public purchaser appears in the poor execution of contractual obligations by the contracting operator. Cases of poor execution take many forms, such as execution that does not conform to the agreed terms, deliberate delay in execution, or refusal to execute—even in cases where the contracting operator invokes the non-performance of contractual obligations by the public purchaser.

Accordingly, in this article, we will attempt to answer the main problem expressed in the following question: What are the legal sanctions available to the public purchaser to impose on the bidder or the contracting operator who breaches his obligations from the day the commitment is submitted until the complete execution of the public procurement?

To answer this question, we will present the penalty of deleting the name from the list of economic operators as one of the most important sanctions imposed by the legislator on any person who breaches his contractual obligations or refuses to complete the procedures of public procurement. This will be done by studying the substantive rules of the penalty of name deletion in Public Procurement Law No. 23-12 (First), then addressing the methods of registration and removal from the list of economic operators prohibited from participating in public procurement (Second).

First: Substantive Provisions of the Penalty of Name Deletion in Public Procurement Law No. 23-12

The general principle is that any person who finds himself qualified to contract with the public purchaser may apply to win any public procurement announced by the latter, as long as the person meets the appropriate technical and financial capacities previously defined in the specifications of the procedure and taken into consideration by the contracting authority upon contracting. These capacities are disclosed when announcing the public procurement, in accordance with the principle of procedural transparency governing public procurement.

The needs of the contracting authority that must be met are identified in advance before initiating any procedure for awarding public orders. The public purchaser must rely, when preparing its needs, on accurately determining their nature and scope according to detailed technical specifications based on standards and/or efficiency to be achieved or functional

requirements. These technical specifications must not be directed toward a specific product or economic operator.

The Algerian legislator has emphasized that the economic operator must enjoy good conduct and reputation in order to win public procurement and has placed this condition as a priority, even before considering his technical and financial capacities. A public procurement contract may not be concluded with persons subject to exclusion measures.

Public Procurement Law confirmed that the contracting authority must select a competent contracting operator who has not been involved in any acts or maneuvers aimed at obtaining or executing public procurement and has not been subjected to exclusion procedures, while applying the provisions of Articles 94 and 95 of the Public Procurement Law related to procurement oversight, by stipulating:

“Regardless of the procurement procedure adopted, the contracting authority may award the public procurement only to one or more economic operators capable of executing it and not subject to exclusion measures.”

From these legal texts, it appears that the Algerian legislator has considered exclusion from participation in public procurement and codified a concept similar to exclusion but different from it, namely the prohibition from participating in public procurement and the inclusion of the economic operator’s name in the list of economic operators prohibited from participating in public procurement.

Elsewhere, paragraph 2 of Article 66 of the Public Procurement Law states:

“In this framework, the concerned economic operator shall be provisionally registered in the list of economic operators prohibited from participating in public procurement, maintained by the competent departments of the ministry in charge of finance.”

Thus, the legislator granted the contracting authority two legal tools to impose sanctions on the contracting operator or bidder—depending on the case: prohibition from participating in public procurement and exclusion from participation. Therefore, we will explain the meaning of prohibition and exclusion from participating in public procurement, then define the cases and methods of each.

1– Definition of Prohibition and Exclusion Linguistically

Exclusion in Arabic means removal or distancing. It is said: *aqṣā-yuqṣī-iqṣā*, meaning “to remove.”

Prohibition in Arabic means preventing or hindering the ability to act.

Thus, exclusion means complete removal from participation in public procurement and refers—based on the texts of Public Procurement Law No. 23-12—to the legal effect or the consequence

resulting from the action of the bidder or contracting operator. In other words, it is the administrative sanction that the public purchaser may apply when the conditions requiring exclusion are met because of a breach of integrity rules in public procurement.

Prohibition from participating in public procurement is the consequence of confirming the exclusion of the economic operator and preventing him from applying for other public procurements that may be concluded by the same contracting authority that issued the provisional exclusion decision or other contracting authorities, due to the registration of his name in the list of economic operators prohibited from participating in public procurement. The contracting authority must verify this, and for added caution, the economic operator must submit a declaration of integrity.

2– Cases and Methods of Excluding the Economic Operator from Participating in Public Procurement

The Algerian legislator did not list cases of exclusion in the Public Procurement Law except for the case mentioned in Article 66, unlike Decree No. 15-247 on public procurement and public service delegation, which devoted Section 4 of Chapter 3 to specifying cases of exclusion.

The ministerial decisions of 17 December 2015 (registration/removal) and 19 December 2015 (exclusion procedures) also regulate these matters.

2-1 Cases of Exclusion from Participation in Public Procurement According to Law No. 23-12

The Public Procurement Law did not explicitly stipulate the cases of exclusion of the national or foreign economic operator from participation in public procurement except in one instance specified in Article 66, when the contracting authority discovers evidence of bias or corruption before, during, or after the conclusion of a public procurement or an addendum. In such a case, it acquires the right to take any deterrent measure, especially the termination or cancellation of the public procurement or the concerned addendum, in addition to the provisional inclusion of the name of the concerned economic operator in the list of economic operators prohibited from participating in public procurement. This is the same case stipulated in Article 75 of Public Procurement and Public Service Delegation Regulation No. 15-247 in item nine, which states: “Persons registered in the list of economic operators prohibited from participating in public procurement, as specified in Article 89 of this decree.”

2-2 Cases of Exclusion from Participation in Public Procurement According to Public Procurement and Public Service Delegation Regulation No. 15-247

Article 75 of Public Procurement and Public Service Delegation Regulation No. 15-247 listed the cases of temporary or permanent exclusion from participation in public procurement as follows:

- Persons who refused to complete their bids or waived the execution of a public procurement before the expiry of the bid validity period, according to the conditions stipulated in Articles 71 and 74 of Public Procurement Regulation No. 15-247. This constitutes a guarantee established in favor of the public purchaser, ensuring that the bidder remains committed during the bid validity period, which is determined in the procedure announcement. The contracting authority sets this period considering the complexity of the procurement subject, and it must be sufficient for preparing the bids and their arrival before the date and hour for opening the envelopes specified in the public procurement announcement. One of the most important legal effects resulting from the bid validity period is the prohibition of price updating during this period.
- Persons subject to bankruptcy proceedings, liquidation, cessation of activity, judicial settlement, or conciliation.
- Persons who have been the subject of a final judicial ruling due to an offense affecting their professional integrity.
- Persons who do not fulfill their tax and parafiscal obligations.
- Persons who do not fulfill the legal filing of their companies' accounts.
- Persons who submitted a false declaration.
- Persons registered in the list of institutions that breached their obligations after having been subject to termination decisions under their responsibility by project owners.
- Persons registered in the list of economic operators prohibited from participating in public procurement, as stipulated in Article 89 of the Public Procurement and Public Service Delegation Regulation.
- Persons listed in the national register of perpetrators of fraud and serious violations of tax, customs, and commercial legislation and regulations.
- Persons who have been convicted due to a serious violation of labor and social security legislation.
- Persons who breached their obligations specified in Article 84 of Public Procurement Regulation No. 15-247.

2-3 Methods of Exclusion from Participation in Public Procurement

Article 02 of the decision determining the methods of exclusion from participation in public procurement for the year 2015 clarified that exclusion may be temporary or permanent and may be automatic or by decision.

2-3-1 Automatic Temporary Exclusion from Participation in Public Procurement

Automatic temporary exclusion is imposed by the contracting authorities against economic operators in the following cases:

- Persons in a situation of judicial settlement or conciliation unless they prove that they are authorized by the judiciary to continue their activities.
- Persons subject to judicial settlement or conciliation unless they prove that they are authorized by the judiciary to continue their activities.
- Persons who do not fulfill their tax and parafiscal obligations.
- Persons who did not fulfill the legal filing of their companies' accounts.
- Persons finally convicted by the judiciary due to tax fraud, false declaration, or an offense affecting their professional integrity.
- Persons finally convicted by the judiciary due to a violation of:
 - Articles 19 and 23 of Law No. 81-10 on the conditions of employment of foreign workers, amended and supplemented.
 - Articles 7, 13, 15, 16, and 24 of Law No. 83-14 dated 02 July 1983 on the obligations of those subject to social security, amended and supplemented.
 - Articles 37, 38, and 39 of Law No. 88-07 dated January 1988 on health prevention, safety, and occupational medicine.
 - Articles 140, 144, and 149 of Law No. 90-11 dated 21 April 1990 on labor relations, amended and supplemented.
 - Articles 24 and 24 of Law No. 04-19 dated 25 December 2004 on the placement of workers and the monitoring of employment.

2-3-2 Temporary Exclusion by Decision from Participation in Public Procurement

The contracting authority may issue a temporary exclusion decision upon discovering serious and consistent evidence of bias or corruption, before, during, or after the conclusion of a public procurement or an addendum, as a prelude to issuing the decision to register the economic operator in the list of economic operators prohibited from participating in public procurement.

2-3-3 Permanent Exclusion by Decision from Participation in Public Procurement

The economic operator is excluded from participation in public procurement when his name is included in the list of those prohibited from participating in public procurement by the competent court after ruling on his appeal against the temporary prohibition decision.

Second: Methods of Registration and Removal from the List of Economic Operators Prohibited from Participating in Public Procurement

The competent departments of the ministry in charge of finance prepare the list of economic operators prohibited from participating in public procurement, in which every economic operator whose exclusion has been confirmed by the contracting authorities is registered.

Registration in this list is considered an administrative sanction automatically applied when it is proven that the economic operator committed acts described as corruption in the context of the public procurement, whether related to the procurement document or its addendum. It may also constitute a supplementary penalty for the unilateral termination of the public procurement due to the fault of the contracting operator. However, the application of this administrative sanction is not subject to the discretionary power of the public purchaser; the automatic deletion (registration) in the list of economic operators is applied even if the contracting authority considers it inappropriate to terminate the public procurement due to the operator's fault.

In this context, Article 93/1 of Public Procurement Law No. 23-12 stipulates the following:

“It is not permissible to object to the application of contractual clauses related to the guarantee and/or mandatory follow-ups intended to repair the damage suffered by the contracting authority due to the fault of the contracting operator on the pretext of contract termination. Moreover, the latter shall bear the additional costs resulting from the public procurement.”

In general, the ministerial decision dated 19 December 2015 specified the methods of registration and removal from the list of economic operators prohibited from participating in public procurement. The articles of this decision defined the procedures for registration and removal in Articles 02 to 08 of this decision, starting from the discovery of serious and consistent evidence of bias or corruption until the registration of the economic operator in the list of economic operators prohibited from participating in public procurement.

Accordingly, the procedures for registration and removal from the list of economic operators prohibited from participating in public procurement are as follows:

1– Discovery of Serious and Consistent Evidence of Bias or Corruption

The discovery of evidence proving the involvement of an economic operator in bias or corruption before, during, or after the conclusion of the public procurement or its addendum constitutes a principal reason for imposing various administrative sanctions on him, such as the termination or cancellation of the public procurement or its addendum. The contracting authority has the right to include the name of the concerned economic operator in the list of economic operators prohibited from participating in public procurement, maintained by the competent departments of the ministry in charge of finance.

The Algerian legislator has been keen to regulate this case in the various legal texts related to mechanisms for combating corruption in public procurement. This is the only case stipulated in Public Procurement Law No. 23-12 under Article 66/1.

It should be noted that registration in the list of economic operators prohibited from participating in public procurement is provisional, thereby addressing the shortcomings present in Article 89 of the Public Procurement Regulation.

Upon reviewing Article 89 of the Public Procurement Regulation, it becomes clear that any person who engages in acts or maneuvers aimed at offering a promise to a public official to grant or allocate, directly or indirectly, to himself or another entity, a reward or benefit of any kind in connection with preparing a public procurement or an addendum, or its conclusion, monitoring, negotiation, or execution, shall be registered in the list of economic operators prohibited from participating in public procurement.

It is noted in Article 89 of Public Procurement Regulation No. 15-247 that registration in the list of those prohibited from participating in public procurement is mandatory. In other words, registration in this list is not subject to the discretionary power of the contracting authority, unlike its authority to take any deterrent measure against the contracting operator. Article 89 allowed it to apply any appropriate deterrent measures, including the termination of the public procurement or its addendum or the cancellation of the procedure.

One of the most important observations regarding Article 89 of Public Procurement Regulation No. 15-247 is that the legislator did not specify whether registration in the list of economic operators prohibited from participating in public procurement is temporary or permanent. The article referred, in its fourth paragraph, to the Minister of Finance's decision to determine the methods of registration and removal from the list.

Paragraph 02 of Article 89 of Public Procurement Regulation No. 15-247 obligated the contracting operator to submit the declaration of integrity, whose model is specified in Article 67 of this decree.

2– Temporary Prohibition from Participation in Public Procurement

After discovering the evidence incriminating the economic operator, the contracting authority or its representative, or any competent authority, sends a detailed report to the head of the public authority or the concerned minister. Before deciding on the case presented, the latter must summon the concerned economic operator by registered letter with acknowledgment of receipt to submit his response to the alleged acts within a period not exceeding 10 days.

If the concerned economic operator does not respond within the specified period or does not provide convincing elements capable of refuting the evidence against him, the head of the

public authority or the concerned minister issues a reasoned decision temporarily prohibiting the concerned economic operator from participating in public procurement, and this decision is sent to the concerned economic operator.

3– Appeal Against the Temporary Prohibition Decisi

After notifying the concerned economic operator of the decision of temporary prohibition from participating in public procurement issued against him, he may appeal it before the competent judicial authority in accordance with Article 03 of the Order dated 19 December 2015, which determines the procedures for registration and removal from the list of economic operators prohibited from participating in public procurement mentioned above. The Order did not specify any special conditions or procedures for the appeal submitted by the concerned economic operator. Thus, what is meant by the appeal is filing an annulment action against the decision, subject to the conditions and procedures established by the amended and supplemented Code of Civil and Administrative Procedures.

4- Results of not appealing the decision of temporary prohibition from participating in public procurement:

If the economic operator against whom the decision of temporary exclusion from public procurement was issued does not submit a judicial appeal within the four-month period starting from the date of notification of the decision of temporary exclusion from public procurement, he shall be registered in the list of economic operators prohibited from participation by a decision issued by the head of the public authority or the competent minister, and this decision shall be notified to the concerned economic operator.

5- Results of appealing the decision of temporary prohibition from participating in public procurement:

An appeal submitted by the concerned economic operator against the decision of temporary prohibition from participating in public procurement results in a set of legal effects that fall under one of the following two scenarios:

5-1 Annulment by the competent court of the decision of temporary prohibition from participating in public procurement:

If the competent court accepts the judicial appeal submitted to annul the decision of temporary prohibition from participating in public procurement, it shall be lifted by a decision issued by the head of the public authority or the competent minister.

It is worth noting that the term *annulment* mentioned in Article 5 of the Order dated 19 December 2015, which determines the procedures for registration and removal from the list of economic operators prohibited from participating in public procurement, is criticized, as it

would be preferable to use the term *cancellation of the decision of temporary prohibition from participating in public procurement*.

5-2 Confirmation by the competent court of the decision of temporary prohibition from participating in public procurement:

If the competent court to which the appeal against the decision of temporary prohibition from participating in public procurement was submitted deems the decision lawful and refuses to cancel it, the head of the public authority or the competent minister shall issue a decision registering the concerned economic operator in the list of economic operators prohibited from participating in public procurement, and the concerned party shall be notified with a copy of this decision.

A copy of the registration decision in the list of economic operators prohibited from participating in public procurement shall be communicated to all contracting authorities or published on the public procurement electronic portal as a decision of final prohibition from participating in public procurement. Consequently, registration in the list of economic operators prohibited from participating in public procurement has absolute authority against all contracting authorities, becoming effective from the date of its issuance, and each contracting authority must verify the list before accepting any bidder's submission. Thus, registration in the list of economic operators prohibited from participating in public procurement constitutes one of the exclusion conditions from participating in public procurement procedures; in other words, it is considered an exclusionary condition that leads to rejecting the file of its holder even before examining the offer he submits.

Conclusion:

The sanction of removing the name of an economic operator consists in inserting it into the list of economic operators prohibited from participating in public procurement, making it one of the exclusionary conditions that lead the public purchaser to reject the offer submitted by a specific person regardless of his technical and financial capacities.

The main points of the study can be summarized as follows: One of the cases of exclusion or prohibition from participation is the registration of the economic operator in the list of economic operators prohibited from participating in public procurement. This may occur in two ways: either through automatic temporary exclusion or through a formal decision, which is an administrative act issued by the contracting authority when one of the legal grounds against the economic operator is established, including inserting his name in the list of economic operators prohibited from participating in public procurement.

Alternatively, exclusion may be final by a decision issued by the head of the public authority or the competent minister registering the concerned economic operator in the list of economic operators prohibited from participating in public procurement after the expiry of the judicial appeal period, which prevents the economic operator against whom the temporary prohibition decision was issued from participating in public procurement, or after the confirmation of the decision by a judicial judgment issued by the competent judicial authority to which the economic operator appealed to annul the temporary prohibition decision issued against him. Finally, we urge the Algerian legislator to intervene to issue regulatory texts clarifying the mechanisms for implementing the provisions of Law No. 23-12 and the necessity of addressing the redefinition of exclusion cases and their procedures, whether these cases occur through traditional means or are committed by the economic operator using modern information and communication technologies. Until then, electronic documents may be analogized to their paper counterparts.

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