

Public procurement of local authorities between legality requirements and economic efficiency imperatives:

A study of the content of Article 103 of Law 23/12

Abderrahmane Tourirat¹, Mounir berrabah²

University Center of Barika, Algeria

[Abderrahmane.tourirat@cu-barika.dz] (mailto : abderrahmane.tourirat@cu-barika.dz)

[Mounir.berrabah@cu-barika.dz] (mailto : mounir.berrabah@cu-barika.dz)

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Abstract

The subject of supervisory control over public procurement of local authorities under Law 23/12 aims to highlight the role exercised by the supervisory authority in monitoring and guiding the activity of local authorities when concluding and executing public procurement contracts, thereby ensuring respect for legality, protecting public funds and achieving economic efficiency. The main objectives of this supervision include ensuring that contracts comply with applicable legislation and regulations, guaranteeing respect for the principles of transparency, equality and free competition in the selection of the contracting partner, in addition to rationalising public expenditure and preventing manifestations of corruption. Administrative supervision also aims to ensure the consistency of contracts with local development programmes and the state's economic priorities, while seeking to achieve a balance between the autonomy of local authorities and the necessity of subjecting them to control in order to safeguard the public interest.

Keywords: Public procurement; supervisory control; local authorities.

Introduction:

The supervisory system serves as the mirror reflecting the performance of public administration in the state, showing the extent of the administrative apparatus's efficiency or its failure to meet public needs. Through supervisory control, which is one of the most important elements of oversight, administrative supervision is a fundamental pillar of any decentralised organisation, as it is the closest body to monitor implementation as well as the final delivery of the project.

The successive public procurement laws have not devoted significant space to supervisory control, whether prior or subsequent. Law 23/12 ¹ and Presidential Decree 15-247 ² addressed it in a single article rather succinctly, leaving it to other legal texts that have dealt with it, such as the Municipality Law ³, the Wilaya Law⁴, and other provisions.

Supervisory control⁵ in the field of public procurement aims at two objectives: on the one hand, it aims to respect the principle of legality by complying with the prescribed legal procedures; on the other hand, it aims to verify that the contracts entered into by the contracting authority conform to the objectives of effectiveness and economy, and that the subject matter of the contract falls within the framework of the programmes and priorities set for the sector⁶.

Accordingly, we pose the following problem:

To what extent does supervisory control over the public procurement of local authorities contribute to achieving a balance between ensuring respect for legality on the one hand, and achieving economic efficiency and sound management of public funds on the other hand?

To answer this problem, we followed the descriptive and analytical method by addressing the various legal texts that clarify the extent to which legality control is entrenched under local authorities law (firstly), then we address supervisory control dedicated to economic efficiency under public procurement law (secondly).

Firstly: Legality Control under Local Authorities Law

Legality control exercised by the supervisory authority takes place before the commencement of the public procurement contract, i.e., before the issue of the order to start works for the contractor awarded the project. The aim is to verify that the contract has been concluded in accordance with the applicable legal and regulatory procedures, while respecting the principles of transparency and competition. We will clarify this control through the Municipality Law and then the Wilaya Law.

1) Prior Supervisory Control under the Municipality Law

The supervisory authority exercises its control over the acts of regional decentralised bodies in order to ensure respect for laws and the principle of legality of acts. This control is based on the powers vested in the supervisory authority under the Municipality Law, which granted the State representative at the wilaya level the power to exercise legality control over the deliberations of municipal people's assemblies in accordance with Article 57 of the Municipality Law, in order to verify their compliance with the law and their validity.

With regard to municipal contracts, the conclusion of contracts and procurement falls within the competence of the president of the municipal people's assembly as the representative of the municipality. However, the latter cannot sign the contract until after authorisation from the municipal people's assembly by way of a deliberation which itself is subject to approval by the wali, such approval extending to both the deliberation and the contract together⁷.

The municipality is obliged to send the complete contract file to the State representative at the wilaya level⁸, and the date of dispatch marks the beginning of the calculation of the legal deadlines granted to the wali to take his decision regarding the approval of the deliberation containing the authorisation for the president of the municipal people's assembly to sign the contract. This date is also used to calculate the time limits for appeal in the event of the wali's refusal, as well as in the case of his silence, where the lack of a response within 30 days⁹ is considered implicit approval¹⁰.

The wali assesses the legality of the deliberation on the basis of the attached documents that constitute the legal framework for the contract¹¹. The wali is granted a period of 30 days from the date of dispatch to decide on its legality, and this control produces one of the following effects:

- **Approval of the contract:** The deliberation is returned to the municipality approved by the wali, and it is displayed at the municipality headquarters. In this case, the contracting authority

issues the order to start works to the contracting enterprise, and the execution deadlines begin to run from the date of the order to commence execution.

- **Amendment or correction of errors:** If the deliberation or the contract file contains formal or substantive errors that do not affect the essence of the contract, the wali requests the municipality to correct them.

- **Annulment:** In the event of a legal violation, whether in the contractual documents or in the procedures for concluding the contract, the wali decides to annul the deliberation by a reasoned decision. The municipal people's assembly may submit an administrative appeal or bring legal proceedings before the competent administrative court, in accordance with the applicable conditions and procedures¹².

In any event, certain deliberations are considered null and void by operation of law under Article 59 of the Municipality Law, meaning they are deemed never to have existed and have no legal effect. The cases that lead to nullity have been specified as follows¹³:

- Deliberations taken in violation of the Constitution and not in conformity with laws and regulations, particularly Articles 2-3-9- thereof.
- Deliberations that affect the symbols and emblems of the State.
- Deliberations not drawn up in the Arabic language.

2) Prior Supervisory Control under the Wilaya Law

The deliberations of the wilaya people's assembly are subject to the control of the minister responsible for the interior, as they do not become effective until after his approval in accordance with Article 55 of the Wilaya Law.

The acts of the wilaya people's assembly are subject to control aimed at examining their legality and their conformity with legislation and regulations, thereby ensuring the soundness and legality of deliberations and entrenching the rule of law and institutions.

The contract file consists of all the documents that were addressed in the study of the procurement field in the Municipality Law, and the same procedures are followed in accordance with the provisions of the Wilaya Law.

The law grants the Minister of the Interior a period of two months¹⁴ from the date of referral of the deliberation to him for approval and to decide on its legality and validity. The exercise of this control produces the following:

- **Approval of the contract:** The deliberation is returned to the wilaya approved by the minister, and the order to start works is issued in favour of the contracting partner, and the execution deadlines begin to be calculated.

- **Amendment or correction of errors:** If there are rectifiable errors, they are requested to be corrected.

- **Annulment:** In the event of a legal violation, the deliberation is considered null and void by operation of law¹⁵.

Secondly: Supervisory Control under Public Procurement Law

Article 103 of Law 23/12 and Article 164 of Presidential Decree 15-247 are the sole articles that provide for supervisory control. This control aims to ensure that the contracts entered into

by the contracting authority conform to the objectives of effectiveness and economy, and to verify that the operation which is the subject of the contract falls within the framework of the programmes and priorities set for the sector. These provisions also oblige the contracting authority to prepare an evaluation report, which is sent according to the nature of the expenditure committed. We will address it through two main stages:

1) Control during the Execution of the Contract

In order to achieve the objective set out in Article 103 of Law 23/12 and Article 164 of Presidential Decree 15/247, namely ensuring that the contract concluded by the contracting authority conforms to the objectives of effectiveness and economy, we must first define what is meant by these two terms.

Effectiveness means measuring the extent to which the intended objectives of the contract are achieved against the objectives actually realised – i.e., the ability of the public institution to achieve its objectives, expressed by the relationship between the results achieved and the set objectives¹⁶.

Economy means resorting to the lowest possible cost while achieving appropriate quality and the required quantity in expressing the public need and at the appropriate time, based on the analysis of public needs and the conditions for the rational use of resources¹⁷.

Supervisory control is based on inspectorates specifically established to evaluate and control the activities of bodies and agencies placed under supervision. There are central general inspectorates established within various ministries¹⁸ and local general inspectorates established at the level of each wilaya¹⁹.

At the central level, the general inspectorate is tasked, with regard to public procurement, with carrying out investigations aimed at monitoring the conditions of soundness, integrity and fairness under which the preparation, conclusion and execution of contracts concluded by ministerial departments, deconcentrated departments, or public institutions and agencies placed under supervision have been carried out. The central general inspectorate performs a set of tasks²⁰:

- Ensuring the proper and regular functioning of the bodies placed under supervision and remedying deficiencies in their management.
- Ensuring the application of legislation and regulations as well as standards and techniques in the sector.
- Proposing all measures and recommendations to improve the management of the inspected bodies.

The general inspectorate exercises its control within the framework of an annual control programme approved by the competent minister. The inspector, while carrying out his duties, enjoys wide powers of monitoring, investigation and enquiry, whether on the basis of documents or on site. Its activity is summarised in an annual report sent to the supervisory minister.

At the local level, there are general inspectorates at the wilaya level, tasked within their competence with monitoring the conformity of the procedures for concluding public procurement contracts entered into by municipalities and public institutions of an

administrative nature under their authority, as well as the execution of public procurement contracts.

The function of the general inspectorate, placed under the authority of the wali, consists of three tasks: control, information and evaluation. It may also carry out investigations whenever the wali deems it necessary²¹.

However, in practice, this control is not exercised to a great extent, and if it is carried out, it is superficial and does not investigate the files of public procurement contracts that are in the process of execution. Moreover, the legislator did not explicitly stipulate the mandatory nature of this control in the law regulating public procurement, which will affect the achievement of effectiveness and economy in the field of public procurement.

2) Control after the Execution of the Contract

This control is an evaluation tool in the hands of the bodies responsible for it to measure the efficiency of the operation and evaluate the methods of its execution, in addition to evaluating the performance of the various actors involved. Article 164 of Presidential Decree 15-247 stipulated the obligation of the contracting authority to prepare an evaluation report relating to the conditions of project completion and their total cost, comparing them with the objectives set in advance, upon the final delivery of the project.

This report is sent, according to the nature of the expenditure committed, to the minister, the wali, or the president of the competent municipal people's assembly, as well as to the competent external control bodies. A copy of this report is also sent to the Public Procurement and Public Service Delegations Regulatory Authority.

This supervisory control aims to enable the evaluation of the actual feasibility of projects compared to the feasibility studies previously carried out. It also allows the supervisory authority to review the conditions of completion, compliance with the specified deadlines, the obstacles encountered during the execution process, the extent to which the completion matches the set objectives, and respect for the appropriations allocated to the project²².

Conclusion:

Through the study of the objectives of supervisory control over the public procurement of local authorities under Public Procurement Law 23/12 and the Municipality and Wilaya Laws, with a view to entrenching the legality of public procurement and achieving the desired economic effectiveness, we have arrived at a set of findings:

1. Entrenching the legality of public procurement of local authorities and its conformity with the laws and regulations in force.
2. The extension of supervisory control to all stages of public procurement of local authorities (before, during and after execution), which ensures comprehensive monitoring and limits violations.
3. The primary objective of supervisory control is to ensure economic effectiveness and sound management of public funds at the local level.
4. Supervisory control contributes to strengthening the principle of competition and respect for transparency and efficiency in local public management by selecting the best offer from an economic perspective.

5. The density of control stipulated in the Municipality and Wilaya Laws and other laws may lead to slow procedures in concluding public procurement contracts.

Based on the findings reached, we offer the following suggestions:

- 1- Training human resources at the local level responsible for the supervisory control process in the legal and economic management of public procurement.
- 2- Supporting digitalisation in the management and monitoring of public procurement of local authorities to entrench transparency.
- 3- Strengthening intelligent prior control based on efficiency and digitalisation, rather than relying solely on traditional formal control that may lead to the disruption of local projects.
- 4- The necessity of achieving a balance between control and administrative flexibility to ensure efficiency without disrupting local public projects.

References:

Firstly: Laws

Law No. 11-10 of 22/06/2011 relating to the municipality, Official Gazette No. 37.

Law No. 12-07 of 21 February 2012 relating to the Wilaya Law, Official Gazette No. 12.

Law No. 23-12 of 05 August 2023 defining the general rules relating to public procurement, Official Gazette No. 51, dated 06 August 2023.

Presidential Decree No. 15-247 of 16 September 2015 relating to the organisation of public procurement and public service delegations, Official Gazette No. 50, dated 16 September 2015.

Décret exécutif 90-188 du 23/06/1990 déterminant les structures et les organes de l'administration centrale des ministères. J.O. n° 20.

Décret Exécutif n°94-216 du 23/07/1994 relatif à l'inspection générale de wilaya. J.O. n° 48.

Secondly : Books

Al Nawa Kharashi, Project Management within the Framework of Public Procurement Organisation, Dar Al Khaldouniya for Publishing and Distribution, Algeria, 11th edition.

Hussein Mohamed Abdel Aal, Administrative Control between Management Science and Administrative Law, Dar Al Fikr Al Jami'i, Alexandria, 2004, p. 167.

Ammar Boudiaf, Explanation of the Municipality Law, Jusour for Publishing and Distribution, Algeria, 1st edition, 2012.

M. Sabri, K. Aoudia, M. Lalle, Guide de marchés publics, éditions du sahel 2000.

Thirdly : Theses

Abdelwahab Allag, Control over Public Procurement in Algerian Legislation, Master's thesis, Faculty of Law and Political Science, University of Biskra, academic year 2003-2004.

Footnotes:

^{1^} Law No. 23-12 of 05 August 2023 defining the general rules relating to public procurement, Official Gazette No. 51, dated 06 August 2023.

^{^2^} Presidential Decree No. 15-247 of 16 September 2015 relating to the organisation of public procurement and public service delegations, Official Gazette No. 50, dated 16 September 2015.

^{^3^} Law No. 11-10 of 22/06/2011 relating to the municipality, Official Gazette No. 37.

^{^4^} Law No. 12-07 of 21 February 2012 relating to the Wilaya Law, Official Gazette No. 12.

^{^5^} Supervisory control has been defined as "the sum of powers decided by law for a higher authority over the persons and acts of decentralised bodies for the purpose of protecting the public interest". See: Ammar Boudiaf, *Explanation of the Municipality Law*, Jusour for Publishing and Distribution, Algeria, 1st edition, 2012, p. 37. It has also been defined as "control of legality and appropriateness over the acts and actions of regional or service-based decentralised bodies by central authorities, with the powers they have in this regard". See: Hussein Mohamed Abdel Aal, *Administrative Control between Management Science and Administrative Law*, Dar Al Fikr Al Jami'i, Alexandria, 2004, p. 167.

^{^6^} Article 103 of Law 23/12 and Article 164 of Presidential Decree 15/247.

^{^7^} Al Nawa Kharashi, *Project Management within the Framework of Public Procurement Organisation*, Dar Al Khaldouniya for Publishing and Distribution, Algeria, 11th edition, p. 387.

^{^8^} Article 194 of Law 11-10.

^{^9^} Article 57 of Law 11-10.

^{^10^} Al Nawa Kharashi, same reference, p. 387.

^{^11^} Al Nawa Kharashi, previous reference, p. 388.

- Deliberation of the municipal people's assembly, as well as previous deliberations on the same subject if they exist.

- Minutes of opening of bids.

- Minutes of evaluation of tenders.

- Decision of the competent public procurement committee.

- The contract in question, including the letter of tender and the declaration of acquisition, accompanied by its special terms and conditions.

- All documents arising from the preparatory process that led to the conclusion of the contract.

- Report setting out the reasons for the non-viability of the tender.

- Report of justifications for resorting to the negotiation formula, and any information relating to the procedures concerning the contract.

- Minutes of the announcement of the tender in the national newspapers.

- Any other supplementary document that the municipal people's assembly deems relevant to the subject, or that the State representative considers necessary for exercising control over it, such as the enterprise winning the contract and the amount of the contract.

^{^12^} Article 61 of Law 11-10.

^{^13^} Article 59 of Law 11-10.

^{^14^} Article 55 of Law 12-07.

^{^15^} Article 53 of Law 12-07 itself.

^{^16^} Abdelwahab Allag, Control over Public Procurement in Algerian Legislation, Master's thesis, Faculty of Law and Political Science, University of Biskra, academic year 2003-2004, p. 115.

^{^17^} Abdelwahab Allag, same reference, p. 115.

^{^18^} Article 17 of Executive Decree 90-188 of 23/06/1990 determining the structures and bodies of the central administration of ministries, O.J. No. 20.

^{^19^} Executive Decree No. 94-216 of 23/07/1994 relating to the wilaya general inspectorate, O.J. No. 48.

^{^20^} M. Sabri, K. Aoudia, M. Lalle, Guide de marchés publics, éditions du sahel 2000, p. 120.

^{^21^} M. Sabri, K. Aoudia, M. Lalle, op. cit., p. 121.

^{^22^} Al Nawa Kharashi, previous reference, p. 410.