

## Opening and Evaluation Committee For Public Procurement

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### Abstract:

The Algerian legislator, through Presidential Decree 15/247, has subjected administrative contracts to an effective control system for fear of violating the rules and procedures for their conclusion, through the system of the Bid Opening and Bid Evaluation Committee, a technical committee whose mission is to open bids submitted by economic dealers, as well as evaluate These offers are technically and financially, and give their opinion about who has the right to this deal, and thus their effective role in terms of preserving the principles of administrative contracts, such as equality between candidates, transparency of procedures, and freedom of access to public requests and on the other hand, preserving public money and the quality of Projects to be completed.

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## 1. INTRODUCTION:

The development of the activity of the public services of the State and the enlargement of their domains have increased the volume of public expenditure in particular, that carried out within the framework of administrative contracts, the latter becoming one of the means the most important ones engaged by the administrative services, whether to meet their needs or within the framework of the realization of public projects.

The interest of the Algerian legislator in regulating administrative contracts as a legal mechanism for the execution of a large part of public expenditure appears during the multiplicity of successive regulatory texts, through which it has always sought to rationalize public expenditure. and enshrine the principles of competition, transparency, and free access to public demand, and on the other hand, the appearance of effects The negative impact of the financial crisis emanating from the deterioration in oil prices has the State had to take into account in the development of its financial policies, the search for mechanisms and means of rationalizing its public expenditure. It's public spending, and perhaps the most important feature of the new law is the creation of an envelope opening and bid evaluation committee instead of the two-committee system represented by the opening committee tenders and the tender evaluation committee.

Article (160) of Presidential Decree 15/247 regulating administrative contracts stipulates: **“Within the framework of internal control, the contracted service costs one or more standing committees responsible for opening folds, the analysis of the offers, and, if necessary, the variants and options hereinafter referred to as tender opening and evaluation commission offers”**. (decree15/247, 2015, p 39)

Through the above, we will try to answer this problem by posing the following problem:

What is the concept of the Bid Opening and Evaluation Commission in light of the provisions of Presidential Decree 15/247 governing administrative contracts?

To answer this problem, the plan is divided into two parts. The first part includes the formation of the bid opening and evaluation commission and its organizational rules. In a second part, we will study the attributions of the commission of opening and evaluation of folds and the nature of its missions.

## 2. The Rules of Organization of the Tender Opening and Evaluation Committee:

The system relating to the formation of the tender opening and evaluation commission, its rules of the organization, and its workflow is of great importance because of its role in consolidating the independence of the commission, and its efficiency in carrying out its tasks and embodies transparency, And the selection of the commissions for opening and evaluating the envelopes and the mode of succession of its members. (Nouy, 2012, p 212)

### 2.1 Composition of the Bid Opening and Evaluation Committee:

The text of the article (160) of the presidential decree specified the composition of the commission of qualified employees affiliated with the administration, and consequently, the study of the composition of the commission of opening of folds and evaluation of bids as an internal control mechanism in administrative contracts requires knowing which authority is competent to set up the committee, as well as studying the method of appointing its members and the conditions of their selection, their number and the duration of their mandate.

#### A. The legal framework of the commission:

Article (160) paragraph (1) of the presidential decree regulating public procurement: **“Within the framework of internal control, the contracted service costs one or more standing committees responsible for opening folds, the analysis of the offers, and, if necessary, the variants and options hereinafter referred to as tender opening and evaluation commission offers”**. (decree15/247, 2015, p 39) The decision to establish the committee is within the powers of the administrative officer, in that sense the head of the establishment constitutes the commission, by decision, and we note here that the legislator by the text of the article (160) did not oblige the administration to create a single commission, but it can rather create more commissions to open the envelopes and evaluate the offers, and there we can say that the legislator The Algerian wanted to avoid the slowness in the administrative work resulting, perhaps, from the accumulation of files within the public procurement framework by certain principals who stand out for the abundance and diversity of their public contracts due to the nature of their activity. (Rouault, 2005, p 489)

It should be noted that article (160) paragraph (2) of the presidential decree on the regulation of administrative contracts provides: **“The contracting service may be set up, under its responsibility, a technical committee in charge of the development of the analysis report of the offers for the needs of the bid opening commission and evaluation of offers”**, and therefore grant the legislator The administration has the possibility of instituting a technical committee responsible for drawing up a report analyzing the tenders for the needs of the commission of opening and evaluation of offers. It is noted here that the legal text raised an ambiguity on the question of the creation of a technical committee. Is it a technical committee formed at the request of the tender and evaluation committee, or is the institution responsible? Who appreciates the importance of it and establishes it by themselves, and whether the members of the technical committee should belong to the administration or not, although the establishment of a technical committee is not necessary because it is assumed that the composition of the bid opening and bid evaluation committee includes technical members or members with knowledge and experience in the field and the type of business that the administration concludes, and consequently the legislator could waive the right to the idea of a technical commission.

## **B. Conditions of Membership of the Commission:**

The current regulation of administrative contracts is accompanied by new provisions relating to the composition of the Commission for the Opening and Evaluation of Bids, including the suspension of the composition of the Commission subject to the availability of competence, and this is what was stipulated in article (160) in its second paragraph, which stipulated: **“This committee is made up of qualified officials, belonging to the contracting service, chosen based on their competence”**, (decree15/247, 2015, p 39) that the Commission for the evaluation of offers is composed of qualified officers who are chosen for their competence, unlike the repealed section law which required competence in the composition of the bid evaluation committee without the bid evaluation committee, Authorized to exercise the attributions entrusted to the Commission for the Opening and Evaluation of Bids.

In addition, the new law stipulated for the composition of this committee that the employee should be subordinate to the administration, which was not provided for in this matter.

The Bid Evaluation Committee in the repealed law, thus eliminating the phenomenon of appointing members outside the administration for purposes not related to the public interest as much as they are related to certain narrow objectives of the supervisors, this phenomenon was observed by some institutions subject to the conclusion of their contracts to the presidential decree, on this basis the problematic application arose The condition of employee for local authorities, although the elected council is an essential organ of the organs of administration and

management of local authorities, no elected official may be a member of the bid opening and bid evaluation commissions, given that they are elected and none of them has the quality of employee during the exercise of his electoral functions, referred to in the organic law of the public service, given that they are delegated for these tasks and not employees within the meaning of ordinance n° 06/03 relating to the public service, as Article (4), its first paragraph, defines a public official: **“Any official appointed to a permanent public post is considered to be an official...”**. (order03/06, 2006, p 3) Accordingly, according to the text of article (162) of the presidential decree, the official of the administration is responsible for determining the legal and organizational procedures in force for the appointment of the members of the committee for the opening of the envelopes and evaluation offers. The text of this article was silent on the number of members of this committee and their duration of membership, leaving the matter to the discretionary authority of the civil servant of the administration, the legislator is supposed to fix the minimum number of members of the committee and specify the duration of their mandate for a certain period, as a mechanism guaranteeing their independence, unlike the French legislator, who determined their number with a president and five members, under the law on administrative contracts. (Abdelhaq, 2017, p 70)

In this regard, it can be said that the Algerian legislator omitted the text on the need to allocate a financial allocation to the members of the bid opening and bid evaluation commission, according to the files, the sessions, and the type of markets they serve. The motivating element in such work is important, both to avoid manifestations of administrative and financial corruption and to induce members to their duties, and avoid manifestations of absence and evasion during opening and control.

Here, let us note that the legislator recognized the need to grant to the arbitration commission provided for in article (48) in paragraph (6): **“The contracting service may pay bonuses to the winner(s) of the competition, by the jury's proposals, according to the rates and methods set by the joint order of the minister responsible for housing and the minister responsible for finance”**. (decree15/247, 2015 p 13) Arbitration commissions receive a financial subsidy to their members for their fees. With this subsidy to the members of the commission for opening the envelopes and evaluating the offers, the question remains, is it an omission by the Algerian legislator, or is the work of arbitration worth it.

It can be said that the legislator has given the contracting authority broad powers to set up a committee for opening bids, evaluating tenders, and selecting and appointing its members, especially since they are employees of the contracting authority, and subject to the presidential authority of the Head of Administration, Carry out its missions to be considered as an internal control system in the field of administrative contracts.

## 2.2 Rules of Organization and Operation of the Committee:

Through the new organization of public procurement, we note that the Algerian legislator has granted the civil servant of the administration the power to determine the rules relating to the organization and functioning of the commission by a decision taken within the framework of legal and regulatory provisions.

Thus, the study of the rules relating to the organization and operation of the tender opening committee and the evaluation of the offers revolves mainly around the provisions relating to the meeting of the committee and its legal quorum, and that's what we'll cover through the first section of this requirement.

### A. How to Trade in Committee:

The Chief Administrative Officer is required by law to prepare a decision that includes rules relating to how the committee meets and its legal quorum to specify the ways and means, to

ensure that the summons is issued to the members of the committee and the quorum at which it is met, which is deemed to be at least an absolute majority or two-thirds of the members of the committee.

Thus, according to the text of the article (162) in its second paragraph of the presidential decree: **“However, the commission meets validly, during the bid opening session, regardless of the number of the members present”**. (decree15/247, 2015, p 39) The contracting authority must ensure that the number of members present ensures the transparency of the procedure. Thus, the quorum of the bid opening committee is valid regardless of the number of participants. As for the bid evaluation committee, the number of members present must allow the transparency of the procedure, in the sense that the quorum for convening the committee in the bid evaluation share is not less than two-thirds of the members, of the committee or by an absolute majority of its members at least.

About the meetings, the meetings of the tender opening commission are public, the commission recording its work relating to the opening of the envelopes and the evaluation of the offers in two special minutes numbered by the head of administration and marked with initials, the first report being reserved for the opening of envelopes. and the second record concerns the tender evaluation part, because it is in the direction of the violation It is clear that the meetings of the tender evaluation committee, which are valid only in the presence of a certain majority, are not provided for by the Administrative Contract Law, due to the different nature of the tasks of the committee in the opening part and the evaluation part, since the former mainly takes care of the formal administrative procedures related to the openness and does not take criteria for it, A technique that leads to the identification of the entity that holds the deal, unlike the evaluation part of the offers, which has a technical character, a search that at the end of the process affects the identification of the characteristics of the deal, entity that owns the deal more clearly than in the opening share. (Waline, 2005, p 640)

## **B. The Functioning of the Committee:**

As explained above, the Bid Opening and Evaluation Commission records its bid opening and bid evaluation work in two special registers numbered by the head of the establishment and marked with their initials.

Thus, the task of opening the envelopes follows the process of writing the minutes in the register designated for this purpose by the session clerk and signed by the members present and the process of evaluating the offers. It is necessary to develop a mechanism or method for weighing the decisions of the committee in the event of a tie vote between acceptance and rejection.

The minutes of the opening of the envelopes and the evaluation of the offers are of great importance since they facilitate the process of control by the bodies authorized by law to control the management agreements, whether bodies affiliated with the judiciary or bodies affiliated with the administrative body such as the control of the General Inspectorate of Finance and the Board of Accounts. Accordingly, the legislator is supposed to determine the responsibility of each of the head of the establishment and the committee for opening the envelopes and evaluating the offers in keeping the records, and the committee is supposed to be responsible for the records, In this case, the competent administrative agent must provide the Committee with the necessary means to protect and preserve the documents.

## **3. Powers of the Commission:**

Article (161) of the presidential decree that the committee for the opening and evaluation of bids, carries out the administrative and technical work, and submits it to the administration which awards the contract or declares the procedure futile and issues a reasoned opinion in this regard.

Therefore, the powers of the committee are to open the envelopes and to evaluate the offers submitted by the economic concessionaires, and therefore its tasks are divided into tasks related to the opening of the envelopes, and this is what we will discuss in the first requirement, and the tasks related to the evaluation of offers, which is what we will study in the second requirement.

### 3.1 Functions of the Committee in the Opening part of the Envelopes:

These powers are considered as formal administrative and preliminary work, materialized by the material preparation of the files and the offers of the contractors who present themselves to the competition on the subject of the business. After reception by the commission, represented by its president, of the files of the entrepreneurs of the administration, this one is supposed to be done according to a receipt specifying the number of entrepreneurs and their classification according to the date of deposit, knowing that the system of the contracts administrative authorities did not specify the terms of this step, however, the administration must take measures to protect the rights of entrepreneurs and ensure the transparency of the procedures until the submission of the bids to the bid opening commission and to the bid evaluation committee.

#### A. Envelope Contents:

The contractors submit their tender in three separate, well-sealed envelopes, each of which bears the name of the establishment, the reference of the call for tenders, and its subject. The first envelope is the application file, the second envelope relates to the technical offer, and the third envelope includes the financial offer. These envelopes are placed in a new, hermetically sealed envelope bearing the mention it can only be opened by the Commission for the Opening and Evaluation of Tenders. In this regard, Article (67) of the Presidential Decree clarified each of the application files, (decree15/247, 2015, p 18) the technical offer and the financial offer. In the case of the competition, the offer contains the application file and the financial and technical offer, and the service envelope, the content of which is specified in the specifications.

The commission checks the documents that each envelope or offer is required to contain by the aforementioned article (67), as well as all the documents mentioned. It is not required in the documents to be duly certified, except in exceptional cases by a legislative text or a presidential decree.

#### B. Envelope Opening Procedures:

The bid opening session must be compatible with the date and time limit for the submission of bids, which is the last day of bid preparation, and this as stipulated in Article (66) paragraph (1) of the presidential decree: **“In any case, the time taken to prepare offers must allow competition, as broad as possible, to play developed”**, as also indicated in the specifications and what is included in the announcement of the call for tenders. (decree15/247, 2015, p 18)

A public meeting is held and the administration summons all the tenderers or candidates to the bid opening session, as the case may be, in the notice of competition or by letter addressed to the contractors or candidates concerned. However, in the case of restricted procedures, the application files are opened separately, and in the case of a restricted tender procedure, the envelopes relating to the technical offers, the final technical offers, and the financial offers should open two times.

In the event of the competition, the envelopes relating to technical offers, services, and financial offers are opened in three stages, and the service envelopes are not opened by the jury, and it is up to the administration to allocate a safe place for financial envelopes until they are opened.

The tasks of the committee during the opening process according to the text of Article (71) of the Presidential Decree are as follows: (decree15/247, 2015, p 20)

- Validate the registration to the offers.

The list of candidates or contractors will be drawn up in the order of the date of arrival of their envelopes or offers, with an explanation of the content of the amounts and any discounts.

- Prepares a list of documents that are all displayed.

The members of the committee sign in initials the documents of the open folds which are not the subject of a request for additional information.

The minutes are drawn up during the meeting and signed by all the members present, provided that the reservations made by the members, if any, are noted therein.

- Invites the holders, if necessary, in writing, through the administration, to complete their technical offers under penalty of rejection of their offers with the missing documents required, with exception of the note of technical justification, within a maximum period of 10 days from the date of opening of the bids, and whatever happens, all documents issued by the contractor are excluded from the request for completion relating to the evaluation of the offers.

He proposes to the administration, in the minutes, to declare the procedure futile, according to the conditions provided for in article (40) of the presidential decree.

### **3.2 Tasks of the Committee in the Bid Evaluation Part:**

The task of evaluating the offers represents the technical aspect of the commission of opening the bids and evaluating the offers, this process being considered as very difficult and complex for the commission, both from the point of view of the validity of the requests tenders only of their compliance with the system of administrative contracts and the specifications approved by the administration, or when the difficulty of estimation and selection with regard to the multiple selection criteria in certain administrative contracts, and with all these long procedures and tasks carried out by the Tender Opening and Tender Evaluation Commission, the selection of the contracting concessionaire remains a prerogative of the administration, (Brahim, 2013) and from there, after studying the technical process of the Tender Evaluation Committee offers in the first section, we will try to identify the legal nature of the work of the Committee for the Opening of Envelopes and Evaluation of Offers through the intermediary diary of the second branch.

#### **A. Conducting a Bid Evaluation:**

The bid evaluation process, as stipulated in Article (72) of the Presidential Decree, (decree15/247, 2015, p 20) is carried out by the Bid Opening and Evaluation Committee, where the latter performs the following tasks: and the bids are non-compliant with the content of the specifications drawn up by the provisions of the presidential decree or the subject of the contract, and in the event of procedures not including a prior selection stage, the envelopes of technical, financial and related service offer to eliminated offers will not be opened.

The exclusion cases are defined as follows:

- Economic operators who have refused to complete their tenders or who have withdrawn their tenders, who are in a state of bankruptcy, liquidation, cessation of activity, legal settlement, or agreement.

- Those who are the subject of bankruptcy, liquidation, cessation of activity, legal settlement or reconciliation, or who have violated their professional integrity, and who do not fulfill their tax rights, and quasi-fiscal.

- Those who do not respect the legal deposit of their social accounts and who have made a false statement...

The committee, when evaluating bids, performs the following tasks:

- The remaining bids are analyzed in two phases, based on the criteria and methodology specified in the specifications. Initially, he draws up the technical offers, excluding offers that have not

obtained the minimum necessary score stipulated in the specifications. Secondly, it studies the financial offers of entrepreneurs that have been submitted to it. Qualify them technically from the start, taking into account any reductions in their offers.

- It proposes to the contracting authority to reject the successful tender if some of the practices of the contractor concerned are formed arbitrarily in a situation of market domination or are likely to lead to a disturbance of competition in the sector concerned, and the decision must be in the specifications, which is stipulated in the second paragraph of the text of Article (72) of the Presidential Decree.

- If the overall financial offer of the economic intermediary is temporarily retained or if one or more prices of its financial offer seem to it to be abnormally low compared to the reference price, it asks the administration in writing for the justifications and clarifications that it judges if necessary, and after verification of the justifications provided, he proposes to the administration to reject this offer if it decides that the holder's response is not economically justified, and the administration rejects this offer by a decision and it is what is provided for in the provisions of Article (72) of the Presidential Decree in its second paragraph.

- But if the financial offer of the economic operator temporarily selected is exaggerated compared to the tariff reference, it is proposed to the administration reject this offer.

- In the event of a restricted invitation to tender, the best offer in terms of economic advantages will be retained. They called for the weighting of several criteria.

- In the event of a call for competition, the Commission for the Opening and Evaluation of Bids proposes a list of the selected winners to the management and then studies their financial bids to select the best bid in terms of economic advantages, based on the weighting of several criteria is what was stipulated in the second paragraph of the text of the article (72).

## B. The Legal Nature of the Committee's Work:

Regarding the text of Article (161) of the Presidential Decree, the work of the Tender Opening and Evaluation Commission is considered technical administrative work. the agreement, and issued a reasoned opinion in this regard, and therefore the work of the committee is considered a material and priority act over the granting of the agreement, since the final decision to grant the agreement remains the prerogative of the head of the administrative body, and therefore, the legal recourse is in the decision of the management and not in the decision of the committee of the opening of folds and evaluation of offers. (andré de laubadre, jean claude vaneza, yves gaudemet, 2002, p 602)

On this basis, the legislator used the term “the committee proposes to the contracting authority”. In many legal texts included in the new regulation, administrative contracts, in particular those related to the missions of the commission, whether in the part of the opening of the bids or the part of the evaluation of the offers, we take up, for example, in the text of the article (71). Extract from the presidential decree regulating administrative contracts: **“propose to the contracting department, if necessary, in the minutes, to declare the fruitlessness of the procedure, under the conditions laid down in article 40 of this decree”**, (decree 15/247, 2015, p 20) meaning that this he is not the one who decides, but rather has the power to propose to the head of the administrative body, who has the power to decide.

It is on the one hand, and the other hand, the official administration must justify its decisions, whether they are based on the recommendations of the committee or for other reasons, and this is confirmed by numerous texts contained in and we take for example what was said at the end of the text of the aforementioned article (161). It issues a reasoned opinion in this regard, as well as the text of the aforementioned article (72): **“propose to the contracting authority to reject the tender of the economic operator selected on a provisional basis, deemed excessive about a price reference. The contracting service rejects this offer, by a reasoned decision”**.

- If it is related to the fact that the financial offer of the temporarily selected economic operator is exaggerated compared to the price reference, it is proposed to the administration to reject this offer, and the administration rejects this offer by a decision, and on this basis, the responsibility for awarding public contracts lies with the official administration and does not lie with the members of the committee if he has not followed their suggestion, and accordingly, the legislator is supposed to oblige the civil servant of the contracting authority to justify all his decisions, in particular those based on the proposals of the commission of opening of the folds and evaluation of the offers to facilitate the various bodies of external control the follow-up of the award process administrative contracts and the basis for decision-making in this regard.

Thus, it can be said that the nature of the work of the committee, in addition to being an internal control mechanism in the awarding of administrative contracts, contributes to administrative, technical, and advisory work that contributes to the process of concluding administrative contracts and helps the head of the contracting authority to make sound decisions, compatible with the organization of administrative contracts and under the requirements of the general interest.

It should be noted that administrative contracts are in principle different from unilateral administrative acts. Since they presuppose a voluntary agreement between the administration and its co-contracting party, we must not forget in the first place that administrative law is an unequal law. Secondly, it should be noted that administrative contracts are most often what is called Contracts of adhesion, it, therefore, leaves the co-contracting party little more than the choice of deciding whether to contract or not: the notion of contractual negotiation is therefore virtually absent in administrative law. As for unilateral actions, the original simplicity (the contract is administrative if it is the act of the administration) has given way to a more complex definition.

Thus, the criteria of the contracts are of jurisprudential origin. The first historical criterion was the organic criterion: to be administrative, a contract had to have been signed by at least one public person. This simplicity can be explained at the origins of administrative law when the administration dealt only with activities, not of interest to private persons. From the moment when the administration has been able to take an interest in the activities already carried out. (Gros, 2014, p 18)

#### **4. Results and Discussion:**

The committee for opening envelopes and evaluating offers is one of the mechanisms for rationalizing public expenditures.

The administration can create more than one committee to open envelopes and evaluate offers to avoid slow administrative work if it needs to.

The Committee for Opening and Evaluating Bids contributes to administrative, technical, and advisory work in concluding administrative contracts and assists the administration in making sound decisions.

The legislator neglected to stipulate the payment of financial compensation for the fees of the members of the Committee for Opening and Evaluating Bids, and this is one of the shortcomings in the legislation regulating public deals.

#### **5. CONCLUSION:**

The current law on administrative contracts had what distinguishes it from the rest of the previous laws, that is, the adoption by the legislator of the single commission system instead of the two committees which prevailed in the old organization, in line with the French legislator in

its adoption of the tender committee system, to facilitate the simplification of procedures for the sake of efficiency The Commission.

The law in force has also well regulated the powers of both the committee and the contracting authority, limiting the role of the former to administrative work and the latter to technical work by the text of articles (71) and (72) of the same decree and conferring on the latter the power to award or cancel the contract, or to declare invalidity, or to cancel the temporary award of the contract, by issuing a reasoned opinion on the matter. In its new organization, the Commission for the Opening and Evaluation of Bids is a control mechanism for the protection of public funds and the rationalization of public expenditure, and a concretization of the principles underlying the organization of administrative contracts. , represented in the principles of freedom of access to public requests, equality in the treatment of candidates, the transparency of procedures, and the protection of competition. Accordingly, we list several recommendations that can help fill some of the gaps:

The need to adjust the selection criteria, which is the identification and selection of the best offers in terms of economic advantages, by combining the price criterion with other criteria to achieve the element of quality, speed, and ability to achieve, gain experience, and technology, and highlight the aesthetic value and other international standards approved in this regard.

The need to associate all the economic operators, the various services specialists, and experts during any amendments to the texts regulating the internal administrative control provisions on administrative contracts.

The legislator must also remedy the allocation of a subsidy to the members of the Commission for the Opening and Evaluation of Bids to motivate them to do the work they do and to protect them from slipping into the path of corruption.

Finally, we have tried, through this study, to shed light on this type of control in the organization of public contracts to give it the role and place it deserves in the provisions of the presidential decree regulating administrative contracts.

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