

newsletter

PUBLIC LAW | ALGERIA |

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NEW CODE OF PUBLIC TENDERS ENTERS INTO FORCE IN ALGERIA

A new regulation governing public tenders and public service delegation contracts, implemented by Presidential Decree no. 15-247 dated 16 September 2015 ("**Decree 15-247**") entered into force on 20 December 2015, i.e. three months after its publication in the Official Journal, in line with the provisions of its article 219.

Decree 15-247 upholds the main rules and provisions already in place under the previous regulation. In particular, it confirms the exclusion of public economic companies from the scope of the public tenders regulation, making them only responsible for "*drafting and ensuring their management bodies adopt procurement procedures, depending on their specificities, which are based on principles including free access to the tender process, equal treatment of bidders and transparency of procedures*".

Decree 15-247 further specifies the implementing procedures of a certain number of provisions in order to facilitate their application, and contains substantial modifications such as:

- **Raising the application thresholds for the public tender procedure.** From now on, public works and public supply contracts whose price is below 12,000,000 Dinars and study and service contracts whose price is below 6,000,000 Dinars are no longer required to implement a public tender procedure.
- **Explicit framework for the negotiation of "contract execution conditions".** As regards tender procedures, Decree 15-247 clearly re-states the prohibition in principle of any negotiation, while nonetheless enabling the service contractor, with the prior approval of the tenderer, to "review the contract and optimise its offer".

As regards procedures, whether in direct award or after consultation, Decree 15-247 expressly imposes the implementation of a negotiation committee and traceability of the negotiation proceedings.

- **Driving the promotion of national production.** As well as maintaining the application of a national preference margin, Decree 15-247 imposes that contracting services launch national tender procedures whenever "*national production or the national manufacturing entities*" can meet their needs. Additionally, except where impossibility is duly justified, foreign companies bidding alone for a tender are obliged to subcontract at least 30% of the contract price to Algerian companies.

- **Strengthening the supervision of public procurement contracts and of ethics in the granting of such contracts.** An authority for the supervision of public contracts and public service delegations has been set up, which enjoys autonomous management. The role of this authority is to draw up and monitor the implementation of the public tender regulation, and to rule on disputes arising from the execution of public tender contracts entered into with foreign companies.

Additionally, this authority must draft a code of ethics for public officials involved in the supervision, awarding and execution of public tender and public service delegation contracts.

Lastly, Decree 15-247 has abolished the Commission Nationale des Marchés (National Contract Committee). Contract supervision now falls within the scope of public contract committees working within the contracting services, and of sector-based public contract committees, depending on the contract price. This new organisation should, in principle, accelerate supervision procedures.

- **Limiting contentious appeals, in particular international arbitration.** In line with a recent trend of Algerian authorities, Decree 15-247 strengthens the case for friendly dispute settlements and limits resorting to arbitration in public tender procedures. Such approach is aimed at considering the recourse to arbitration as an exceptional means of dispute settlement, and was already retained in an Instruction by the Prime Minister in early 2015.

Committees for the friendly settlement of disputes have thus been set up with each minister, public institution manager and Wali. Contracting services must indicate, in their specifications document, that they will resort to these committees before taking a matter to court. The role of these committees seem to be restricted to national public markets, with article 154 of Decree 15-247 limiting their competence to "*disputes arising from the execution of public contracts entered into with national contracting partners*".

Additionally, when proposed by the minister concerned, resorting to an international arbitration body in the event of disputes arising from the execution of a public tender is now subject to prior approval formulated during a government meeting.

The main addition of Decree 15-247 resides in the implementation and express organisation of a **public service delegation mechanism**. Public entities or legal persons in charge of a public service can thus entrust the management of said public service to a private player through a concession, leasing, governance or management contract. Payment of such private player is ensured for the most part by the operation of the public service.

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