

Legislative Deficiency in Regulating the Handling Contract Under Law No. 23-12

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Abstract---Law No. 23-12 dealt with the provisions of the handling contract in a single article within the second section entitled “Handling” of the second chapter related to “Annex and Handling.” However, this discussion was limited or fell short of a comprehensive overview of the various legal aspects of this contract, as the legislator overlooked many of the fundamental issues that emerged from the practical reality, especially with regard to determining the conceptual framework of the handling contract, and the conditions that must be met for the validity of the contract. subcontracting, and the legal implications resulting from it, which makes it necessary to rectify this legislative deficiency through more precise and detailed regulation of the provisions of the handling contract.

Keywords---public contract, contracting interest, original contractor, contractor, legal deficiency.

Introduction

Public transactions are considered the legal and economic tool that the state uses to implement its public policies, and through which it implements development programs that contribute to the advancement and advancement of the national economy. In order for the state to be able to achieve its goals and achieve its objectives, it exerts its utmost efforts to choose an economic dealer that has a set of essential transactions, such as professional, technical, and financial competence and professional experience, with which the administrative authority guarantees the proper implementation of the transaction and the achievement of it. The public interest behind its contract.¹

¹ Abdel Aziz Abdel Moneim Khalifa, Implementing the Administrative Contract and Settlement of Its Disputes Judicially and Arbitration, Mansha'at Al Maaref, Egypt, 2009, p. 256.

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Hence, the personal consideration was of utmost importance to the administration, as it chose the contracting party on the basis of it, which imposes on him a fundamental obligation, once he carries out his contractual obligations, to carry out this implementation himself. ²If this is the general principle, it is not an absolute principle, as it accepts some exceptions due to the development of the functions and tasks that the contracting party carries out with the administration as a result of technical, scientific and economic progress, which the contract imposed on him. Subcontractor to carry out part of the tasks assigned to others.

Although subcontracting was not welcomed by jurisprudence and successive legal systems, which found a violation of the rule of personal consideration upon which the administration relies in choosing its contractor, it quickly imposed itself and became a realistic phenomenon that must be regulated in a way that achieves the public interest.

For this reason, we find that the Algerian legislator paid attention to subcontracting, like most countries in the world. He devoted two articles to subcontracting in the Civil Code under Chapter ³One of Chapter Nine, which includes contracts related to work, and under Section Three of it, he called it subcontracting, as Article 564 stipulated the definition of subcontracting by saying: "The contractor may entrust the implementation of the work in its entirety or in part to a subcontractor if he is not prevented from doing so by a condition." In the contract or the nature of the work does not require reliance on his personal competence, but in this case the subcontractor remains responsible towards the employer." Article 565 clarifies the rights of subcontractors and workers.

As for Presidential Decree No. 247-15,⁴ the term subcontracting was mentioned in Section Six, Chapter Four, under the name "handling" through only five legal articles (from Article 140 to 144 thereof) to clarify the extent to which the customer contracting with the contracting authority can resort to granting the implementation of part of the deal to a handler through the handling contract according to the conditions stipulated in this decree, provided that the handling does not exceed 40% of the amount. The totality of the deal, and the provisions of this decree emphasized the responsibility of the handler towards the contracting authority for the implementation of the part of the deal dealt with by handling, provided that the handling contract must contain specific data recognized by the law.

With this decree in force for nearly ten years, and in light of the economic and regulatory transformations that Algeria has witnessed, it has become necessary for the state to give more flexibility and a legislative character to the public procurement system, as it is the basic mechanism for granting public projects and achieving economic development.

In this context, Law No. 23-12 ⁵was issued, which came to consolidate this reform trend by upgrading the provisions of public contracts to the level of legislative texts. However, the regulation of handling in a single article within the second section entitled "Handling" of Chapter Two related to "Attachment and Handling" is considered insufficient to address the various aspects of this contract, especially since Decree No. 15-247 had dealt with its provisions in somewhat more detail through five articles, which It reflects a decline in regulation that requires legislative reconsideration to ensure clarity of the legal framework for the handling contract.

Accordingly, handling has become a natural method for implementing part of the public transaction due to its importance due to the advantages it enjoys, as handling is the most effective means of filling

² Mounia Jalil, *The New Organization of Public Procurement According to Presidential Decree No. 15-247*, Movem Publishing, Algeria, B.S.N., p. 189

³ Order No. 75-58 of September 26, 1975, containing the Civil Code, G.R. No. 78 issued on September 30, 1975, amended and supplemented

⁴ Presidential Decree No. 247-15, dated September 16, 2015, regulating public procurement and public utility authorizations, G.R. No. 50 issued on September 20, 2015.

⁵ Law No. 12-23, dated August 5, 2023, specifying the general rules related to public procurement, Article No. 51.

the deficit of the economic dealer in implementing huge projects, as they require large funds, mechanisms, expertise, techniques, and diverse and specialized competencies that cannot be combined in one economic dealer. Therefore, the space must be opened for the intervention of handlers who contribute to filling this deficiency, each according to his specialization. And his abilities.

Although the laws regulating the provisions of public contracts were keen to frame the handling contract, they overlooked some aspects, causing the practical reality to produce some legal problems, especially with regard to the conceptual framework of the handling contract and the conditions that must be met for the validity of the subcontract, in addition to the effects resulting from this contract. This is what prompts us to raise the following problem: To what extent has the legislator, through Law No. 23-12, regulated the handling contract in a way that ensures clarity of provisions and avoids the legislative oversight that resulted from previous texts?

To answer the problem raised and cover all its aspects, we relied on the analytical approach, by analyzing the content of the legal texts relevant to our topic and to answer the problems it raises, and the descriptive approach in order to describe the phenomenon of subcontracting.

Although the study is not a comparative study, we will find the comparative approach imposes itself in some points of research between Algerian and French law.

In this context, we divide this article into two topics as follows:

The first requirement: legal deficiencies in the conceptual framework of the handling contract.

The second requirement: some legal problems related to the legal organization of the handling contract.

The first requirement: Legal deficiencies in the conceptual framework of the handling contract (subcontracting).

It is not the legislator's job or habit to provide legal definitions, because the definition process is considered a difficult technical work, leaving this task to the jurisprudence and judiciary.

By extrapolating the provisions of Law No. 23-12, we notice that the term subcontracting was mentioned within the second section, chapter two, under the name "handling" in a single article only. The legislator did not define handling, but rather merely stipulated the possibility of resorting to it by the original contractor, taking into account that it is difficult for him alone to implement the public transaction with all its details and aspects, and this is not new for the legislator, as the process of definition does not fall within his duties, but it is an inherent specialty of law explainers and judiciary personnel.

In terms of terminology, we find several names for the term "handling". In the Civil Code, the legislator used the term "subcontracting" under Articles 564 and 565 thereof, and the term "secondary dealing" in regulating previous public transactions, while he used the term handling in both Presidential Decree No. 15-247, and Law No. 23-12, as well as Law No. 02-17,⁶ which includes the law. Guidelines for the development of small and medium enterprises within the second chapter entitled to promote handling within the second chapter entitled assistance and support measures for the promotion of small and medium enterprises.

In order to understand the term "handling," it is necessary to analyze Article 82 of Law No. 23-12, and compare it with Article 140 of Presidential Decree No. 15-247, which preceded it in regulating this contract, for the purpose of drawing similarities and differences between the two texts and the extent of development that the legislator has introduced to the regulation of handling (Section One). In order to fill the legal deficiency related to the definition of the term handling, it is necessary to point out its jurisprudential definitions, as the definitions given to it varied (Section Two).

⁶ Law No. 17-02, dated 01/10/2017, containing the directive law for the development of small and medium enterprises, G.R. No. 02 issued on 01/11/2017.

Section One: A reading of Article 82 of Law No. 23-12.

Before delving into the analysis of Article 82 of Law No. 23-12, it should be noted that administrative contracts are governed by general rules that apply to them all, even if the administrative contract does not contain an explicit text confirming it. Among these rules is that the obligations of the contractor with the administration are personal obligations, meaning that the contractor (the owner of the deal) must implement them personally and by himself and refrain from waiving them in whole or in part to others who are foreign to the contract. This was the general principle, but it is not an absolute principle, as it accepts some exceptions related to the handling contract.⁷

We find that the legislator allowed the contracting agent to contractually transfer part of the tasks assigned to him to others, with the intention of carrying them out under his legal responsibility in accordance with the provisions of Law No. 23-12,⁸ which is known as the handling contract, as handling in public contracts is considered one of the mechanisms for implementing state projects, as these projects require accuracy in planning, specialization and speed in implementation, in order to deliver these projects on time and according to standards. and required technologies.

Referring to the exception to personal performance, we find that Article 140 of Presidential Decree No. 15-247 stipulates that: "The contractor contracting for the contracting authority may grant the implementation of part of the deal to a handler through a handling contract, according to the conditions stipulated in this decree.

Whatever the case, the handling cannot exceed forty percent (40) of the total amount of the deal.

Ordinary supplies transactions cannot be the subject of handling. Ordinary supplies mean supplies on the market that are not manufactured based on specific technical specifications prepared by the contracting authority.

Article 82 of Law No. 23-12 states: "The contracting agent may grant the implementation of part of the public transaction through a handling contract, as the handling cannot exceed forty percent (40%) of the amount of the public transaction.

For foreign institutions that provide undertakings on their own, unless there is justification for the impossibility of doing so, they must contract under the handling of not less than thirty percent (30%) of the initial amount of the deal with institutions subject to Algerian law.

Based on the presentation of the text of the previous two articles, Article 140 of Presidential Decree No. 15-247 will first be analyzed, with its three paragraphs:

- After the issuance of Presidential Decree No. 15-274, the regulator adopted the term "handling contract" instead of "secondary dealing" used in previous public procurement regulations - a trend that is commendable - since the handling dealer has become a party concerned with implementing part of the subject of the original contract and handling the task and work from the original contracting dealer after the approval of the contracting authority, since the term secondary dealer indicates that it is secondary in relation to For the contracting interest, and despite that, he has a relationship with it.⁹
- The principle in the field of public procurement is that the contracting client undertakes all the work related to the public procurement, so there is no division in this field. However, Presidential Decree No. 15-274 departed from this rule and allowed the original contractor to cede part of the implementation of the transaction to the secondary client (the handler), because in practice there are many administrative contracts that require the contribution of more than one person in implementing

⁷ Ammar Boudiaf, *Explanation of the Organization of Public Transactions According to Presidential Decree No. 15-247 of September 16, 2015, Section Two*, Jusoor Publishing and Distribution, Algeria, 2017, p. 57.

⁸ Zeina Mekdad, *The Legal System for Handling in Public Transactions According to Presidential Decree No. 15-247*, Algerian Journal of Law and Political Sciences, Institute of Legal and Administrative Sciences, Ahmed Ben Yahya Al-Wancharisi University Center, Temsemsilt, Volume 6, No. 1, 2021, p. 362.

⁹ Al-Nawi Kharshi, *Public Transactions - An Analytical, Critical and Quantitative Study of the Public Transactions System*, Dar Al-Huda, Algeria, 2019, p. 358.

the subject of the contract¹⁰, such as a person contracting with the administration to build a complex. Residential, so the nature of the work required and the multiple specializations necessary to complete the work necessitated that the contractor contracting with the administration resort to concluding secondary contracts with a specialized company for digging foundations, with a specialized company for concrete works, with another for construction,¹¹ with a company for installing elevators and others, and thus the handling contract has become an indispensable necessity in many administrative contracts.

The second paragraph of the article - the subject of our analysis - came to specify the amount of this part that the original contractor can entrust to the handler to complete, so that this part does not exceed 40% of the total amount of the deal, which is an acceptable condition considering that the principle of personal implementation remains the general rule, so the services of the handler (the branch) cannot obscure the services of the main contractor (the original), and for reference, Presidential Decree No. 15-274 from its predecessor, with reference to this condition.¹²

- The regulator also stipulated, under the third paragraph, that the handler's place in regular supplies deals should not be those supplies that are on the market and are not manufactured based on specific technical specifications prepared by the contracting authority. It is understood from this that all areas of deals, whether works, services, studies, or even supplies, except for what this paragraph excluded, are subject to some parts being implemented through handling within the limits of the percentage stipulated in the second paragraph of the same article.

After analyzing the provisions of Article 140 of Presidential Decree No. 15-247, it is advisable to move on to studying Article 82 of Law No. 23-12, to find out what developments or amendments it brings in dealing with the issue of handling. This article allows the contracting dealer in public transactions to entrust the implementation of part of the deal to another party called the "handler," in accordance with the handling contract. However, the legislator has placed restrictions on this delegation. The most important of which is the percentage of works or services that can be delegated that does not exceed 40% of the total value of the deal, which aims to preserve the basic responsibility of the original customer and ensure the implementation of the largest part of the deal on his part.

As for foreign institutions that submit offers on their own, the legislator has required them, except in the case of justified impossibility, to conclude handling contracts with institutions subject to Algerian law at a rate of not less than 30% of the initial amount of the deal, with the aim of encouraging the participation of national institutions in the implementation of public contracts, transferring expertise and technologies, and supporting the local economy by involving Algerian customers in major projects.

It is clear by comparing the text of the two articles that the legislator preserved some of the essential provisions that were contained in Presidential Decree No. 15-247, while introducing limited amendments that represent a relative development in the organization of the handling contract within Law No. 23-12, and this can be stated as follows:

First: What is constant between the two texts.

*** Initial basis for handling:**

The legislator still allows the contractor to grant the implementation of part of the deal to a handler under the handling contract, which reflects the continued legal recognition of this method in implementing public contracts.

*** Determine the percentage at which handling is granted:**

Article 82 of Law No. 23-12 maintained the same percentage (40%) as a maximum for handling the amount of the public transaction, emphasizing that the contracting dealer remains the primary responsible for implementing the transaction.

*** Handling is subject to specific conditions:**

¹⁰ Nasri Mansour Nabulsi, *Administrative Contracts - A Comparative Study* - 2nd Edition, Zein Law Publications, Beirut, 2012, p. 79.

¹¹ Ibrahim Muhammad Ali, *Effects of Administrative Contracts*, Dar Al Nahda Al Arabiya, Cairo, 2008, p. 359.

¹² Ammar Boudiaf, *op. cit.*, p. 62.

In both texts, it is implicitly understood that handling is subject to the control of the contracting authority and that it is not concluded absolutely freely, but rather according to conditions determined by the legislator or the book of conditions.

Second: The variable between the two texts.

*** Development from a regulatory text to a legislative text:**

Article 82 of Law No. 23-12 came within a law and not a presidential decree, which means the transfer of the organization of the handling contract from the regulatory framework to the legislative framework, in a step aimed at consolidating the legal provisions and giving them higher mandatory force.

*** Delete some restrictions related to the nature of deals:**

Article 82 of Law No. 23-12, contrary to Article 140 of Presidential Decree No. 15-247, no longer provides for the exception of transactions of ordinary supplies from the possibility of handling. From this it may be understood that the legislator has expanded the field of application of handling to include broader types of transactions, which enhances contractual flexibility.

*** Expanding the scope of the obligation for foreign institutions:**

Law No. 23-12 added a new provision requiring foreign institutions that submit bids on their own to conclude handling contracts with institutions subject to national law at a rate of no less than 30% of the initial amount of the deal, unless there is justification for the impossibility of doing so.

This amendment shows an encouraging trend towards involving national institutions in implementing public contracts, supporting the local economy and transferring expertise.

Despite the increased interest in handling as one of the important methods in implementing public procurement contracts and proving its importance as a main driver of the development process and the advancement and development of the national economy, this method - i.e. handling - is often compatible with practical reality and in itself constitutes an indispensable practical necessity. The majority of contracting parties with the administration do not have all their own financial and technical means to fully implement the contract, and therefore they have no choice but to resort to Concluding secondary contracts with third parties with specialization for the purpose of full implementation of the project.¹³ The subcontractor is a factual and legal reality adopted by Presidential Decree No. 15-247 and stipulated the provisions of this type of contract within its articles and Law No. 23-12, but they did not provide a comprehensive and complete definition within the content of Article 140 of the same decree, and Article 82 of Law No. 23-12, so it has become necessary Today thinking about the legal reconstruction regarding the precise definition of the handling contract.

This is in contrast to Executive Decree No. 21-219,¹⁴ through which the regulator attempted to provide a definition of handling in accordance with Article 41 thereof, by stating that: "The process through which the contractor alone or an organizer within the framework of a temporary grouping of enterprises, by means of a handling contract and under his full responsibility, assigns another economic operator, called (the handler), to implement part of the public deal for the works concluded with the contracting authority."

In contrast to the situation in Algeria, the French legislator defined subcontracting under Law No. 75-1334 amending and supplementing subcontracting in its first article as: "The process by which the contractor, under his responsibility, entrusts another person called the contractor and subcontractor to implement all or part of the project or administrative contract concluded with the employer."¹⁵

¹³ Ahmed Mahmoud Ahmed Abu Musa, subcontracting within the scope of public works contracts in Palestine - a comparative study with Islamic law, Master's thesis, College of Sharia and Law, Islamic University, Gaza, 2016-2017, p. 1.

Law No. 75-1334, issued on December 31, 1975, regulating subcontracting, amended and supplemented.

¹⁴ Executive Decree No. 21-219 of May 20, 2021, approving the book of general administrative provisions applicable to public works procurement, G.R. No. 50.

¹⁵ Art 1 modified by the Ordonnance no. 1307-2010, on October 28 2010, art7: "At the beginning of the day, the sous-traitance is the operation of the quelle un entrepreneur's profile A sous-trait, and sous responsabilité, to a person who calls sous-traitant for the execution of the whole or part of the contrat d'entreprise or part of the market. The public joins the maître l'ouvrage." Noon 75-1334 on December 31, 1975 relative to the sous-trait.

Quoted by Jamal Badri, Lectures on Subcontracts, - Sublease, Subcontracting, Subagency, Lectures scheduled for second-year Master's students, Contract Law and Liability Branch, Faculty of Law, Youssef Ben Khadda University, Algeria 1, 2018-2019, p. 6.

It is clear from the text of the above article that the French legislator argued that subcontracting includes the total or partial implementation of the original contract, until he returned and limited subcontracting to partial implementation of the contract in accordance with Public Procurement Law No. 2006-975, which stipulates that: "The original party in a public works contract, a public services contract, or an industrial contract can subcontract for the purpose of implementing some or part of his contract, provided that The contracting authority has obtained acceptance of each of the subcontractors and the terms of direct payment to them."¹⁶

Thus, the French legislator - unlike the Algerian legislator - undertook the task of giving a definition of subcontracting, and in view of the important place that the subject of subcontracting can occupy in achieving economic development, it is necessary to shed light on the set of jurisprudential definitions that came regarding this type of contracting through the following point.

The second section: Jurisprudential attempts to find a definition of the handling contract.

Jurisprudence has varied definitions of subcontracting (handling contract). The French jurist André DeLaubadère defined it as: "that legal act through which the contractor entrusts others to implement part of the contract."¹⁷

While part of Egyptian jurisprudence defined it as: "the transaction concluded by the original contracting party with a third party with the intention of implementing part of the subject of the contract or implementing part of his obligations."¹⁸

A second opinion also defined it by saying: "The contribution of third parties to the implementation of all or some of the administrative contract concluded between the administrative entity and the person with whom it contracted, such that between two new parties, the original contractor and the subcontractor, a new bond of two contracts is created, which is the bond of implementation of the entire contract, with the possibility of the subcontractor becoming a creditor of the contracting administration within the limits of the work carried out by him."¹⁹

According to the opinion of some jurists, "subcontracting is nothing but the agreement according to which the original contractor abandons all or part of the contract concluded with the administration, in favor of another person, provided that he remains personally responsible before the administration for implementing the original contract."²⁰

As for Algerian jurisprudence, it defines the handling contract as: "a contractual association according to which the handler is obligated to implement part of the public transaction at the request of the contracting customer and in accordance with the conditions and methods specified in the current regulation and under the responsibility of the contracting customer."²¹

Regardless of the variety of definitions that have been said regarding the handling contract, we find that this legal term is based on two terms. The first is represented by the term "contract," and the contract is linguistically: the source of contracting something, making it a contract or a contract. If he tightens it, then it is chanted, then it is the opposite of the solution. "The ayn, the qaf, and the dal are one root that indicates tightening, tightening, and trustworthiness, and to it all the door returns. Some of the meanings of which are called: linking." And tightening, tightening, collecting, guaranteeing, covenant, documenting, obligating, ruling, and concluding,²² and the term "handling", and handling means giving,

¹⁶ Article 12 of Law No. 975 of 2006, dated August 1, 2006, relating to the Public Procurement Law.

¹⁷ André DELAUBADERE, *traité des contrats administratifs*, tome 2, LGDJ, 1987, p. 12.

¹⁸ Mr. Issa Al-Hassan, *Obligations and Rights of Contractors in Implementing a Public Works Contract*, PhD dissertation, Faculty of Law, Cairo University, 1997, p. 42.

¹⁹ Mr. Najm Hamad Al-Ahmad, *subcontracting within the scope of administrative contracts - a comparative study*, doctoral dissertation, Faculty of Law, Ain Shams University, 2001, p. 29.

²⁰ Abdel Aleem Abdel Majeed Musharraf, *The Idea of Personal Consideration in the Field of Administrative Contracts*, Dar Al Nahda Al Arabiya, Cairo, 2003, p. 88.

²¹ Ammar Boudiaf, *op. cit.*, p. 60.

²² Fouad Ephrem Al-Bustani, *Munjid Al-Talib*, Dar Al-Mashreq, Beirut, 1986, p. 488.

so it is from the source “handling”, “handling”, so it is “handling” (with a kasra on the waw), and the object is “handling”, so he handed over the thing, that is, he gave it to him, extending his hand with it.²³ Based on the data provided and by combining the two terms together, the handling contract can be defined as: “A legal act according to which the contracting party with the administration entrusts another person (the handler) to implement part of the subject of the original contract, provided that the original contractor remains responsible for implementing the entire contract and implicitly for the subcontractor - the handler -, and handling requires that the subject of the original contract be divisible.”²⁴

In light of all the previous definitions, the handling contract is characterized by a set of characteristics that distinguish it from other contracts, including:

The handling contract is a consensual contract:

A consensual contract is a contract for which the consent of both parties is sufficient for its conclusion, that is, it is established as soon as their wills are identical, regardless of the means of expression in writing, orally, or by gesture.²⁵

A legitimate question remains regarding the subcontracting concluded between the original contractor and the contractor. Is it considered a consensual contract or a formal contract?

Subcontracting - as a general principle - is considered one of the contracts based on mutual consent, that is, the principle of the contract applies to it according to the law of the contracting parties.²⁶ As soon as the wills of both the original contractor and the subcontractor are identical, the subcontract is concluded, as it is sufficient for it to be valid that the offer and acceptance between these two parties are identical and that their will is directed to produce legal effects, provided that there is no text or agreement that prevents this contract.

However, with reference to the content of Article 143, fourth paragraph of Presidential Decree No. 15-247, we note that the regulator obligated the original contractor to submit a copy of the handling contract obligatorily to the contracting authority,²⁷ which indicates that the sub-contract in the field of public contracts must be in writing. Moreover, Article 144 of the same decree stipulates the contents and data of the handling contract, and this confirms the necessity of writing the handling contract in the deals. Generality.

The handling contract is a contract binding on both sides:

Under the handling contract, the handler is obligated to complete the work subject to the contract and deliver it at the specified time according to the agreement. In return, the original contractor is obligated to provide a known financial compensation to the secondary contractor when he completes the agreed-upon works. This characteristic results in another advantage, which is that the handling contract is a compensation contract and not a donation contract, because each party to the contract receives compensation for what it performs.

The handling contract is subordinate to the original contract:

The handling contract is based on a previous original contract, so it is considered an accessory contract. Jurisprudence defines the original contract as: “Whatever is independent in its existence and is not subordinate to another contract.” As for the accessory contract, it is what was subordinate to an original contract that existed before it, and the original contract has an independent existence.

²³ Youssef Shukri, Student's Dictionary, Dar Al-Kutub Al-Ilmiyyah, Beirut, 1971, p. 612.

²⁴ : Zeina Miqdad, previous reference, p. 364.

²⁵ Hanan Sarah, Subcontracting in the Construction Contracting Contract, PhD thesis, specializing in Comparative Business Law, Faculty of Law and Political Science, Mohammed bin Ahmed University, Oran 2, 2015-2016, p. 24

²⁶ Rafah Razoui Arabal, Personal Consideration and Its Impact on Implementing the Administrative Contract - A Comparative Study, Al-Muhamqqiq Al-Tibbi Journal for Legal and Political Sciences, Faculty of Law, University of Babylon, No. 2, 2016, p. 599.

²⁷ Which states: “A copy of the handling contract must be delivered to the contracting authority by the contracting customer.”

As for the accessory contract, it follows in its existence and validity the original contract on which it is based,²⁸ so it is valid or invalid and remains or diminishes according to the original contract.” This characteristic - i.e. dependency - leads to the unity of goal that the administration seeks from implementing the administrative contract, so the goal of the original administrative contract and the subcontract is one, which is to achieve the public interest and contribute to the management of the public facility.

It must be noted that the feature of subordination in subcontracting is from one side only, meaning that the subcontract is subordinate to the original contract while the latter is not subordinate to the subcontract. Despite this, both contracts remain distinct and independent of each other, namely the original contract and the subcontracting agreement.²⁹

The handling contract creates three-way legal relations:

The handling contract is a contractual process that assumes the existence of two independent contracts (the original contract concluded between the contracting authority and the original contractor, and the subcontract concluded between the original contractor (joint) and a person foreign to the original contract called the handler). As we note, subcontracting leads to the emergence of a complex, three-party legal relationship. The difference between them is that the latter creates a single legal relationship, but it is binding on its three parties, while in a complex legal relationship with three parties, three distinct legal relationships arise. The first includes both the contracting interest and the original contractor, while the second includes both the original contractor and the contractor, and finally the indirect relationship between the administration and the contractor.³⁰

The second requirement: some legal problems related to the legal organization of the handling contract

Pursuant to the provisions of Article 112 of Law No. 23-12, which stipulates that the previous regulatory provisions remain in effect until the issuance of new regulatory texts, and given that Law No. 23-12 did not address the detailed terms and controls for the validity of subcontracting, it requires referring to the provisions of Presidential Decree No. 15-247, as it is still the specific regulatory framework of reference for the practical rules that it regulates the handling contract and its conditions in the field of public procurement.

Despite the legal regulation of the handling contract through the regulator, through Presidential Decree No. 15-247, stipulating the conditions legally required for the validity of the subcontract, and his clarification of the effects resulting from this contract, he overlooked some aspects, so that the practical reality creates some legal problems that must be addressed.

In order to shed light on these legal problems, we divide this requirement into two sections. In (the first section) we address the legal problems related to handling conditions, while in (the second section) we address the legal problems related to the effects resulting from subcontracting.

Section One: Legal problems related to handling conditions.

Presidential Decree No. 15-247 stipulated a set of controls and conditions that must be met by the handling contract, but it overlooked some aspects that must be legally met for the validity of the handling contract, and this is what will be highlighted in the successive paragraphs:

First: Handling involves executing part of the deal.

This condition finds its legal basis in Article 140 of Presidential Decree No. 15-247, which states: “The contracting handler may grant the contracting authority to grant the implementation of part of the deal to a handler through a handling contract...”

²⁸ : Zuhair Mustafa Saleh, The effects arising from subcontracting in administrative contracts - a comparative study, published on the website: <http://www.mohamah.net>

It was accessed on 08/10/2022 at 16:30.

²⁹ Ahmed Mahmoud Abu Musa, previous reference, p. 55.

³⁰ Gamal Badri, previous reference, p. 8.

The regulator adopted this condition to prevent secondary dealing in the entire transaction. This is considered, from a legal standpoint, to be a waiver by the contracting dealer of the public transaction, taking into account not exceeding the percentage specified in the text of Article 2/140 of the same decree, which is 40% of the total amount of the public transaction.

This was reaffirmed by the legislator in Article 82 of Law No. 23-12, which indicates the stability of this principle in the Algerian legislation for public procurement.

Second: Explicitly specifying the scope of the handling contract in the terms and conditions book, if possible.

This condition was mentioned in Article 143 of Presidential Decree No. 15-247, which stipulates that: "The main field of handling intervention must be explicitly determined, with reference to some basic tasks that must be carried out by the contracting client in the book of conditions, if possible, and in the deal..."

The original contractor may not resort to the subcontracting technique if the deal contract does not contain a reference to that. The wisdom behind this condition is that the organizer wanted to determine the scope of handling at an early stage and not at the implementation stage,³¹ so that all parties to the deal would become fully aware of the field that is the subject of the handling contract.

It should be noted that Article 140, in its third paragraph, of Presidential Decree No. 15-247 affirmed that the scope of handling should not include transactions for ordinary supplies, which means supplies that are on the market and are not manufactured based on specific technical specifications confirmed by the contracting authority.

On the other hand, Article 82 of Law No. 23-12 no longer includes this exception, which means that the legislator has expanded the scope of application of handling to include broader categories of public transactions compared to the previous regulation.

Third: The necessity of prior and written approval of the person handling the will.

Article 143, in its second paragraph, of Presidential Decree No. 15-247 stipulates the following: "The choice of the handler and his conditions related to payment must be obtained by the contracting customer, obligatorily, and with the approval of the contracting authority in advance and in writing, taking into account the provisions of Article 75 of this decree, after confirming his professional, technical and financial capabilities in advance..."

By extrapolating the text of the above article, the contractor must obtain the approval of the contracting authority that represents one of the parties to the original contract. This approval is granted after the contracting authority confirms the professional qualifications and specifications of the subcontractor, his material and human means, and the extent of their conformity to the works that are the subject of the subcontract. It must also ensure that he is not excluded from public contracts, which are the cases stipulated in Article 75 of Presidential Decree No. 15-247, such as if the secondary dealer is in a situation that violates tax legislation, accounting legislation, or social legislation. The dealer may be in bankruptcy, or registered on the list of those prohibited from submitting offers, or a judicial ruling has been issued against him related to a crime affecting professional integrity, and other cases referred to in Article 75.

We note that the organizer, during this period, has placed the handler in the position of the original contracting client and at the same level, in terms of qualification conditions for choosing the original contracting client, as the contracting authority cannot express its approval for the handling except after ensuring his financial and commercial capabilities and material and human means, which must be compatible with the work for which the handling contract will be subject.

After the administration gives its approval to the handling contract, this contract must include a specific form. Article 144 of Presidential Decree No. 15-247 clarifies the essential handling contract details and limits them to:

- The name, surname and nationality of the person who is required by the handling institution.
- The name and location of the handling institution, if applicable.

³¹ Saad Laklib, Bin Sheikh Al-Nawi, Rights and Obligations of the Contracting Party in the Public Transaction According to the New Law on Public Transactions No. 15-247, Journal of the Research Professor for Legal and Political Studies, Faculty of Law and Political Sciences, Mohamed Boudiaf University, M'sila, No. 6, June 2017, p. 68.

- The subject and amount of the services being handled.
- The deadline and timetable for completing the services being handled and how to apply financial penalties when necessary.
- The nature of prices, methods of payment, and updating and reviewing prices when necessary.
- How to receive services.
- Providing guarantees, responsibilities and insurances.
- Conflict settlement.

From what was presented above, we reached the conclusion that the original contractor must commit, when he wishes to subcontract with another contractor in the implementation of the contract, to request prior administration approval for this contract, based on Article 143 in its second paragraph of Presidential Decree No. 15-247, but it neglected to address the same problems, which required the legislator to include solutions for them within the provisions of Law No. 23-12. We mention Among them:

- If Article 2/143 of Presidential Decree No. 15-247 spoke of the necessity of expressing in writing the agreement of the contracting authority to handling, it did not specify the legal deadlines for that, because when the administration, when its contracting party submits to it a request to resort to subcontracting, must respond to it within a reasonable period, because it is of no use to remain silent, otherwise it will expose itself to legal accountability.³²

- Also, Presidential Decree No. 15-247 did not include the case of the contracting authority's silence regarding the request for subcontracting after the expiry of the legal deadlines - which are supposed to be referred to in the content of Article 2/143 - so is its silence interpreted as a rejection, or is it considered an implicit acceptance of the subcontractor?

The recipient did not clarify through this article the criteria upon which the contracting authority relies to express its will in the event of rejection. Its rejection must be explicit, and it is preferable for the rejection to be made in an official, written form. By referring to the general rules in the administrative field, we find that the contracting authority must respect the principle of legality - that is, the conformity of its actions with the law in its broad sense - otherwise the rejection decision will be considered defective. It may be appealed before the judicial authorities.

After reading Article 143 of Presidential Decree No. 15-247, we find that the regulator did not leave complete freedom to the contracting authority to accept the handling request to the extent that it might harm the public interest, but rather restricted it to a set of controls centered on the person of the handling person by ensuring his technical, financial and professional capabilities. It also requires that the subcontractor not be in one of the cases excluded from participation in public procurement, which are the cases stipulated It is stipulated in Article 75 of the same decree, and in the sense of violation, the contracting authority rejects the request to resort to subcontracting as a result of the weakness and absence of controls and conditions that were previously exposed to.

These observations highlight the urgent need for the new regulatory texts adopted in implementation of the provisions of Law No. 23-12 to fill this legal deficiency, or at least to respond to the demands of the public law commentators by adding a paragraph related to the case of the contracting authority rejecting the handler, which states: "The contracting authority may reject a handler that it deems does not meet the necessary conditions to perform the services that are the subject of the deal in a proper manner." The contracting authority expresses its rejection to the contracting customer by a reasoned letter, within a period of fifteen (15) days starting from the date of receiving the proposal for a list of handlers from the contracting customer."³³

³² Fadila Shaaban, Noureddine Zarkoun, The scope of application of subcontracting provisions under Presidential Decree No. 15-247, *Journal of Legal and Political Sciences*, Faculty of Law and Political Sciences, University of Martyr Hama Lakhdar, El Oued, Volume 10, No. 1, p. 181.

³³ Al-Nawi Kharshi, previous reference, p. 360 and beyond.

Fourth: It is mandatory for the handler to announce his presence to the contracting authority.

Article 142 of Presidential Decree No. 15-247 states: "A contractor who intervenes in the implementation of a public contract must announce his presence to the contracting authority.

The contracting authority that learns of the presence of an unauthorized handler in the place where the deal is being executed is obligated to notify the contracting handler to remedy this situation within eight (08) days, otherwise coercive measures will be taken.

In addition to the previous conditions, Article 142 added another condition, which is the obligation to notify the contractor of his whereabouts to the contracting authority, in order to prove his seriousness and commitment. The contracting authority that knows of the presence of an unauthorized handler in the place of implementation of the public contract must notify the contracting party responsible for this to remedy the matter within 8 days. In the event of non-compliance, it has the right to take all measures and procedures in its regard. This is what was emphasized in Article 141 in its second paragraph of Presidential Decree No. 15-247.

However, what is blamed on the organizer is that he did not clearly and precisely explain the nature of these coercive measures that the administration imposes on its contracting party in the event that he concludes a handling contract without obtaining its approval and the terms of its signature, but rather limited himself to mentioning them. This deficiency must be corrected by the organizer.

Contrary to what was stated in Executive Decree No. 91-219, which stipulated among its provisions the coercive measures to be taken by the contracting authority in the event that the contractor does not implement the terms of the deal as well as the orders of the contracting authority, and these measures are deterrent and/or void, in accordance with Article 8.41 thereof - which referred the application of its provisions to Articles 119 to 123 - by stating: The authority must The contractor who knows of the presence of an unauthorized handler in the place where the deal is being executed must notify the contractor responsible for this, in order to remedy the situation within eight (08) days, and in the event of non-compliance, deterrent and/or reprehensible measures will be taken..."

Section Two: Legal problems related to the effects resulting from the handling contract.

The general rule in the field of public contracts is that it is prohibited for a contractor with an administration to contractually transfer part of the tasks entrusted to him to others except with the approval of the contracting authority. Therefore, the authority that has the power to conclude the original contracting contract is the same one that has the power to approve or reject the subcontracting request submitted to it by its contractor (the original contractor). In both cases, whether approval or rejection would have consequences. Important legal matters that vary depending on the nature of the procedure followed.

First: The legal effects resulting from the handling contract associated with the administration's approval.

Subcontracting with the approval of the administration has several important legal effects, whether in terms of the administration's relationship with the original contractor, or in its relationship with the subcontractor (handler), as well as the effects of subcontracting on the relationship of the original contractor with the subcontractor.

-1 Effects of handling on both parties to the original contract:

The contractual relationship between the original contractor and the contracting authority remains valid and complete without prejudice to it in the event that the administration approves the contractor, and the subcontracting does not become a party to the contract. On this basis, no direct contractual relationship is established between the contracting department and the contractor, and the original contractor is not responsible for executing the contract. The contractor contracting with the administration remains solely responsible for implementing the entire deal, even for the part that the contractor was assigned to implement, and this is what I confirmed. Article 141 of Presidential Decree No. 15-247 stipulates: "The contracting dealer is solely responsible towards the contracting authority

for the implementation of the part of the transaction dealt with by handling,” and its counterpart is Article 82 of Law No. 23-12.

The relationship between the two parties to the original contract is governed by two principles:³⁴

- It is not permissible to exempt the original contractor who is the owner of the deal from his obligations towards the contracting authority if he resorts to dealing in the form of handling in implementing part of the deal.
- It is not permissible to amend or change the obligations of the contracting authority towards the original contractor. By resorting to subcontracting, the original contractor does not waive his contractual position, nor the rights that arise for him under his first - original - contract. Therefore, he has the right to demand that the contracting authority implement all the obligations imposed on it under the contract concluded between them.

2 The effects of handling on the relationship between management and the handler:

Despite the administration's approval of the subcontracting, it does not create any contractual relationship between the administration and the handler, as they are not bound by any contract and thus each of them is considered not obligated to confront the other. All that results from this approval is that the handling contract is legitimate and therefore the administration cannot repudiate it after that. Otherwise, it commits a contractual error that necessitates its responsibility for compensation before the original contractor contracting with it.³⁵

However, with reference to Article 2/143 of Presidential Decree No. 15-247, we find that it created a kind of direct link between the contracting authority and the handler, which is limited to the settlement of financial products, as it stipulates: “...the approved handler, in accordance with the previously mentioned conditions, receives his dues directly from the contracting authority, in the title of the services stipulated in the deal whose implementation it guarantees, according to the methods determined by a decision.” From the Minister in charge of Finance.

After extrapolating this article, we notice that the organizer authorized the contractor to collect his dues from the contracting authority in order to ensure the effectiveness of the public request, as well as to ensure the protection of the contractor's right to payment and to enhance his legal position. However, the application of this article raises several legal problems in practical reality, since the contracting authority is the one who made the direct payment to the contractor. Is the contractor obligated to deliver the completed work to it or to the original contractor as a party to the contract? The contract he concluded with the handler, and whether the handler's obligation to guarantee hidden defects is towards the contracting authority or the handler³⁶. In addition, he blames the organizer for referring the implementation of how to pay the handler's dues to a decision issued by the Minister of Finance,³⁷ and this decision has not been issued yet despite the passage of seven years since the issuance of Presidential Decree No. 15-247.

3- Effects of the handling contract on both parties (the original contractor and the handling):

It is established and established in jurisprudence and jurisprudence that the relationship between the original contractor and the contractor is a direct contractual relationship due to the existence of the subcontracting agreement concluded between them, and it is considered one of the core ties of private law in which jurisdiction over the resulting disputes falls to the ordinary judiciary and not to the administrative judiciary,³⁸ and private law applies to it, even in cases in which the administration accepts

³⁴ Othmani Murabit Habib, Handling in the Public Works Procurement Law as a Mechanism to Enhance the Competitiveness of the National Economy - A Study in Light of Executive Decree No. 21-219, Journal of Business Administration and Economic Studies, Zian Ashour University, Djelfa, Volume 7, No. 2, p. 546.

³⁵ Fadila Shaaban, Nour al-Din Zarrouk, op. cit., p. 183.

³⁶ Othmani Murabit Habib, op. cit., p. 546.

³⁷ Previously, a decision was issued by the Minister of Finance on March 28, 2011 - in light of the previous canceled Public Transactions Decree, which used to express the transfer of secondary cooperation - regarding the methods of direct payment to the secondary customer, which was published in G.R. No. 24, through which everything related to the conditions and methods of direct payment was clarified.

³⁸ Rafah Razoui Arabal, op. cit., p. 605.

the handling and the contractor is responsible in the face of the original contractor if he does not carry out the assigned work. In accordance with the principles that must be observed, he is charged with achieving a result and not with exercising care.³⁹

Since the subcontract borrows its place from the original contract, the subcontract is consistent in nature with the original contract. In subcontracting, we find ourselves facing a handling contract in which the original contractor occupies the position of the contracting interest and the handler occupies the position of the original contractor.

Accordingly, we find that the contractor has the same obligations as the original contractor towards the contracting authority, which is to complete the agreed-upon work, the obligation to deliver the completed work to the original contractor and not to the administration, as the latter - the administration - is not contracted with him, and Presidential Decree No. 15-247 did not include this obligation or its provisions, especially with regard to delivery methods, place, and time. However, work was done in practice. A clause is placed in the contract under which the handler is obligated to respect the provisions of the deal with regard to the obligations and requirements for implementation.

The handler is also obligated to the original contractor to guarantee the hidden defects of the completed works. In return, we find that the original contractor has the same obligations as the contracting department, which is to enable the handler to complete the work to be handled, receive the completed work, and pay the agreed upon wage.⁴⁰

In the context of the relationship between the original contractor and the contractor by virtue of the subcontracting agreement, a legitimate question remains about the extent to which the rules governing the administrative contract concluded between the original contractor and the contracting authority can be applied to the existing relationship between the original contractor (joint contractor) and the subcontractor, which is a relationship of course governed by private law.

In this regard, it can be said that determining the extent to which the rules of the administrative contract can be applied to the contract concluded between the original contractor and the handler is due to the explicit agreement between the two parties to the handler contract. In application of this, the original contractor can include conditions in his contract with the handler that are unusual in private law, if the original contractor fears that the handler may fail to fulfill his obligations within the specified deadlines, and these conditions will produce their legal effects as long as the handler accepts them when concluding the agreement.⁴¹

Second: The legal effects resulting from a handling contract that is not accompanied by management approval.

We demonstrate these effects by studying the following relationships:

-1 Effects of the handling contract on both parties to the original contract:

The original contractor's resort to concluding a handling contract without obtaining the administration's approval is considered a complete violation of the principle of personal consideration,⁴² and is therefore destined to be invalid. Subcontracting does not apply to the administration and is not invoked against it, nor does any contractual relationship arise between the contractor and the administration. Therefore, the original contractor remains the only one responsible before the administration, and his unilateral behavior that the contracting authority rejected does not free him from that responsibility. On the other hand, subcontracting without a previous license from the contracting authority is considered a serious contractual error on the part of the contracting agent that justifies the imposition of the maximum penalties on him. This is confirmed by Article 142 of Presidential Decree No. 15-247 - previously mentioned - with the phrase "...otherwise coercive measures will be taken against him."

³⁹ Zabidiyah Miqdad, op. cit., p. 375.

⁴⁰ Soumaya Sharif, Ammar Maashou, The Legal System for Disputes Arising from the Handling Contract in Public Transactions, Voice of Law Journal, Djilali Bounaama University, Khamis Miliana, Volume 8, No. 2, 2022, p. 744.

⁴¹ : Ahmed Muhammad Ahmed Abu Musa, previous reference, p. 128.

⁴² Fawzia Hashemi, The effects of implementing public contracts on the contracting parties - a comparative study, doctoral thesis, majoring in legal sciences, Faculty of Law and Political Sciences, Djilali Yabis University, Sidi Bel Abbes, 2017-2018, p. 326.

-2 The effects of the handling contract on the relationship between management and the handling person:

In this case, there is no contractual relationship between the handler and the contracting authority, so contractual responsibility does not arise between them, in addition to the fact that the administration is not a party to the handling contract.

The absence of a direct contractual relationship between the contracting authority and the contractor entails that the administration may not ask the contractor to complete the work subject to the original contract, because the contractor was not a party to this contract, and it does not have the right to do so with exceptions to the subcontracting agreement, because it is not a party to it. Although the handler does not have a contractual relationship with the contracting authority, and he is not permitted to demand his financial dues from it, he can seek recourse against it for the expenses he has made in accordance with the general rules of the provisions of the Civil Code.⁴³

3- Effects of the handling contract on both parties:

The effects of a handling contract that are not accompanied by the approval of the contracting authority do not differ from those effects that result from subcontracting in the event of the administration's approval. The relationship between the original contractor and the handler is a contractual relationship subject to the provisions of private law, and the ordinary judge has jurisdiction over its disputes.

Conclusion

Through our study of this topic, we arrived at a number of results that clearly illustrate the legal deficiencies regarding the handling contract.

We noticed at the beginning that the legislator addressed the provisions of the handling contract in a single legal article, which is undoubtedly insufficient to address all the legal and contractual aspects raised by the handling contract.

- The original principle in the field of public contracts is that the contracting customer undertakes all work related to the public deal. However, Presidential Decree No. 15-247 and Law No. 23-12 allowed the contracting customer to contractually transfer part of the tasks assigned to him to others.

- The legislator did not provide an accurate and comprehensive definition of handling within the content of Article 82 of Law No. 23-12.

From the jurisprudential definitions, we have concluded that the handling contract is characterized by the same characteristics as the public deal contract concluded between the original contractor and the contracting authority, because the handling contract is a minor or subsidiary deal affiliated with the main deal, and includes many of its data.

Among the manifestations of the deficiency of legal regulation, we also find that the legislator did not address the conditions that must be met for the validity of subcontracting, nor the legal effects resulting from it, which constitutes a legislative vacuum.

- Executive Decree No. 21-219 clarified the type of coercive measures that the contracting authority imposes on the contractor in the event that he resorts to subcontracting without its approval, thus filling the shortcomings found in Presidential Decree No. 15-247.

- Subcontracting has legal effects on the legal relationships arising under it, which vary according to the administration's approval or disapproval of this contract.

Based on these results, we suggest some recommendations as follows:

It is hoped that the legislator, in the framework of future amendments, will rectify this shortcoming by setting a precise definition of the handling contract, specifying the necessary conditions for the validity of the subcontracting, and clarifying the legal implications resulting from it in a way that achieves a balance between the requirements of flexibility and guarantees of legality.

- Paying more attention to the legal position of the recipient because he is often the weak party in the contractual relationship, as we find that the legislator has not addressed this relationship, so it has

⁴³ Fadela Shaaban, Nour al-Din Zarqoun, op. cit., p. 184.

become necessary to add articles that are consistent with all the problems and disputes that may occur between the parties to this relationship.

- Updating the decision regulating the methods of direct payment of handler dues issued in 2011 and amending its provisions in line with Presidential Decree No. 15-247.

We suggest adding articles that clearly and precisely specify the case of the contracting authority's silence regarding subcontracting, in addition to the criteria it relies on to express its will in the event of its rejection of the handling contract.

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