

Possessory Pledge as a Mechanism for Securing Public Contracts in Algeria: Regulations and Issues

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Abstract:

Public procurement represents an important mechanism for the development of the state's economy and for encouraging economic investment and foreign partnership. The possessory pledge mechanism is considered a fundamental tool regulated by the Algerian legislator under the provisions of public procurement law, in order to facilitate the financing of public contracts in cases where the contracting authority delays the payment of its dues to contractors after the full execution of the contract's subject matter. This mechanism serves to guarantee debts arising or expected to arise from the execution of the contract, as well as loans granted within the framework of its financing.

Accordingly, this study aims to identify and address the various procedural formalities and legally established controls governing the possessory pledge as a financing instrument for public procurement in Algeria.

Keywords: possessory pledge; public procurement; Public Procurement Guarantee Fund; bank guarantee.

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Introduction

The issue of financial guarantees in public procurement is considered one of the sensitive matters that, in the present time, raises numerous legal and practical challenges, due to its direct connection with one aspect of public expenditure. The overall process of concluding and executing public contracts is often hindered by various problems and risks that may prevent the completion of project execution, which inevitably affects the efficiency of public services provided by state institutions.

While the general principle is the application of the rule of “payment after service rendered” (Payement après service fait), meaning that the contracting administration is only obliged to pay the contractor's dues after the latter has fully executed the services stipulated in the contract specifications, practical considerations have led to the restructuring of the financial settlement system for public contracts. This has been achieved through the adoption of a set of advance financing measures that ensure administrative funding of public contracts, namely the system of advances and progress payments (Les avances et les acomptes), on the one hand, and banking financing mechanisms, mainly bank loans (Les crédits bancaires) and bank guarantees (La caution bancaire), on the other.

Accordingly, the financial guarantees provided in the field of public procurement serve a dual purpose. For the contractor dealing with the public administration, and given the latter's privileged legal position and extensive powers, it is necessary to provide legal safeguards that protect the contractor and restore balance between the legal positions of both parties. For the contracting administration, it often faces various obstacles resulting

from the poor selection of contractors, which may hinder the completion of the contract's execution stages. Therefore, it is also necessary to establish safeguards that protect public funds from the risks of mismanagement and erroneous decisions, while ensuring the financial balance of the contract.

Based on this, the contracting authority is keen, from the outset and as a priority, to award the contract to a financially capable contractor with sufficient financial competence. Consequently, contractors are required to provide financial guarantees that protect the contracting authority from the financial risks that may arise in the event of non-performance of their obligations. These guarantees are mainly represented in the system of bank guarantees. Conversely, the lending banking institution, while awaiting the maturity of the loan repayment, requires sufficient guarantees from the contractor benefiting from the loan, and at the forefront of these guarantees is the mechanism of the possessory pledge of public contracts.

The Presidential Decree No. 15-247 of 16 September 2015, regulating public procurement and public service delegations¹, provides in Article 145 that the contracts concluded by the contracting authority and its appendices are eligible for possessory pledge within the conditions specified therein. This was confirmed by the provisions of Law No. 23-12 establishing the general rules of public procurement, in Article 85, which states that: "Public contracts and their appendices are eligible for possessory pledge."

Accordingly, the research problem falls within the following question: Has the Algerian legislator succeeded in structuring the legal framework for financing and securing public contracts by defining the features and controls of the possessory pledge, in a manner that ensures financial balance between all parties to the contract?

To answer this question, we have chosen to divide the analysis into two main sections: first, the substantive rules governing the possessory pledge mechanism in public procurement; and second, the procedural rules governing the possessory pledge mechanism in public procurement.

Section One: Substantive Rules of the Possessory Pledge Mechanism in Public Procurement

Security in all its forms has, since ancient times, played a highly important role in promoting credit and stimulating borrowing and financing operations. It is rare to find financial dealings in which individuals are willing to grant a loan without sufficient real and/or personal guarantees that protect them from the risk of debtor insolvency and ensure full repayment of their rights.

Although the general principle in financial and banking transactions is that the creditor relies on the debtor's financial liability for repayment, and that the debtor voluntarily and automatically performs the obligation imposed upon him, practical reality has shown that, in most cases, the general guarantee and other personal guarantees are insufficient to provide effective and complete protection for creditors. This has led to the emergence of real security mechanisms, among which is the possessory pledge.²

The possessory pledge is considered one of the most important credit contracts within the system of real securities; therefore, various national legislations have been keen to regulate its provisions³. In order to define the concept of the possessory pledge in public procurement and determine its scope, it is necessary, at the outset, to define it and clarify

its legal nature. From there, the legal framework governing the application of the possessory pledge in the field of public procurement must be identified.

First: Conceptual Framework of the Possessory Pledge in Public Procurement

The possessory pledge constitutes a real security intended to guarantee a personal right of the creditor in exchange for his possession of the pledged asset. Although the possessory pledge is, in general, governed by the provisions of civil law, a question arises regarding the specific nature of the possessory pledge established as a real guarantee in public procurement contracts.

The answer to this question will be addressed in the following two paragraphs:

1. Definition of the Possessory Pledge

Defining the possessory pledge requires addressing the various legal and jurisprudential definitions related to it⁴. This will be clarified by dividing the first paragraph into two main elements: the first concerns the definition of the possessory pledge in legal terminology, and the second addresses its definition in jurisprudential terminology.

1.1. Legal Definition of the Possessory Pledge:

The Public Procurement Code does not provide a definition of the possessory pledge as a financing mechanism for public contracts. The Presidential Decree No. 15/247 only sets out, in Article 145, the substantive and formal conditions governing this mechanism. By reference to the Civil Code, the Algerian legislator regulates the rules of possessory pledge in general under Articles 948 to 965 of Ordinance No. 75-58 of 26 September 1975 containing the Civil Code⁵. Article 948 defines the possessory pledge as follows:

“A possessory pledge is a contract by which a person undertakes, as security for a debt owed by himself or by a third party, to deliver to the creditor or to a third party designated by the contracting parties, a movable or immovable asset which confers upon the creditor a real right enabling him to retain the asset until his debt is paid, and to be preferred over ordinary creditors and creditors later in rank in receiving payment from the value of the pledged asset, in whosoever’s hands it may be.”

From this definition, it is understood that the Algerian legislator considers the possessory pledge a real accessory right granted to the creditor as security for the repayment of his debt, whereby the debtor delivers to him an asset movable or immovable that the creditor may retain until the debt is settled, with a preferential right over subsequent creditors to recover his claim from the proceeds of the pledged asset or what replaces it, regardless of whose possession it is in. Accordingly, the possessory pledge is essentially an accessory right that cannot exist independently but is linked to and based on an underlying principal right, namely the personal right owed by the debtor.⁶

This definition is consistent with that provided by the French Civil Code, which defines the possessory pledge in Article 2071⁷ as: “A pledge is a contract by which a debtor delivers a thing to a creditor as security for the debt he has borrowed from him.” Both definitions agree that the possessory pledge is a contract concluded between the pledging debtor and the secured creditor, and that it is an accessory real right that depends on the existence of a principal obligation. They also agree that the pledge results in the transfer of possession of the pledged asset from the debtor to the creditor.

Similarly, Article 145 of the Moroccan Code of Real Rights defines the possessory pledge as: “A real right established over property delivered by the debtor or his guarantor to the secured creditor to guarantee the repayment of a debt, and which entitles the creditor to possess and retain the pledged property until his debt is paid.”⁸

To say that, unlike the definitions provided by the Algerian and French legislators, the definition adopted by the Moroccan legislator did not highlight the contractual nature of the possessory pledge, nor did it emphasize the secured creditor’s right to follow the pledged asset wherever it may be found. This was addressed by the Moroccan legislator in Article 1170 of the Code of Obligations and Contracts, which defines the possessory pledge as follows:

“A contract by which the debtor or a third party assigns, for the benefit of the creditor, a movable or immovable asset or an incorporeal right as security for the obligation. It grants the creditor the right to recover his debt with priority over all other creditors if the debtor fails to fulfill his obligation.” This definition expands the concept of the pledged asset to include immovable property, movable property, and also related incorporeal rights.⁹

With the issuance of Executive Decree No. 21-219, the Algerian legislator addressed the issue of defining the possessory pledge contract in public works contracts, without other types of public procurement. It is defined in Article 1.80 as follows:

“The possessory pledge is the contract relating to the pledge of a debt which allows the contractor, whether individually or within a temporary consortium, and where applicable the subcontractor benefiting from direct payment, to pledge their reciprocal debts arising from the execution of public works contracts, in favor of a banking institution, a group of banking institutions, or a financial institution.”

It is clear that the Algerian legislator focused in this definition on identifying the parties to the contract (the contractor or subcontractor on one side, and the banking or financial institution on the other) and its subject matter (reciprocal debts), without focusing on defining the possessory pledge itself as an accessory real right, thereby implicitly referring back to the provisions of the Civil Code.

2.1. Jurisprudential Definition of the Possessory Pledge:

Definitions of the possessory pledge provided by both legal and Islamic jurists are varied. Each has attempted to highlight the essential features that distinguish the possessory pledge from other legally and religiously recognized real securities¹⁰. Among the legal doctrinal definitions are the following:

Some jurists define it as: “An accessory real right granted to the creditor under a pledge contract over property owned by the debtor or a third party, as security for the fulfillment of an obligation. It entitles the creditor to retain the asset until his debt is paid, and to recover his right from its price with priority over all other creditors.”¹¹ It has also been defined elsewhere as: “A contract that establishes a security right over a loan or debt. Accordingly, the debtor or borrower transfers an incorporeal right to his creditor as security for repayment of the loan or debt. In case of non-payment, the creditor may sell the property to recover his debt.”¹²

The above definitions, in our view, apply to the legal and terminological concept of the possessory pledge in public procurement, which has been defined as: “The contract whereby every contract holder or

secondary contractor accepted for direct payment, the unique copy of the contract delivered to him by the public authority.¹³

We critique this definition for being incomplete, as it does not identify the parties to the pledge contract, nor does it specify in favor of whom this pledge is established; there is no reference to the banking institution benefiting from the pledge.

We also mention, among the definitions of the possessory pledge in public procurement, another definition that describes it as: “the sole means of banking financing for public contracts, whereby the public contract is granted as security in exchange for obtaining such financing, whether before banking institutions or the Public Procurement Guarantee Fund considered a financial institution authorized to finance public contracts. The importance of this guarantee stems from its connection to the public contract itself, whereby debts arising or to arise from the execution of the contract are secured, as well as loans granted within the framework of its financing. As a consequence of the implementation of this guarantee, rights arise for the granting entity, as it becomes the beneficiary of the possessory pledge of the public contract.”¹⁴

It is worth noting that the Algerian legislator correctly used the term “Nantissement,”¹⁵ which refers to a possessory pledge over a tangible and/or intangible right, to designate the possessory pledge in public procurement, instead of using the term “gage,”¹⁶ which refers to a possessory pledge over movable property, or “antichrèse,”¹⁷ which refers to a possessory pledge over immovable property. The term “Nantissement” is the most legally appropriate term for the concept of possessory pledge in public procurement, since the subject matter of the pledge is the contractor’s right to the value of the contract paid by the contracting authority. This right cannot, in our view, be classified as either movable or immovable property; rather, it is an incorporeal right (the pledge of the public contract). What is transferred to the benefiting financial institution is not the monetary value of the contract in its material form, but rather the right to receive the contract value from the contracting authority in the event that the contractor (the debtor-pledgor) fails to repay the loans and advances granted by the financial institution as guarantees for the execution of the contract. The transfer of possession of the pledged right to the financial institution is realized in an intangible form through its exclusive receipt of the single copy of the public contract delivered by the contracting authority, to the exclusion of all other creditors of the contracting debtor.

2. Legal Nature of the Possessory Pledge in Public Procurement

It should be recalled that the possessory pledge is a type of security aimed at protecting the creditor from the risk of the debtor’s failure to repay the debt owed. It grants the secured creditor the right to retain the pledged asset until the debt becomes due and is fulfilled by the pledging debtor; otherwise, in the event of refusal by the debtor. In the event of his inability to repay the amounts owed, the creditor has the right to request the sale of the pledged asset through legal procedures and to recover his debt from its price, with priority over other ordinary creditors.¹⁸

For this reason, private law jurists consider the possessory pledge as a contract of security. It is a real security contract encumbering the pledged property, and it always presupposes the existence of a secured debt, whether this debt precedes the pledge contract or is contemporaneous with it. In all cases, it is an accessory contract that does not exist independently, but rather follows the existence of the secured debt; there is a reciprocal

relationship between the emergence of the debt and the emergence of the pledge, each making the other its cause.¹⁹

Thus, in our view, the possessory pledge in public procurement can be regarded as a mechanism of dual nature. It is simultaneously a banking financing instrument and a security and guarantee instrument. In addition to enabling the contractor holding the contract to benefit from financing provided by a credit institution, it allows him to fulfill his obligations towards the contracting authority. It also serves as a means of ensuring that the contractor fulfills his obligations towards the financial institution financing the project, granting the latter the right to recover the advanced financial amounts with priority over other creditors, as well as the right to follow the pledged asset in whatever hands it may be found.

We support this view with what was stated by Professor “Fayçal Zedani,” who said: “The parties to the possessory pledge (the administration, the contract holder, and the banking institution) tend to make the public procurement pledge system oscillate between being an administrative financing mechanism for the contract alongside advances and payments granted by the administration to the contractor and being a banking financing mechanism in favor of the contractor in order to enable him to fulfill his obligations towards the administration. Regardless of this duality of financing (administrative financing / banking financing), the pledge of public procurement remains a practice that allows the contractor, under a pledge agreement concluded between the financial institution and the contractor, to benefit from financing by earmarking the contract as security for his obligations towards the financial institution.”²⁰

Second: The Scope of the Possessory Pledge in Public Procurement

Here, it is necessary to distinguish between the personal scope of the possessory pledge in public procurement meaning the persons who are entitled to be parties to this pledge and the material scope of the pledge, which includes the types of public contracts that the contracting authority may pledge and the subject matter of the possessory pledge. This will be detailed in the following two sub-sections:

1. The Personal Scope of the Possessory Pledge in Public Procurement

As previously explained, the possessory pledge in public procurement is a legal mechanism of a dual nature; at the same time, it enables the financing of the public contract through credits and loans granted by Banking institutions to enable the contractor to implement the agreed contractual clauses. The possessory pledge also allows the bank or financial institution acting as guarantor or lender obtain a real security interest over the advances and financial loans it has granted to the contractor. This enables it to rank ahead of other creditors in recovering the amount of the public contract subject to the pledge, in the event that the contractor fails to repay the sums owed.²¹

Accordingly, the specificity of the possessory pledge mechanism in the field of public procurement becomes apparent. It is a contract that brings together the debtor-pledgor and the creditor-pledgee; however, its formation procedures require the intervention of several parties, which can be identified as follows:

1.1. The Contractor (the debtor-pledgor): The notion of the contractor is defined, as stated in Article 37 of Presidential Decree No. 15-247, which provides that: “The contractor may

be one or several natural or legal persons who undertake, under the contract, either individually or within a temporary grouping.”²²

Based on the content of Article 37 above, the concept of “contractor” includes any natural or legal person under private law or public law, acting individually or jointly on a temporary solidarity basis.

The Public Procurement Law allows candidates and tenderers to submit their applications and bids either individually or jointly within a temporary grouping of enterprises. This grouping takes two main forms: the first is a temporary grouping of joint enterprises, where each member is bound to perform the entire contract; the second is a temporary grouping of co-contracting enterprises, where each member is responsible only for the services assigned to it. In all cases, the form of grouping is determined according to the requirements and nature of the contract.²³

In addition, Article 38 of the same Presidential Decree²⁴ expands the scope of competition by extending the status of “contractor” in public procurement to both national and foreign operators, providing that: “The contracting authority, in order to achieve its objectives, may, for the execution of its services, enter into contracts with companies governed by Algerian law and/or foreign companies.”

Based on the above, the term “contractor” applies to the following entities:

- Public national enterprises;
- Private enterprises;
- Foreign enterprises established in Algeria.
- Foreign enterprises not established in Algeria, provided that they offer bank guarantees issued by foreign banks that are approved by the competent Algerian banking authority.

Public procurement law stipulates that the contracting authority may award a contract only to an enterprise that is considered capable of executing it, regardless of the procurement method adopted²⁵. It is also required that the contracting authority maintain a national database (“Fichier national”) of economic operators, sectoral databases (“Fichiers sectoriels”), and a local database (“Fichier local”) at the level of each contracting authority. These records must be updated regularly in accordance with legally established procedures.²⁶

Finally, it should be noted that the holder of the public contract, who may assume the status of debtor-pledgor, may be the contractor itself that is, the enterprise or person to whom the contract has been awarded. It may also be a subcontractor; in this case, the subcontractor may pledge its rights under the public contract to a bank or to the Public Procurement Guarantee Fund authorized to carry out such operations.

In this regard, paragraph 12 of Article 145 of Presidential Decree No. 15-247 provides that: “Subcontractors and secondary contractors may pledge all or part of their debts, within the limits of the value of the services they perform, under the conditions set out in this article.”

2.1. The banking institution (the pledgee creditor)

The provisions of the public procurement law explicitly state that the possessory pledge mechanism is concluded between the public contract holder (as the first party) and a legally approved banking institution or the Public Procurement Guarantee Fund (as the

second party). This is inferred from paragraph 1 of Article 145 of Presidential Decree No. 15-247, which states: “The possessory pledge shall be concluded only with a banking institution, a group of banking institutions, or the Public Procurement Guarantee Fund.” This was also confirmed by Executive Decree No. 21-219 in Article 1.82 concerning public works contracts.

It is clear, with respect to the concept of “banking institution,” that it includes all types of financial institutions specialized in the management of funds whether in safekeeping, lending, or buying and selling²⁷. However, some ambiguity arises regarding the definition of the “Public Procurement Guarantee Fund”: does it constitute a public administrative body of the state, or is it merely a commercial institution for the banking financing of public contracts?

The Public Procurement Guarantee Fund (C.G.M.P.) is a public institution of an industrial and commercial nature, established by Executive Decree No. 98-67 of 1998²⁸, amended by Executive Decree No. 08-06 of 2008²⁹, as part of the economic reform program initiated by the state in order to overcome the difficulties faced by economic operators benefiting from public contracts. Public contracts and public orders financed by the state budget³⁰. Accordingly, the Fund’s functions, as a financial institution, consist in accompanying Algerian enterprises throughout the entire execution period of public procurement from the expression of their intention to carry out the project until the release of the guarantee or surety.

This was expressly confirmed in Article 2 of Executive Decree No. 98-67, which states: “Considering it as an essential instrument of the State aimed at maintaining the balance between the material and financial development of public equipment projects included in annual and multi-annual programs financed by the State budget, the Fund’s mission consists in ensuring the financing of public contracts and public orders.”³¹

On this basis, the Fund is entrusted with providing its guarantee or surety, in any form, in order to facilitate the financial implementation of public contracts and public orders.”

The Fund is headquartered in Algiers and is placed under the supervision of the ministry in charge of finance (Article 04)³². It enjoys legal personality and financial autonomy, and the law grants it a commercial status in its relations with third parties thus subjecting it to private law while its relations with the State remain governed by public law.³³

The Fund is authorized to carry out the following activities:³⁴

- Establish representative offices across the national territory;³⁵
- Undertake all movable, immovable, commercial, and financial operations related to its objectives;
- Conclude all contracts, agreements, or conventions related to its purpose.

Accordingly, the Fund’s competences include:

- Enabling enterprises to obtain all guarantees or sureties that facilitate the financial execution of public contracts;
- Providing guarantees required by contracting authorities to benefit from contractual advances intended to cover expenditures related to the execution of public contracts and public orders;
- Settling statements and/or invoices of enterprises when payment is not made within the legal deadlines;

- Granting advances against progress statements before the contracting authority recognizes their right to payment;
- Providing overall loans that may cover the financing needs of enterprises with significant and regular portfolios of contracts or orders concluded with state services or their branches;
- Benefiting from the institution's guarantee with banks in order to obtain any loan related to the execution of a public contract or order, usually in the form of a promissory note guarantee.³⁶

It is managed pursuant to Article 07 of Executive Decree No. 98-67 by a Board of Directors and a General Director. Its internal organization consists of administrative structures and executive structures.³⁷

The Board of Directors meets upon convocation by its Chairperson in ordinary session twice a year. It may also meet in extraordinary session either at the request of the supervisory authority, or at the request of its Chairperson, or the General Director of the Fund³⁸. The Board's decisions are adopted through deliberation and are approved by a simple majority of votes cast on the following matters:

- The internal regulations of the Board;
- The general organization of the Fund;
- The estimated short-, medium-, and long-term activity programs of the Fund;
- General conditions for processing operations;
- General conditions of employment and remuneration of Fund staff;
- Investment programs of the Fund;
- The annual forecast statement of the Fund's revenues and expenditures;
- The annual balance sheet and accounts of the Fund's results, as well as their approval and allocation of results;
- Recourse to conciliation for settling major disputes;
- Measures to be taken for debt recovery;
- Draft amendments to the Fund's statutes;
- Draft amendments to the amount of capital;

Any other measures likely to improve the organization, functioning, and efficiency of the Fund in order to facilitate the achievement of its objectives.

It is clearly evident that the function of granting advances and financial guarantees in the field of public procurement falls outside the competence of the Board of Directors of the Fund. By contrast, Article 17 of Executive Decree No. 98-67 indicates that this competence is exclusively vested in the General Director of the Fund, who is responsible for the following tasks:

- Proposing to the Board of Directors the internal organization of the Fund;
- Representing the Fund in all civil acts and before the judiciary;
- Ensuring compliance with the internal regulations of the Fund;
- Proposing to the Board of Directors the statutes of the Fund's personnel and the remuneration scale.
- It exercises hierarchical authority over all employees of the Fund;
- It proposes the Fund's activity programs;
- It prepares the estimated revenue and expenditure budgets;

- It authorizes principal disbursement of the Fund's budget;
- It opens and manages all current accounts, advances, deposit accounts with treasury offices, banking institutions or credit institutions, as well as postal cheque centers;
- It signs, endorses, and approves all documents, securities, bills of exchange, and other commercial instruments;
- It grants guarantees, sureties, and standby guarantees;
- It may conclude settlement procedures and amicable dispute resolutions, subject to authorization from the supervisory ministry;
- It prepares annual balance sheets and income statements and proposes the allocation of results;
- It concludes all contracts, agreements, or conventions.

In order to carry out its assigned missions, the Fund is provided with share capital, the amount of which is determined by the Minister of Finance. The State is also required to provide it with the necessary means, subsidies, and advances. In addition, the Fund receives compensatory remuneration for its public service role, except for those activities covered by dedicated resources within its operational mechanisms.³⁹

Based on the foregoing, the Fund is legally required, within the framework of public investment programs, to provide its guarantee or surety aimed at facilitating the financial execution of public contracts, as well as contracts for works or supply of equipment financed by the State budget.⁴⁰

For this purpose, the Fund enables economic operators holding public contracts or orders to benefit from the following:

- Contractual and legal advances intended to cover expenditures related to the execution of public contracts and orders;⁴¹
- Mobilization of debts arising from the execution of public contracts and orders;⁴²
- Access to overall credit facilities capable of covering their preliminary financing needs without discrimination or debt mobilization, particularly when dealing with enterprises holding significant and regular portfolios of contracts concluded with the State and its branches.

This is confirmed by the provisions of Article 146 of Presidential Decree No. 15-247, which states that the Public Procurement Guarantee Fund may finance public contracts to facilitate their execution, particularly through the payment of statements or invoices within the framework of mobilizing the debts of public contract holders. This includes:

- In the context of pre-financing aimed at improving the cash flow of the public contract holder before the contracting authority recognizes their right to payment;
- In the context of loans granted against acquired rights;
- In the context of guarantees for exceptional advances granted in return for possessory pledges related to various public contracts concluded by contracting authorities.

Accordingly, once the Fund grants such guarantees, it enables construction or supply companies benefiting from the contract to execute it under optimal conditions, as they require financing at different stages depending on the progress of the contract. This financing may be needed:

- To obtain the guarantees required by the contracting authority awarding the contract when tenders are awarded through competitive bidding;
- To obtain advances that ensure the commencement of works;
- To ensure the smooth execution of the contract during the performance phase of the agreed services, where the Fund intervenes to facilitate financing of the public contract;
- And the granting of guarantees may extend even after the completion of service execution, in order to cover risks of defects in execution or incomplete performance by the contract holder.

In return, the Fund requires the contracting operator to provide personal and/or real security in exchange for obtaining such advances and guarantees. The nature of this security varies; however, Algerian legislation through Presidential Decree No. 15-247, and previously Presidential Decrees No. 02-250 (2002) and No. 10-236 (2010) has expressly provided for the possessory pledge of the public contract as the most important legal mechanism offered by the contracting operator as security for the amounts and guarantees obtained from the Fund.

The Public Procurement Guarantee Fund is required to provide the Ministry of Finance with information relating to the implementation status of its activity program, as well as its accounting and financial position statements, duly recorded and approved by its governing bodies.

3.1. The contracting authority

The contracting authority, within the meaning of Algerian public procurement law, refers to the public administration acting as the project owner, which in all cases is a legal person governed by public law. Accordingly, the provisions of Presidential Decree No. 15-247 apply only to public contracts involving expenditures:⁴³

- The State;
- local authorities (territorial collectivities);
- public administrative institutions;
- public institutions governed by legislation regulating commercial activity, when they are entrusted with carrying out an operation financed, wholly or partly, through a temporary or final contribution from the State or local authorities.

In addition to the bodies mentioned above, and as provided in Article 10 of Presidential Decree No. 15-247, “contracts concluded by a delegated project owner on behalf and for the account of the project owner pursuant to a delegated project management agreement shall be subject to the provisions of this chapter.”

This means that contracts concluded under a delegated project management agreement (Convention de maîtrise d’ouvrage déléguée) are not, in principle, subject to the rules governing public procurement contracts, except where they are concluded by a delegated project owner (maître d’ouvrage délégué), on behalf and for the account of the project owner (maître d’ouvrage). In such cases, the principles of freedom of access to public procurement, equal treatment of candidates, and transparency of procedures set out in Article 5 of the same decree must be respected.

Similarly, anybody not originally subject to public accounting rules and public procurement legislation, regardless of its legal status, is required to establish

procurement procedures based on the principles of freedom of access to public orders, equal treatment of candidates, and transparency of procedures, whenever it uses public funds in any form whatsoever. This is confirmed by Article 11 of Presidential Decree No. 15-247.

Finally, it should be noted that the following contracts are not subject to public procurement rules:⁴⁴

- contracts concluded between public bodies and administrative public institutions among themselves;
- contracts concluded with public institutions governed by commercial legislation when these institutions carry out activities not subject to competition;
- contracts relating to delegated project management (contrats de maîtrise d'ouvrage déléguée);
- contracts relating to the acquisition or leasing of land or real estate (contracts d'acquisition ou de location);
- contracts concluded with the Bank of Algeria.
- contracts concluded under the procedures of international organisations or under international agreements, where such is required;
- contracts relating to conciliation and arbitration services (contrats relatifs aux prestations de service de conciliation et d'arbitrage);
- contracts concluded with lawyers for assistance and representation services;
- contracts concluded with a central purchasing body (centrale d'achat) subject to public procurement rules and acting on behalf of contracting authorities.

It is also worth noting that public economic enterprises are not subject to public procurement award procedures. However, when they carry out an operation financed, wholly or partly, by a temporary or final contribution from the State or local authorities, they are required to adapt their internal procedures to public procurement regulations and ensure their approval by their competent governing bodies. They must likewise establish procurement procedures tailored to their specific nature, based on the principles of freedom of access to public orders, equal treatment of candidates, and transparency of procedures, and ensure their approval by their social governing bodies.⁴⁵

It is also important to highlight that the Algerian legislator's position regarding the identification of parties to the pledge contract is set out more precisely in Executive Decree No. 21-219, as mentioned above. Article 2.80 defines the parties to the pledge of public works contracts as follows:

- the assignor (transferor of rights), namely the contractor and holder of the public works contract;
- the assignee, namely the banking institution, group of banking institutions, or the Public Procurement Guarantee Fund;
- the debtor (obligor), namely the contracting authority or entity responsible for settling the debt arising from the execution of the public works contract.

2. The material scope of the pledge of public contracts

In addition to identifying the parties to the pledge, examining the scope of the pledge of public contracts requires answering two key questions: first, which public contracts may

be subject to a pledge? and second, what is the subject matter of the pledge does it concern the contract itself, or the debts and financial claims of the contractor?

2.1. Contracts eligible for the pledge

According to Article 145 of Presidential Decree No. 15-247, all public contracts, regardless of their type, may be subject to a pledge to secure debts owed by the contractor or by subcontractors and secondary contractors in favour of the lending financial institution. It is stated that “Public contracts and their amendments are subject to pledge under the conditions set out below...”. This is also confirmed by Article 85 of Law No. 23-12.

Accordingly, public contracts defined in Article 29 of the same presidential decree are subject to pledge rules, and they include:

- public works contracts;
- supply contracts;
- study contracts;
- service contracts.

This is further confirmed by the provisions of Executive Decree No. 21-219 of 20 May 2021, approving the General Administrative Clauses Book applicable to public works contracts⁴⁶, where Article 80 states that: “Public works contracts and their amendments are subject to pledge under the conditions provided for in the Public Procurement Law.”

2.2. The subject matter of the pledge of public contracts

The nature of a public contract, as defined in Article 2 of Presidential Decree No. 15-247, is an agreement concluded between the contractor holding the contract on the one hand, and the contracting authority on the other. From the wording of Article 2, it is clear that the Algerian legislator intended to classify public contracts as written agreements concluded for consideration with economic operators.

However, the contract itself cannot be the object of a pledge; rather, the subject matter of the pledge is the debt generated or to be generated from the execution of the public contract.

Thus, the contract serves merely as a means of proving the validity of the pledge and as an instrument evidencing its content, whether the pledge concerns existing debts or future debts. The pledge therefore extends to all or part of the contractor’s debts (or those of subcontractors and secondary contractors), each within the limit of the value of the services they provide.

This interpretation is supported by paragraph 7 of Article 145 of Presidential Decree No. 15-247, which states: “The beneficiary of the pledge shall alone collect, unless otherwise stipulated in the contract, the amount of the debt assigned as security for his rights, except where the contract provides for informing the pledgor in accordance with the rules of agency.” Likewise, paragraph 12 of the same article provides that: “Subcontractors and secondary contractors may pledge all or part of their debts...”.

Both provisions confirm that the subject matter of the pledge is the contractor’s debts, in whole or in part, and not the contract itself.

These debts consist essentially of the amounts arising from the execution of the services covered by the contract, performed by the contractor whether principal contractor, subcontractor, or secondary contractor and held by the contracting authority, the holder

of the The project. Accordingly, it can be said that the subject matter of the pledge of a public contract is not the pledged contract itself, but rather the rights held by the contractor, subcontractor, or secondary contractor against the contracting authority in relation to the execution of the services forming the object of the contract.⁴⁷

Chapter Two: Procedural rules of the pledge mechanism in public procurement

Executive Decree No. 98-67, as amended and supplemented, does not set out detailed provisions specifically regulating the pledge of public contracts or its enforcement procedures. By referring to the regulatory framework governing public procurement, it is clear that the Algerian legislator neither defined this mechanism nor specified its general characteristics. It merely set out, in Articles 145 and 146 of Presidential Decree No. 15-247, a set of exceptional rules governing the pledge mechanism in public contracts. Similarly, Law No. 23-12 does not provide any specific regulation of the pledge of public contracts; it only confirms that all types of public contracts and their amendments are subject to the pledge mechanism.

This section will therefore attempt to address the various procedural aspects specific to the pledge of public contracts, as distinct from other financing guarantees provided for in the field of public procurement.

First: Procedures of the pledge of public contracts

As previously mentioned, the execution of public procurement projects concluded between a public legal entity and an economic operator requires significant financial resources that the contractor is often unable to provide alone. This has led to reluctance among public contractors and business operators to participate in public tenders and invest in government projects, negatively affecting economic investment in the field of public procurement.

Accordingly, the Algerian state has developed a legal framework that serves as a fundamental support for all actors involved in public contracts. This framework provides a set of legal facilitations related to the financial aspects of concluding and executing public procurement projects, through the availability of financing mechanisms for contracted projects.

In this context, public procurement law has regulated the procedural formalities governing one of these financing guarantees, namely the pledge mechanism. The main procedures related to the pledge of public contracts can be summarized in the following procedural steps:

1. Procedure for delivering the “single copy” to the contractor

Pursuant to the provisions of Presidential Decree No. 15-247, the contracting authority (project owner) is required to enable the economic operator holding the contract to obtain an original copy of the concluded public contract. In the field of public procurement, this is referred to as the “single copy” (L'exemplaire unique). This is expressly provided for in paragraph 2 of Article 145, which states:

“2- The contracting authority shall deliver to the contractor a copy of the contract containing a special statement indicating that this document constitutes a title in the event of a pledge.”

This copy constitutes a mandatory document enabling the contractor to pledge the contract with a bank, a group of banks, or the Public Procurement Guarantee Fund. In reality, it is merely a certified true copy issued by the contracting authority awarding the project, which details all technical and particularly financial clauses agreed upon and set out in the terms of reference of the public contract. The single copy also serves as a legal instrument for proving the rights and obligations of each party to the contract, allowing each party to require the other to fulfil its contractual obligations.

The Algerian legislator has limited the contractor's ability to pledge the contract by restricting it to the "single copy" only, in order to prevent legal circumvention whereby the contractor might attempt to pledge the value of the public contract to several financial institutions and thereby obtain the maximum possible financing. This restriction therefore constitutes a legal safeguard aimed at strengthening trust and credit in transactions between economic operators and financing financial and banking institutions.

It should also be noted that public procurement law grants subcontractors (*les sous-traitants*) and secondary contractors (*les sous-commandiers*)⁴⁸ the right to request a copy of the contract as proof of their rights and obligations. Paragraph 12 of Article 145 of Presidential Decree No. 15-247 allows them to pledge all or part of their receivables by way of a pledge, within the limit of the value of the services they perform.

The same paragraph also provides that these parties are subject, with respect to pledge procedures, to the same formal requirements applicable to principal contractors. It states: "Subcontractors and secondary contractors may pledge by way of pledge... under the conditions set out in this article." This implies the application of the same conditions governing the principal contractor to subcontractors.

In order to avoid financial manipulation by these parties, each subcontractor is issued either a certified true copy of the contract approved by the contracting authority or a contract amendment (*addendum*). This ensures the authenticity and legal validity of the single copy as evidence in the event of disputes between the parties.

The underlying principle is that, although subcontractors and secondary contractors are supposed to receive the financial remuneration for their services directly from the contracting authority. Therefore, they have the right to pledge this portion of the debts generated from the execution of the subcontracted agreement. In return, they are entitled to obtain a true copy of the public contract or its *addendum*.⁴⁹

However, if the contracting authority is unable to deliver the single copy of the contract in order to preserve the confidentiality of the transaction, or if the matter relates to the protection of public order, it must provide the contracting party as well as subcontractors and secondary contractors with an extract of the contract signed by it, including a special statement indicating that this document serves as a supporting instrument in the case of pledge (*possessory lien*). In all cases, the delivery of this document is considered equivalent, for the purpose of establishing the pledge, to the delivery of the full copy.

With the issuance of Executive Decree No. 21-219, which approves the General Administrative Clauses Book for public works contracts, the legislator reformulated the provisions relating to the delivery of the single copy under Article 81 thereof. Accordingly, the contracting authority (the "transferee") is required to deliver to the contractor (the "transferor") a decision containing the pledge of debts within the framework of public works contracts, accompanied by an extract of the public works contract, including a

special statement indicating that this document constitutes a supporting instrument in the event of a pledge with a financial institution referred to as the “credit institution of the transferee.”

The legal conditions required for the special statement of the single extract of the public works contract are defined as follows:

- The statement of the single extract must be accompanied by a serial number and recorded in a numbered and initialed register, with specification of the registration number and date of preparation;
- The special statement of the single extract must be issued in the form of a decision and must obligatorily include the following information: the nature of the pledge contract, the name and capacity of the transferor, the name and capacity of the transferee, and the identification of the debt (designation of the debtor, estimated amount of the debt, maturity dates, payment schedule, etc.);
- The decision containing the pledge of debt must be drawn up in two dated and signed copies by the contracting authority (the transferee), each containing the information enabling the transferee institution to record the date and registration number of receipt;
- The contractor (the transferor) is required to return the second copy after completion of the notification procedures to the contracting authority (the transferee);
- The omission of one of the required data, or failure to return the second copy, nullifies the pledge status of the contract;
- The pledge of debt contract is not enforceable against the contracting authority unless the transferee banking institution returns the second copy duly stamped with the date and numbering, and notifies the single copy in its possession to the accountant in charge of payment.

Special provisions apply to the following cases:

In cases where it is impossible for the contracting authority to deliver the “single copy” of the contract in order to preserve the confidentiality of the transaction or where matters of public order are involved, it must nevertheless provide the contracting party as well as subcontractors and secondary contractors with an extract from the contract signed by it. This extract must include a special statement indicating that the document constitutes a supporting instrument in the event of a pledge (possessory pledge). In all cases, the delivery of this document is considered equivalent, for the purposes of establishing the pledge, to the delivery of the full copy of the contract.

With the issuance of Executive Decree No. 21-219, approving the General Administrative Clauses for public works contracts, the Algerian legislator restructured the provisions relating to the issuance of the single copy in Article 81 thereof. Under this provision, the contracting authority (the obligee/assignor) must deliver to the contractor (the assignor of the right) a decision establishing the possessory pledge of debts within the framework of the public works contract, accompanied by an extract of the public works contract. This extract must contain a specific statement indicating that it serves as a security instrument in the event of a pledge with the institution referred to as the “assignee credit institution.”

The legal conditions governing the special statement in the single extract of the public works contract are set out as follows:

- The statement of the single extract must be accompanied by a serial number and recorded in a numbered and initialled register, with an indication of the registration number and date of preparation.
- The special statement in the extract must be issued by decision and must obligatorily include the following details: the nature of the pledge contract, the name and capacity of the assignor of the right, the name and capacity of the assignee, and the specification of the debt (identification of the debtor, estimated amount of the debt, maturity dates, payment schedule, etc.).
- The decision establishing the possessory pledge of the debt must be drawn up in two dated and signed copies by the contracting authority (the assignor), each containing the information enabling the assignee institution to record the date and registration number of receipt.
- The contractor assigning the right is required to return the second copy after completion of the notification procedure to the contracting authority (the assignor).
- The omission of any required information, or the failure to return the second copy, results in the loss of the possessory pledge status of the contract.
- The pledge of debt is not enforceable against the contracting authority unless the assignee banking institution returns the second copy duly stamped with the date and registration number, and notifies the single copy in its possession to the accounting officer responsible for payment.

Special rules apply in the following cases:

(a) Possessory pledge granted in favour of a subcontractor benefiting from direct payment:

Under Article 83 of Executive Decree No. 21-219, a subcontractor may pledge all or part of its receivables, within the limit of the value of the services it performs. The specific conditions of the pledge contract are as follows:

- The subcontractor benefiting from direct payment receives a certified true copy of the public works contract and, where applicable, its amendment.
- The main contractor may not pledge receivables relating to the portion of the contract assigned to subcontracting, and the subcontractor may not subcontract a portion of a contract that is already subject to a pledge.
- The legislator distinguishes between subcontracting approved before notification of the contract, in which case the single copy must include a statement specifying the subcontracted portion, its value, and the identity of the subcontractor benefiting from direct payment.
- If subcontracting is approved during contract execution after the single copy has been issued, the single copy must be amended accordingly. If it is impossible to recover the original single copy, the contractor must obtain a certificate from the assignee institution confirming that the pledge does not hinder direct payment to the subcontractor, and the latter must issue a partial release of the pledged amount.

- In all cases, the contracting authority cannot accept direct payment to a subcontractor for receivables subject to a total pledge, nor can it reduce or increase the pledged amount; the solution is to amend the single copy by including subcontracting and its amounts.

(b) Case of a joint consortium of companies: where the public works contract is executed by each company separately, a single copy is issued for each member of the consortium, as specified in the special data of the copy (Article 2.84 of Executive Decree No. 21-219).

(c) Case of a joint consortium of companies: where the contract is executed jointly and collectively through a temporary consortium under a single account, a single copy is issued in the name of the consortium (Article 3.84 of Executive Decree No. 21-219).

(d) Case of order contracts: in this case, the pledge applies only to the purchase order, and the single copy is accompanied by the following statement: “Single copy relating to the purchase order valued at (amount in words) within the minimum amount of the public procurement contract set at (amount in words)” (Article 85 of Executive Decree No. 21-219).

(e) In the case of contracts with conditional instalments (staged payments), only the fixed instalment or the confirmed conditional instalment that has reached the level of contract award may be subject to a possessory pledge. This must be indicated in the special statement attached to the single copy. (Article 86 of Executive Decree No. 21-219).

2. Procedure for concluding the possessory pledge of a public contract:

The public procurement legislation considers the possessory pledge of a public contract as an agreement concluded between two parties: the financial institution acting as the pledgee creditor and the contracting party or subcontractors and secondary contractors acting as pledging debtors. Accordingly, the validity of this contract requires the fulfilment of three essential elements:

- **Consent (mutual agreement):** This is reflected in the valid consent of both contracting parties, free from any defects of consent as provided under civil law;
- **Object (subject matter):** This consists of the receivables owed to the contracting party (the pledgor) by the contracting authority, in return for the execution of the services stipulated in the public contract;
- **Cause (legal basis):** The cause of the pledge contract is essentially the underlying public contract itself. Consequently, the nullity or termination of the public contract leads to the nullity of the possessory pledge contract.

It should be noted that the legal formalities required for drafting the possessory pledge contract have not been specifically defined. This reflects the application of the principle that “contracts are the law of the parties,” leaving the determination of the conclusion procedures, content, and final form of the contract to the agreement of the contracting parties.⁵⁰

However, in all cases, the current public procurement law requires the parties to the possessory pledge contract to register it in accordance with the legally established registration procedures. In this regard, paragraph 06 of Article 145 of Presidential Decree No. 15-247 states that: “Possessory pledge contracts are subject to the registration procedures provided for under the applicable legislation.”

3. Notification procedure of the possessory pledge of the public contract:

The contracting party is required, immediately upon concluding the possessory pledge contract, to notify the designated accountant of the contract. This is provided for under paragraph 04 of Article 145 of Presidential Decree No. 15-247, which states: “The assignee must notify the accountant designated in the contract of the possessory pledges.” A possessory pledge is not enforceable against third parties or the debtor unless it has been disclosed or notified.

Accordingly, the banking institution or the Public Procurement Guarantee Fund is required to notify the accounting officer responsible for payment operations, as identified in the single copy of the pledged contract. This notification is made by registered letter with acknowledgement of receipt, accompanied by two original copies of the pledge agreement, which are to be Received one of them and stamping the other before returning it to the pledging banking institution. The notification procedures are carried out in accordance with the legally prescribed formal requirements, and through a judicial officer (bailiff).

The financial accountant responsible for payment in the contract may also proceed with the settlement of due amounts owed by the contracting authority, such as advances and payments on account, in favour of the pledgee creditor, in accordance with the procedures and deadlines established by law.

Second: Effects of the possessory pledge of the public contract

As previously noted, the possessory pledge constitutes a dual safeguard. It guarantees, on the one hand, the banking institution the recovery of loan amounts and guarantees allocated for the execution of the public contract project. On the other hand, it also serves as a safeguard for the contracting authority to ensure the proper and complete execution of the project. Accordingly, the contractor bears a dual liability:

- A liability towards the contracting authority to execute the project in accordance with the agreed terms and conditions;
- And a liability towards the banking institution or the Public Procurement Guarantee Fund to repay the granted loans.

Consequently, the possessory pledge of a public contract produces several legal effects, which may be summarized as follows:

(a) The right of the pledgee banking institution to receive payment of the contract price independently: This is provided for in paragraph 07 of Article 145 of Presidential Decree No. 15-247, which states: “7- The beneficiary of the possessory pledge shall receive the pledged amount alone, unless the contract provides otherwise.”

One of the main effects of the possessory pledge is therefore the right of the pledgee (creditor) to receive, independently of other creditors, the amount of the loan secured by the pledge and granted to the contracting party. This payment is made from the receivable allocated as security for the pledge, with priority over other creditors, in order to ensure the protection and recovery of its rights.

This effect is a direct consequence of the pledgee submitting the release document of the possessory pledge to the public accountant responsible for payment, by means of a

registered letter with acknowledgement of receipt, in accordance with paragraph 05 of Article 145 referred to above.

Accordingly, the pledgee creditor exclusively receives the amounts due from the contracting authority in consideration for the execution of the contract, to the exclusion of all others. This consequently prevents the pledging debtor (the contracting party or subcontractors and secondary contractors) from collecting the debt after its settlement by the contracting authority.

This is what gives the possessory pledge contract its specific legal character. The contract is formed between the pledging debtor, on the one hand, and the pledgee creditor, on the other, but it places the contracting authority in a direct legal relationship with the banking institution or the Public Procurement Guarantee Fund when implementing the provisions of the possessory pledge.

It should be noted that the possessory pledge contract covers, in all cases, the total amounts owed by the contracting authority to the contractor in return for the execution of the project. The pledgee creditor may not claim amounts exceeding those owed to the contracting party or subcontractor, whether already established or to be established in the future following the execution of the contract, in return for the loans granted by the banking institution or the Fund.

As stated in paragraph 07/02 of Article 145, which provides: "Payment shall be made notwithstanding any objections or possessory pledges that have not been notified by the last working day preceding the day on which notification of the relevant pledge is made, provided that none of the claimants fall under the preferential rights mentioned in paragraph 11 below."

It should also be noted that, where the possessory pledge is established in favour of several beneficiaries, they must form a group among themselves, headed by a designated representative.

(b) The pledgee's right to priority and to follow the pledged right into any hands

This is one of the most important legal effects of the possessory pledge contract in favour of the creditor. The beneficiary of the pledge (the banking institution), in addition to being entitled to independently collect the amounts due from the contracting authority, has priority over other creditors of the contractor in recovering these amounts. This is a natural consequence of the possessory pledge as a legal institution.

To achieve this purpose, the pledge beneficiaries are entitled to request from the information officer designated within the contracting authority, as set out in the contract, either during execution or at any stage of performance, a summary statement of services performed or a detailed statement of rights established in favour of the contractor. They may also request statements of payments made on account.

By way of exception to the general rule, the following privileges take precedence over the rights of the beneficiaries of the possessory pledge of the contract:

- Privileges relating to judicial costs;
- Rights related to the payment of wages and compensation for paid leave in cases of bankruptcy or judicial settlement, in accordance with the provisions of labour law;

- Privileges relating to the wages of contractors carrying out the works, subcontractors, or secondary contractors approved by the contracting authority;
- Privileges of the Public Treasury;
- Privileges of landowners whose property has been occupied through temporary requisition or expropriation for public interest.

The pledgee creditor also has the right to follow the pledged right into whomever's hands it may pass, and has the right to recover it and seize it in accordance with the seizure procedures established by law. If the contracting party (the debtor) receives the value of the contract from the contracting authority in bad faith and subsequently disposes of it by transferring ownership to another person, the pledgee creditor retains the right to pursue the pledged right in any hands and recover it, taking priority over other creditors.

(c) The banking institution's right as creditor to possess the pledged right:

In our view, this reflects the application of the general rules of possessory pledge established under the Algerian Civil Code. Referring to Article 951, it provides that:

"The pledgor must deliver the pledged thing to the creditor or to the person designated by the contracting parties for its delivery.

The obligation to deliver the pledged thing is governed by the rules applicable to the delivery of a sold item."

Accordingly, based on Article 951, the contractor is required to enable the banking institution (creditor) to take possession of the pledged right. The question that arises here is whether possession of the pledged right refers, in this context, to the monetary amounts owed to the contractor or subcontractors and secondary contractors.

If Article 951 of the Algerian Civil Code were applied literally, the very purpose of the possessory pledge would disappear. This mechanism is primarily designed to encourage banking institutions to finance contractors in public procurement projects through loans and guarantees. If the funds remained in the possession of the financial institution, this would hinder project execution and would revert us to the previously applied system of self-financing.

Therefore, we can say that the application of this provision in the field of public procurement takes on a special nature. It allows the pledgee creditor to hold the pledged right, while at the same time enabling the pledgor to obtain the necessary financing for the execution of the contract. The solution lies in the fact that the pledgor retains possession of the loaned funds, while in return delivering to the banking institution possession of the "single copy" of the public contract, through which the possessory pledge becomes valid and established; whereby the pledgee creditor remains the holder of the "single copy" of the public contract until it fully recovers its rights from the contracting authority.

In support of our previous argument, we rely on the provisions of the following paragraphs of Article 145 of Presidential Decree No. 15-247. Paragraph 02 of the same article states: "The contracting authority shall deliver to the contracting party a copy of the contract containing a special statement indicating that this document constitutes a security instrument in the event of a possessory pledge." Although the text does not explicitly state that possession of the single copy is transferred from the pledging debtor to the pledgee

creditor, this conclusion can be inferred from paragraphs 04 and 05 of Article 145, which state respectively:

“4- The assignee must notify the accountant designated in the contract of the possessory pledges. The pledge is extinguished upon delivery of the copy referred to in paragraph 02 above to the accountant responsible for payment, who is considered a third-party holder of the pledge vis-à-vis its beneficiaries.”

“5- The assignee shall deliver to the accountant holding the copy the release document of the possessory pledge...”

From our perspective, the expression “the copy referred to in paragraph 02 above” refers to the “single copy of the contract.” Otherwise, how can we explain that the pledge beneficiary is required to return it to the accountant responsible for payment upon settlement of his rights by the contracting authority, if the pledgee had not previously possessed the single copy of the contract?

What is transferred in the possessory pledge of a public contract is not the possession of money itself, but rather the possession of the real right established over the claim. This is achieved through the pledgee’s possession of the single copy of the contract, so that the pledging debtor (the contractor, subcontractors, or secondary contractors) cannot pledge it again to another institution in order to obtain additional financing.

2. Effects of the possessory pledge of the public contract towards the pledging contractor

The main effects of the pledge contract with regard to the contracting party holding the contract, subcontractors, or secondary contractors approved by the contracting authority can be summarized as follows:

“Right of the contracting party to access documents and obtain information related to contract execution.”

This is provided for in paragraph 07 of Article 145, which states: “7- The beneficiary of the possessory pledge shall receive the pledged amount alone, unless the contract provides otherwise, except where it stipulates that the pledgor must be informed in accordance with agency rules.”

It follows from the last part of paragraph 07 that, in order to protect the rights of the contracting party referred to in the previous paragraph as the “creator of the pledge” the pledgee creditor is not always entitled to independently collect the contract amount from the contracting authority. Rather, he is required to inform the pledging debtor of all necessary information regarding the execution of the pledge agreement concluded between them. He is also required, upon the request of the pledging debtor, to obtain all documents related to the execution of the pledge contract, as well as relevant account statements.

This constitutes a preventive and exceptional measure only. Its purpose is to grant the contracting party the right to monitor the creditor-pledgee regarding what he collects of entitlements, which must in no case exceed the debts owed by the pledgor. If the beneficiary of the pledge exceeds his rights over the debtor’s assets and collects amounts exceeding those owed by the pledgor, the latter has the right to initiate legal proceedings and recover all his rights from the collecting financial institution.

The Algerian legislator also referred, in paragraph 07, with regard to the legal characterization of the contracting party’s right to access necessary information, to the provisions governing agency (mandate). This means that the creditor-pledgee becomes,

during the execution phase of the pledge contract, akin to an agent of the pledgor in collecting the due amounts. In return, the pledgor (the contracting party) enjoys all the rights of the principal as provided under Article 577 of the Algerian Civil Code, which states that: “The agent must provide the principal with the necessary information regarding the execution of the mandate and present an account thereof.”⁵¹

- Right of the contracting party to receive payment of the amounts due from the contracting administration: It is normal that the creditor-pledgee exclusively collects the amounts due for the execution of the contracted services from the contracting administration, however this right is limited to the value of the debts and loans granted to the pledgor within the framework of financing the contract. Accordingly, the pledgor regains, upon handing over to the payment accountant the pledge instrument or what is called the release of pledge certificate the right to directly receive the remaining amounts from the contracting administration, which are then no longer collectible by the creditor-pledgee under any circumstances.

Third: Termination of the public contract pledge

The effects of the public contract pledge terminate when the creditor-pledgee, represented by the financial institution or the Public Procurement Guarantee Fund, has recovered the amounts due from the contracting administration, through successive payments that are usually made in the form of advances, progress payments, or direct settlement of the account balance.

This procedure is considered an application of the general rules of pledge established in civil law, where Article 952 of the Algerian Civil Code provides that: “If the pledged property returns to the possession of the pledgor The pledge is extinguished”

On this basis, and in accordance with the provisions of Article 145, paragraph five (05), the assignee (the creditor who has recovered his rights) is required to deliver to the payment accountant (Comptable détenteur) the release document of the pledge (La mainlevée des significations de nantissement), by means of a registered letter with acknowledgment of receipt.

The purpose of this procedure is primarily to activate the role of the payment accountant appointed in the contract, in supervising and verifying the process of extinguishment of the pledge, and the disappearance of the creditor’s possession of the pledged right and its transfer to him. This has been considered by some as an additional safeguard for third parties.

In addition, we note that the beneficiary of the pledge may terminate the effect of the pledge, either partially or totally, through a formal written agreement. Accordingly, the financial institution or the Public Procurement Guarantee Fund may directly initiate the procedures for releasing the pledge, either in whole or in part, by submitting a request for release to the public accountant in charge of payment by registered letter with acknowledgment of receipt. This results in the transfer of the effects of the pledge contract, particularly the right of the beneficiary to receive and collect the amounts and rights arising from the execution of the public contract project, to the assigned payment accountant.

However, the public procurement law did not provide a clear definition of the legal procedures applicable in the event of disputes between the parties to the pledge. What if a dispute arises between the contracting authority and the contractor regarding the

execution of the contract provisions, leading to termination of the contract by the contracting authority in accordance with Articles 149–152 of Executive Decree No. 15-247?

We also note that the public procurement law does not set out any specific procedures for the extinction of the pledge in the event of a dispute between the parties to the public contract leading to its termination. Likewise, the same law does not define the procedures to be followed by the creditor-pledgee to recover his rights from the pledgor in such a case.

Conclusion

The above study has presented an overview of the various legal provisions governing the formation and procedures of the pledge of public contracts in Algeria. It has attempted to address several legal issues raised by the application of this mechanism, allowing us to draw some conclusions and observations regarding the legal regime of the pledge of public contracts in Algeria, which may be summarized as follows:

- The importance and effectiveness of the pledge mechanism lie in its significant contribution to encouraging the contractor to perform his obligations with care and precision in order to achieve the required quality. It secures the contract as a guarantee in favor of the banking institution in order to benefit from financing, while at the same time granting the financing banks the right to recover their funds directly from the contract amount and with priority over other creditors.
- The pledge of a public contract constitutes a bilateral agreement between the contractor or subcontractors on the one hand and the banking institution on the other. However, its effects extend to other parties; a direct relationship is created between the contracting authority and the financial institution, the latter being entitled to exclusively receive the value of the contract from the contracting authority, while the contractor remains bound to collect the value of his services rendered.
- The Algerian legislator has not provided a definition of the pledge of public contracts in Executive Decree No. 15-247, nor in previous regulatory texts. This gap has not been remedied by Law No. 23-12. Instead, the legislator limited himself to determining its legal nature, describing it as a security contract through which the financial institution's claims are guaranteed and protected against misconduct by economic operators.
- The rules of pledge apply to all types of public contracts defined in Executive Decree No. 15-247. Accordingly, public works contracts, supply contracts, and even service and study contracts may be subject to a pledge.
- The validity of the pledge requires the existence of its three essential elements: consent, subject matter, and cause. If the will of either party is vitiated by one of the defects of consent recognized in civil law, the other party may annul the pledge contract and terminate its legal effects. Likewise, the pledge is void if its subject matter or cause is defective. This leads to the termination of the pledge if the contractor loses his right to the contract due to its termination following breach of contractual obligations, and consequently loses his right to receive payment under the contract. The subject matter of the pledge is therefore the debts arising or to

arise from the execution of the contract, while the contract itself serves merely as a legal instrument evidencing the existence and cause of the pledge.

- The Algerian legislator did not specify, within public procurement law, the conditions required for the contractor acting as pledgor, nor those required for subcontractors or secondary suppliers. Nor did it define the substantive rules or procedural formalities governing the conclusion of the pledge contract between the contractor and the financial institution.
- The legislator conditioned the creation of the pledge on the delivery of the “single original copy” of the public contract to the contractor. This document serves as the legal instrument proving the rights and obligations of the contractor under the contract, enabling the banking institution to verify the validity and credibility of the contractor’s commitments.
- Notification of the pledge to the payment accountant results in the effective transfer of possession, ensuring that due amounts are paid directly into the hands of the pledgee instead of the contractor. This notification must be accompanied by the single original copy of the contract. The pledge is extinguished when the pledgee notifies the payment accountant of a full or partial release.

Therefore results in the loss of the pledgee’s right to claim payment for the services from the contracting authority, as well as its right of priority over other ordinary creditors.

Accordingly, there is a need to reconsider and establish clearer legal provisions governing the procedural framework of the pledge of public contracts, particularly with regard to the following aspects:

- A comprehensive and precise regulation of the formal requirements for concluding a pledge contract between banking institutions or the Public Procurement Guarantee Fund, on the one hand, and contractors, on the other, ensuring uniform application across all types of public contracts, while also taking into account the specific formalities applicable where the pledge is concluded between a subcontractor or secondary supplier and a financial institution.
- Clearly defining the procedures for notifying the pledge to the public accountant responsible for payment, as well as the procedures governing the release (*mainlevée*) of the public contract.
- Introducing detailed operational provisions for the settlement of disputes and conflicts that may arise in connection with the execution of either the public contract or the pledge contract, while clearly defining the rights of the pledgee upon termination of the pledge.
- Ensuring harmonisation between the general provisions laid down in the 2015 Public Procurement Code and those introduced by the 2021 Executive Decree.

In conclusion, the failure to address the legal gaps affecting the regulatory framework of the pledge of public contracts in Algeria will inevitably weaken the position of the pledgee. This, in turn, is likely to discourage financial institutions from providing the necessary funding for the execution of public contracts, thereby negatively affecting investment in the public procurement sector as a whole.

References:

¹ Presidential Decree No. 15-247 of 16 September 2015 on the Regulation of Public Procurement and Public Service Delegations (Official Gazette of the People's Democratic Republic of Algeria, No. 50, issued on 20 September 2015), as amended and supplemented by Law No. 23-12 of 5 August 2023, establishing the general rules governing public procurement (Official Gazette of the People's Democratic Republic of Algeria, No. 51, issued on 6 August 2023).

² The debtor is presumed to discharge the creditor's claim voluntarily. If he refuses or delays payment, the creditor may compel satisfaction of his claim through compulsory execution against the debtor's assets, since all of the debtor's property serves as a guarantee for the rights of his creditors. However, the general guarantee is not sufficient to secure the creditor's right, as the creditor remains exposed to the risk that the debtor's assets may be insufficient to satisfy the debt and to competition from other creditors seeking recovery from the same assets. Therefore, it became necessary to provide a special security for the creditor's right in addition to the general guarantee.

Special securities for the protection of creditors' rights have traditionally taken two principal forms: they may take the form of personal securities (*Sûretés Personnelles*) or real securities (*Sûretés Réelles*). The latter are accessory real rights established for the purpose of securing a debt owed by the debtor to the creditor. By virtue of these rights, the secured creditor enjoys priority over ordinary creditors. In addition to the right of preference (*Droit de préférence*), the secured creditor also enjoys the right of pursuit (*Droit de suite*).

See: Mahmoud Gamal El-Din Zaki, *Personal and Real Securities*, 3rd ed., Dar Al-Kitab Al-Hadith, Cairo, 1979, p. 146.

³ The possessory pledge initially appeared in the form of a transfer of ownership from the debtor to the creditor. In early Roman law, real rights were limited to ownership, and if a debtor wished to provide a real security interest over an asset in favour of a creditor, the only available mechanism was to transfer ownership of that asset to the creditor, subject to the creditor's obligation to retransfer ownership once the debt had been satisfied upon maturity.

With the development of Roman law and the recognition of the shortcomings of this security arrangement, a distinction emerged between ownership rights and the accessory real rights that could burden property. It thus became possible to establish a pledge over property owned by the debtor in favour of the creditor, serving as a real security that entitled the creditor to possess the pledged asset in the event of the debtor's non-payment. Moreover, the clause allowing the creditor to acquire ownership of the pledged asset upon default at maturity was abolished and replaced by a provision permitting the creditor, in the event of non-payment, to purchase the pledged asset at a fair price. Subsequently, another provision was introduced authorising the creditor, upon the debtor's default, to sell the pledged asset and satisfy his claim from its proceeds. The creditor was also granted the right to recover possession if it was taken from him by the debtor or by a third party, as well as the right to pursue the asset into whosoever's hands it passed, while the debtor retained ownership of the pledged property.

The possessory pledge was also known under old French law as "*Le mort-gage*" ("the dead pledge"). Under this system, the pledgee creditor was entitled to collect the fruits or

revenues generated by the pledged property without deducting them from the debt. The income derived from the pledged immovable property was allocated solely to the payment of interest, regardless of the amount of that income. Under modern French law, however, the creditor is required to apply the revenues first toward interest and then toward the principal debt. The income of the pledged property is therefore no longer left entirely to the creditor. This modern system is known as “Le vif-gage” (“the living pledge”).

For further details, see:

Mohamed Najib Awadin Al-Maghribi, *Effects of the Possessory Pledge in Relation to the Pledgee Creditor, 1st ed., Dar Al-Nahda Al-Arabiya, Cairo, pp. 9–12.

H. L. Mazeaud et al., *Leçons de droit civil*, Vol. 3 (Suretés – Publicité foncière), Part 1, Éditions Montchrestien, Paris, 1968, p. 176.

⁴ From a linguistic perspective, the expression “possessory pledge” is a compound term consisting of two principal elements: pledge (rahn) and possession (hiyāzah).

The term “rahn” (pledge) in Arabic denotes stability, permanence, and detention. It is said that a thing is ruhina when it becomes fixed, enduring, and restrained. Accordingly, a pledge refers to property placed as security for a debt, meaning an asset that guarantees the debt and remains held until the debt is discharged. This meaning is reflected in the words of Allah, the Exalted, in verse 38 of Surat Al-Muddathir:

“Every soul is held in pledge for what it has earned.”

It is also reflected in the saying of the Prophet Muhammad (peace be upon him):

“The soul of the believer remains pledged by his debt until it is paid on his behalf.”

The second meaning of the term detention or retention is closely connected to the first, since detention implies remaining fixed in a place and not departing from it.

(See: Abdel Fattah Abdallah Al-Barshoumi, *Rules of Pledge and Pre-emption in Islamic Jurisprudence*, 2nd ed., Dar Al-Nahda Al-Arabiya, Cairo, 2004, p. 22; and Abdel Majid Al-Maaloumi, *The Possessory Pledge between Sharia and Law*, 1st ed., Al-Najah Al-Jadida Press, Casablanca, 2003, p. 12.)

As for “hiyāzah” (possession), linguistically it signifies holding, taking possession, and ownership. Consequently, the term possession is used to describe the property belonging to a person, whether movable or immovable.

(Mohamed Abdel Jawad Mohamed, *Possession and Prescription in Islamic Jurisprudence Compared with Positive Law*, 1st ed., Mansha’at Al-Ma’arif, Alexandria, 1977, p. 63.)

⁵ Order No. 75-58 of 26 September 1975 containing the Civil Code, as amended and supplemented.

⁶ This meaning is affirmed by the provisions of Article 891 of the amended Algerian Civil Code, which states:

“A pledge may be established as security for a debt subject to a condition, a future debt, or a contingent debt. It may also be established as security for an open line of credit or for the opening of a current account, provided that the pledge agreement specifies the amount of the secured debt or the maximum limit to which such debt may extend.”

⁷ The original wording of Article 2071 of the French Civil Code was as follows:

“Le nantissement est un contrat par lequel un débiteur remet une chose à son créancier pour sûreté de la dette.”

⁸ See: Abd al-Salam Ahmad Fighou, *Special Civil Contracts in Moroccan Law*, 1st ed., Dar Al-Afaq Al-Maghribiya for Publishing, Rabat, 2008, p. 85.

⁹ Samir Abdelali, *Public Procurement and Development*, 1st ed., Matbaat Al-Ma'arif Al-Jadida, Rabat, 2010, p. 66.

¹⁰ The Maliki definition of the possessory pledge was stated by Ibn al-Hajib as follows: "The transfer by a person having the power of disposition of a saleable property—or even an uncertain asset (gharar)—as security for a right, where such security is stipulated in the contract."

For their part, the Hanafi jurists emphasized the contractual nature of the possessory pledge, describing it as "a contract of security constituted by property." Ibn al-Humam defined it as:

"The making of a thing detained as security for a right that may be satisfied from the pledged property itself, such as debts."

The Hanbali jurists, on the other hand, defined it as:

"Property made as security for a debt, from which the debt may be recovered either from the property itself or from its sale proceeds."

For further details, see: Alaoua Houam, *The Possessory Pledge in Islamic Jurisprudence and Algerian Civil Law*, Master's Thesis in Sharia and Law, Faculty of Social Sciences and Islamic Sciences, Department of Sharia and Law, University of Hadj Lakhdar–Batna, 2008, pp. 5–7.

Abdel Fattah Abdallah Al-Barshoumi, *op. cit.*, pp. 29–33.

¹¹ Rouhidine Al-Souar, *Commentary on Civil Law (Accessory Real Rights)*, 1st ed., Riyadh Press, Damascus, 1981, p. 172.

¹² The original text of the definition reads as follows:

A pledge is a contract by which an intangible asset is assigned as security for a loan or a debt. Thus, the debtor (or borrower) delivers an intangible asset to his creditor as security for the repayment of the loan or debt. If the debtor is unable to fulfil his obligation, the creditor may sell the asset in order to recover the amount owed to him."

In: D. Thioudellet et al., *Pledge (Nantissement)*, Ooreka, website consulted on 25 April 2016:

<https://hypothèque.ooreka.fr/comprendre/nantissement>.

¹³ The original text of the definition reads as follows:

"A pledge is a contract by which the holder of a public contract, or any subcontractor admitted to direct payment, delivers to his creditor the sole copy of the contract issued to him by the public authority."

In:

F. Makowski, *Pledge (Nantissement)*, website consulted on 25 April 2016:

<http://www.marche-public.fr/Marches-publics/Definitions/Entrees/Nantissement.htm>.

¹⁴ See: Leila Camelia Habchi, *Possessory Pledge in Public Procurement Contracts – A Comparative Study*, Master's Thesis in Law, Faculty of Law and Political Science, Djillali Liabès University, Sidi Bel Abbès, 2014, website consulted on 18 April 2016:

[http://rdoc.univ-sba.dz/handle/123456789/540?mode=simple&submit_simple=Affichage+abbr%C3%A9g%C3%A9](http://rdoc.univ-sba.dz/handle/123456789/540?mode=simple&submit_simple=Affichage+abbr%C3%A9g%C3%A9).

sba.dz/handle/123456789/540?mode=simple&submit_simple=Affichage+abbr%C3%A9g%C3%A9).

¹⁵ The term was used in Article 145 of the aforementioned Presidential Decree No. 15-247, which states:

“Public procurement contracts and their amendments may be pledged under the conditions provided below.”

¹⁶ The definition of a possessory pledge over movable property, using the term “Gage”, was stated as follows:

“A contract by which the debtor or a third party relinquishes possession of movable property in favour of the creditor in order to secure payment of the debt; the creditor’s right over the movable property.”

In: Larousse Dictionary, website consulted on 22 April 2016:

<http://www.larousse.fr/dictionnaires/francais/gage/35779>.

¹⁷ The definition of a possessory pledge over immovable property, using the term “Antichrèse”, was stated as follows:

“The pledge of immovable property is called ‘antichresis’ when its owner grants its use and enjoyment to a creditor, allowing the latter to collect its revenues until their accumulated value is sufficient to discharge the debt. The value of the revenues received is first applied to the payment of interest and then deducted from the remaining principal.”

In: S. Braudo, Dictionary of Private Law, website consulted on 22 April 2016:

<http://www.dictionnaire-juridique.com/definition/antichrese.php>.

¹⁸ The Algerian legislator, pursuant to Article 950 of the Civil Code concerning the provisions governing possessory pledge, referred to the provisions of Article 893 of the same Code relating to mortgage. The latter provides that:

“The pledge shall not be separated from the secured debt; rather, it shall remain accessory thereto in its validity and extinction, unless otherwise provided by law.”

Accordingly, the pledgor-debtor may invoke against the pledgee-creditor all forms of defenses that may be raised with respect to the secured claim. Where the pledgor is not the debtor himself and the pledge is constituted by a third-party security provider (real surety), the latter may in addition to invoking against the pledgee defenses affecting the validity of the pledge, such as lack of capacity or defects of consent also rely on any defenses available to the debtor in relation to the debt, even if the original debtor has waived them.

See: Abdel Razzaq Ahmed Al-Sanhuri, *Al-Wasit in the Explanation of Civil Law*, Vol. X: (Personal and Real Securities), 2nd ed., Dar Al-Nahda Al-Arabiya, Cairo, 1994, p. 859.

¹⁹ See: Hassan Abdel Latif Hamdan, *Real Securities*, 1st ed., Al-Dar Al-Jami’iyya, Beirut, 1999, p. 142.

²⁰ Faisal Al-Zoudani, “The Pledge of Public Procurement Contracts between the Requirements of the 1948 Dahir and the Innovations of the New Law No. 112-13,” *Journal of Law and Business*, May 2015, website consulted on 25 April 2016. <http://www.droitentreprise.org/web/?p=2808&>

²¹ The dual nature of public procurement contracts stems from the special nature of such contracts themselves. Public procurement contracts constitute a category of legal transactions entered into by the administration in the course of performing its administrative functions, ensuring the provision of public services, and managing public utilities. From a legal standpoint, they are administrative contracts; however, they possess a specific nature and form that distinguish them in many respects from private contracts, which are based on the concurrence of the parties' wills to produce legal effects. In one of his commentaries on the concept of the administrative contract, Dr. Suleiman Al-Tamawi stated that it is "a contract in its form and a legal regime in its substance." Based on this characterization, a public procurement contract, as one of the legal acts of the administration in general and one of its voluntary legal transactions in particular, is governed by a legal framework comprising a variety of rules and principles relating to its conclusion, execution, and the circumstances surrounding its performance.

This legal framework encompasses two categories of rules. The first consists of legal rules that reflect the contractual nature of public procurement contracts, whereby the principle of party autonomy is embodied through the rule that "the contract is the law of the parties," meaning that contracts may only be concluded through the meeting of the parties' intentions to create legal effects. The second consists of legal rules that establish a regulatory framework through which the legislator seeks to achieve a range of public interests by means of public procurement contracts and by selecting the contracting party who satisfies a set of technical requirements and legal conditions. These requirements constitute, in effect, the technical and legal qualifications necessary for contracting with the public administration in the context of managing and meeting the needs of public utilities.

²² This corresponds to the provisions of Article 21 of Presidential Decree No. 10-236 of 7 October 2010 on the Regulation of Public Procurement Contracts (Official Gazette of the People's Democratic Republic of Algeria, No. 58, 2010).

²³ See: Article 81 of Presidential Decree No. 10-236, cited above.

²⁴ This corresponds to the provisions of Article 22 of Presidential Decree No. 10-236, cited above.

²⁵ See: Article 53 of Presidential Decree No. 10-236, cited above.

²⁶ See: Article 58 of Presidential Decree No. 10-236, cited above.

²⁷ Banking institutions are divided into banks and financial institutions. Under Articles 66 to 68 of the Algerian Currency and Credit Law, a bank is considered a banking institution legally authorized, to the exclusion of any other entity, to carry out the following operations:

- * Receiving funds from the public, particularly in the form of deposits (Article 67);
- * Carrying out credit operations involving a commitment by signature, such as avals, guarantees, sureties, or other forms of security (Article 68);
- * Making payment instruments available to customers and managing such instruments (Article 69).

Order No. 03-11 of 26 August 2003 relating to Currency and Credit does not define the term "financial institution." It merely provides, under Article 71, as follows:

"Financial institutions may neither receive funds from the public nor manage payment instruments or make them available to their customers; however, they may carry out all

other operations.”

Accordingly, financial institutions, like banks, may engage in the banking activity of granting credit, but without intervening in the receipt of deposits or the management of payment instruments. With regard to the establishment of banking institutions of either category, the Algerian legislator requires that, where such institutions are established in Algeria, they must adopt the legal form of a joint-stock company, pursuant to Article 83 of the Currency and Credit Law cited above.

For further details, see:

Kahina Erzil, “The Position of Algerian Banks and Financial Institutions in Foreign Trade,” National Symposium on Banking Reforms in Algeria, Faculty of Law and Letters, University of 8 May 1945, Guelma, 2010, pp. 1–2 (unpublished).

Najma Dania Allouda, The Role of Banking Institutions in Foreign Trade, Master’s Dissertation in International Business Law, Faculty of Law and Political Science, Mouloud Mammeri University, Tizi Ouzou, 2014, pp. 8–12.

²⁸Executive Decree No. 98-67 of 21 February 1998 establishing the Public Procurement Guarantee Fund and regulating its organization and operation (Official Gazette of the People’s Democratic Republic of Algeria, No. 11, issued on 1 March 1998, pp. 15 et seq.).

²⁹ Executive Decree No. 08-06 of 19 January 2008 establishing the Public Procurement Guarantee Fund and regulating its organization and operation (Official Gazette of the People’s Democratic Republic of Algeria, No. 05, issued on 30 January 2008).

³⁰ Before Algeria’s independence, public procurement contracts were governed by French law. At that time, the French legislator entrusted the financing of public procurement contracts to the National Fund for State Contracts (C.N.M.E.), established pursuant to the law of 19 August 1936.

Following independence, the Algerian Development Fund (C.A.D.) was created under Law No. 63-165 of 7 May 1963, establishing and defining the legal status of the Algerian Development Fund.

This situation remained unchanged until the enactment of Legislative Decree No. 93-01 of 19 January 1993 containing the Finance Law for 1993 (Official Gazette of the People’s Democratic Republic of Algeria, No. 04, 1993). Article 131 thereof expressly provided for the establishment of guarantee funds and mutual guarantee schemes.

See: Abdelghani Ben Zemam, Administrative Financing of Public Procurement Contracts in Algerian Law, Master’s Dissertation in Business Law, Faculty of Law, University of Algiers, 2008, pp. 7–73.

³¹ In order to perform the functions entrusted to it, the Public Procurement Guarantee Fund adopts appropriate organizational methods and mobilizes all resources necessary for its activities. To this end, it is required to:

- * Develop information and contract-analysis tools in close cooperation with the various public authorizing officers;
- * Request from beneficiaries of guarantees or sureties all necessary justifications and supporting documents;
- * Seek the assistance of public administrations and various State bodies with regard to all information, investigations, and supervisory measures deemed necessary;
- * Take any measures relating to additional real securities that it considers appropriate;

* Request the assistance of public administrations and various State bodies concerning any information, investigations, and controls required for the proper discharge of its functions;

* Adopt all measures relating to supplementary real guarantees that it deems necessary and appropriate.

³² Pursuant to Article 5 of Executive Decree No. 98-67, cited above, the headquarters of the Public Procurement Guarantee Fund** is located in Algiers. It may, however, be transferred to any other location within the national territory upon a proposal by the Minister of Finance.

Accordingly, the Fund's administrative structure comprises the following directorates and branches:

* General Directorate Algiers;

* Central Regional Directorate Algiers;

* Eastern Regional Directorate Constantine, with a corresponding branch in Sétif;

* Western Regional Directorate Oran, with corresponding branches in Chlef and Saïda;

* Southern Regional Directorate Ouargla.

The Fund also aims, in the future, to establish representatives in every wilaya of the country, amounting to a total of forty-eight (48) regional representations.

³³ See: Article 1 of Executive Decree No. 98-67, cited above.

³⁴ The regional directorates are empowered to carry out the following functions:

* Analyzing and assessing financial and technical results;

* Examining and evaluating loan-guarantee applications submitted by primary banks on behalf of enterprises benefiting from public procurement contracts;

* Monitoring the financial and technical execution of public procurement contracts benefiting from guarantee-backed loans granted by the Fund;

* Preparing, transmitting, and communicating all information and statistical data to the Fund's headquarters, in addition to forwarding the revenues and proceeds generated by their activities.

In general, the regional directorates perform functions similar to those carried out by the central directorate. They are responsible for deciding on the granting of loans and credit facilities secured by guarantees, following a thorough financial assessment. However, where the amount of the credit facility or loan exceeds 15,000,000 Algerian Dinars (DZD), the authority to decide on the granting of the loan is transferred to the central directorate. For further details, see: Faiza Nabi, *The Role of the Public Procurement Guarantee Fund in the Execution of Public Procurement Contracts*, Master's Dissertation submitted in partial fulfillment of the requirements for the Master's Degree in Public Business Law, Faculty of Law and Political Science, Kasdi Merbah University, Ouargla, 2015, pp. 15–17.

³⁵ See: Article 6 of Executive Decree No. 98-67, cited above.

³⁶ This mechanism is also referred to as the “intermediary system.” Under this arrangement, the Public Procurement Guarantee Fund intervenes to facilitate the financial execution of a public procurement contract by acting as an intermediary between the enterprise awarded the contract that is, the contractor engaged by the administration and the bank or financial institution providing the loan required to finance the contract, by furnishing the necessary guarantees.

This occurs when the bank or financial institution decides not to commit to financing the enterprise because the latter is unable to provide sufficient guarantees. In such a case, the bank or financial institution seeks a guarantee from the Fund on behalf of the contractor.

In this context, the Fund acts as a guarantor of last resort upon the maturity of the debt. If the enterprise is unable to repay its debts to the lending banking institution, the Fund undertakes to pay the amount due. Thereafter, the Fund acquires the right to seek reimbursement from the contractor for the sums it has paid on its behalf.

For further details, see: Ismail Bahri, *Guarantees in the Field of Public Procurement Contracts in Algerian Law*, Master's Dissertation, State Law and Public Institutions Branch, Faculty of Law, University of Algiers, 2009, pp. 91–93.

³⁷ Pursuant to Article 1 of Executive Decree No. 08-06, cited above, which amended Article 8 of Executive Decree No. 98-67, the Board of Directors of the Public Procurement Guarantee Fund, chaired by the Director-General of the Treasury, is composed of:

- * The Director-General of the Budget at the Ministry of Finance;
- * A representative of the Minister of the Interior and Local Authorities;
- * A representative of the Minister responsible for Public Works;
- * A representative of the Minister responsible for Housing;
- * A representative of the Minister responsible for Industry;
- * A representative of the Professional Association of Banks and Financial Institutions;
- * A representative of professionals from the Algerian Chamber of Commerce and Industry.

The members of the Board of Directors are appointed by decision of the Minister of Finance for a term of three (3) years, renewable, in accordance with Article 9 of Executive Decree No. 98-67.

The Director-General of the Fund, on the other hand, is appointed by Executive Decree upon the proposal of the Minister of Finance, and his or her duties are terminated in the same manner, pursuant to Article 16 of Executive Decree No. 98-67.

³⁸ The Chairman of the Board of Directors is responsible for preparing the agenda on the basis of a proposal submitted by the Director-General of the Fund. Notices convening Board members must be sent at least fifteen (15) days before the date of the meeting in the case of ordinary sessions. This period may be reduced to no fewer than eight (8) days in the case of extraordinary sessions (Article 11).

³⁹ Pursuant to Article 22 of Executive Decree No. 98-67, the budget of the Public Procurement Guarantee Fund** includes the following items on the revenue side:

- * State subsidies;
- * Treasury advances;
- * Management commissions relating to completed operations;
- * Commissions on guarantees, sureties, and other negotiable instruments;
- * Returns on invested funds;
- * Potential borrowings;
- * Donations and bequests;
- * Financial resources necessary to cover the obligations arising from services performed on behalf of the State.

The Fund's budget also includes the following items on the expenditure side:

- * Expenditure relating to the Fund's equipment and infrastructure;
- * Operating and administrative expenses of the Fund;
- * Expenses connected with the Fund's activities and all other expenditures necessary for the achievement of its objectives.

⁴⁰ Article 3 of the Appendix to the Book of Specifications, drafted pursuant to Law No. 88-01 of 12 January 1988 containing the Framework Law on Public Economic Enterprises, as well as Executive Decree No. 98-67 of 21 February 1998 establishing the Public Procurement Guarantee Fund and regulating its organization and operation, provides that:

"The Fund enables holders of public procurement contracts and public supply orders to benefit from financial advances and to mobilize the debts owed to them in connection with the execution of contracts or public supply orders."

⁴¹ In this case, the holders of such contracts or supply orders are required to issue promissory notes in favor of their financing banks. These instruments are then guaranteed by the Public Procurement Guarantee Fund.

⁴² Such mobilization may take place during the execution of the contracts or upon their completion. It is effected upon presentation of a certificate of entitlement to payment, issued by the public authorizing officer acting as the project owner.

⁴³ See: Article 6 of Presidential Decree No. 10-236, cited above.

⁴⁴ See: Article 7 of Presidential Decree No. 10-236, cited above.

⁴⁵ See: Articles 8 and 9 of Presidential Decree No. 10-236, cited above.

⁴⁶ Executive Decree No. 21-219 of 20 May 2021, approving the General Administrative Specifications applicable to public works contracts (Official Gazette No. 50 of 2022).

⁴⁷ See: Abdelghani Ben Zimam, *op. cit.*, p. 142. Also see: Faiza Nabi, *op. cit.*, p. 46.

⁴⁸ A contractor awarded a public procurement contract may, in accordance with the provisions of Article 140 of Presidential Decree No. 15-247, subcontract part of the contract through a subcontracting agreement, provided that the value of such subcontracting does not exceed forty percent (40%) of the total contract amount in all cases.

Furthermore, Articles 141 and 142 of the same decree stipulate that any subcontractor involved in the execution of a public contract must declare their involvement to the contracting authority. The contracting authority, if informed of an undeclared subcontractor, is required to formally notify the contractor to rectify the situation within a period of eight (8) days, under penalty of sanctions.

Accordingly, the contractor remains the sole party responsible vis-à-vis the contracting authority for the execution of the subcontracted portion of the contract. The contractor is also required to submit a copy of the subcontract agreement to the contracting authority, and such subcontracting is subject to the prior written approval of the latter.

See: Articles 140 to 144 of Presidential Decree No. 15-247.

⁴⁹ A modification order (addendum) constitutes a contractual document attached to the public procurement contract. It is concluded in all cases where its purpose is to increase or reduce services and/or to amend one or several contractual clauses of the contract.

The services covered by the addendum may include additional services that fall within the overall subject matter of the contract. Moreover, the contracting authority may even conclude an addendum to a contract whose execution has already been completed, in order

to cover services or supplies necessary to ensure the continuation of a public service that was previously established. In all cases, the contracting authority is entitled to conclude several addenda for a single contract.

See: Articles 135 to 139 of Presidential Decree No. 15-247.

⁵⁰ See: Abdelghani Ben Zimam, *op. cit.*, p. 147.

⁵¹ Same reference, p. 151