

## Administrative Urgent Proceedings in Public Procurement Disputes under Algerian Law: Cases, Characteristics, and Significance

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### Abstract

This study examines the role and significance of administrative urgent proceedings in disputes arising from public procurement under Algerian law. It adopts a descriptive and analytical approach based on the Code of Civil and Administrative Procedure and the rules governing public procurement. The paper focuses on two principal forms of urgent judicial protection: interim financial advances granted to contractors whose established claims are not seriously disputed, and pre-contractual urgent proceedings intended to safeguard publicity, transparency, and competition during the award stage. It also analyzes the legal characteristics of judgments issued in such proceedings, the twenty-day time limit for adjudication, and the court's power to postpone the signing of a public procurement contract. The study finds that administrative urgent proceedings provide rapid and effective protection for contractors, competing economic operators, public funds, and the public interest. They also reduce the harmful consequences of ordinary procedural delay. However, several provisions remain ambiguous, particularly those relating to appeals and the procedural consequences of exceeding statutory time limits. The study therefore highlights the need for clearer legislative rules and more consistent judicial practice.

**Keywords:** Administrative urgent proceedings; Public procurement; Algerian law; Interim financial advance; Pre-contractual review.

### Introduction

Recourse to the judiciary is one of the fundamental rights provided for by the new Algerian Constitution in Article 158 thereof. This right is based on providing adequate protection for the rights of litigants, including enabling them to present the subject matter of the dispute, submit evidence and proof, raise grounds of defence as well as pleas, and present everything they have within the framework of facts and law. Litigation culminates in the issuance of a judgment that constitutes the decisive word in the case and is binding on the parties. This shows that the right to bring an action is surrounded by sufficient legal safeguards.

Therefore, the Algerian legislator had to place at the disposal of the disputing parties another type of administrative litigation procedure that meets their urgent need, which ordinary procedures cannot satisfy. These measures or procedures are called urgent measures; their purpose is generally to deal with cases that require speed and cannot tolerate delay, in order to protect the rights and legal positions of the disputing parties in the future.

In light of the foregoing, the following problem may be raised: What is the importance of administrative urgency in public procurement matters?

To address this problem, the paper is organized into three themes: (1) cases of administrative urgency in public procurement matters; (2) characteristics of legal urgency in public procurement matters; and (3) the importance of administrative urgency.

Importance of the study: The importance of this study lies in its connection with public funds and the implementation of public requirements upon which every public activity is based. It is also important because the adoption of free competition in the economy in general and in economic activities in particular makes it one of the pillars of the State's economic system, owing to the protection it provides by limiting manifestations of favoritism and corruption resulting from blatant violations of the rules of legality by the public administration. All of this has led the study to examine ways of resolving disputes between the contracting operator and the contracting authority, whether at the stage of conclusion or the stage of performance.

### **Theme One: Cases of Administrative Urgency in Public Procurement Matters**

The Algerian legislator, under Law No. 08-09, which constituted a revolution in litigation procedures before the administrative judiciary, regulated cases of administrative urgency by introducing seven cases, some of which had not previously been known under the old law. We shall address some of them by way of example and not limitation. First, we deal with urgency in matters of financial advances, and then with urgency in matters of administrative contracts and public procurement.

#### **First: Urgency in Matters of Financial Advances (Référé-Provision)**

In order to establish its projects, the administration resorts to private or public companies to carry them out. However, disputes sometimes arise between it and project executors in particular, and contractors in general, whether during the implementation stage or upon completion, especially with regard to the payment of contractors' dues. The administration often delays payment of their money despite the debt being established, which leads them to litigate through full-jurisdiction actions before administrative courts.

However, owing to the nature of procedures and their slowness, deciding the merits of the dispute may take a long time, which may cause harm to the creditor because of the delay in obtaining his dues and may sometimes lead to his bankruptcy if his dues are substantial. The Algerian legislator therefore became aware of this matter and, taking into account what modern legislation—especially French legislation—had achieved, laid down provisions in Chapter Four of Title Three of Book Four concerning procedures before administrative judicial bodies, under the heading “Urgency in Matters of Financial Advances.”

By referring to the French version of the Code of Civil and Administrative Procedure, we find that the Algerian legislator used the same term employed in the French system of administrative urgent proceedings, namely “Référé-Provision,” meaning proceedings for an interim financial advance. It should be noted that this action appeared in administrative litigation procedures in France in 1988. Under this type of urgent action, the creditor of a public person may obtain a financial advance, and it is sufficient that there be no serious dispute concerning the existence of the debt. The usefulness of this action lies in allowing the creditor to obtain advances on the sums due to him while awaiting the precise determination of his rights as creditor, which can otherwise be achieved only through lengthy procedures. Making the claim for a financial advance fall within the jurisdiction of urgent

proceedings confirms the tendency to broaden the jurisdiction of the administrative urgent applications judge and, on the other hand, confirms the abandonment of the traditional principles on which urgent proceedings were based.

In this regard, Article 942 of the Code of Civil and Administrative Procedure provides: “The urgent applications judge may grant a financial advance to a creditor who has brought an action on the merits before the administrative court, unless the existence of the debt is seriously disputed, and may, even of his own motion, make payment of that advance subject to the provision of security.”

### **1. Conditions Specific to the Action for an Interim Financial Advance**

#### **A. The action must be brought by the creditor:**

This means that the claimant must be a creditor of the administration. To establish that capacity, he must attach to his application all documents confirming and justifying the debt, such as the contract proving that the project was entrusted to him, the record of completion and performance of the project and its acceptance by the administration, as well as evidence showing that he demanded payment of his dues. Accordingly, failure to attach those documents and to substantiate his judicial application results in its rejection.

#### **B. An action on the merits must be brought:**

The urgent applications judge may not order a financial advance unless the person concerned has first brought an action on the merits before the judicial bodies to which urgent proceedings belong. The purpose of the action on the merits must be to obtain a judgment ordering the payment of a sum of money. This means that if the matter concerns an action for annulment of an administrative decision, the action for an interim financial advance will not be admissible, even if it is based on damage suffered by the claimant as a result of the challenged decision.

#### **C. The debt must not be seriously disputed:**

That is, the debt must be established, due and payable, and not seriously contested by the defendant—the administration. The creditor must submit documents proving the debt and showing that no action on the merits has been brought by the administration disputing its existence. The urgent applications judge may not issue an order for a financial advance in respect of a disputed debt. The dispute may concern the amount of the debt but not necessarily its existence, and the dispute must be serious, through the defendant's submission of documents capable of creating uncertainty and doubt concerning the debt.

With regard to the amount of the debt, the second paragraph of Article 942 of the Code of Civil and Administrative Procedure provides that the judge may, even of his own motion, make payment of the advance subject to the provision of security. This means that, in the absence of a dispute concerning the amount of the debt, the judge may still grant the financial advance while making it subject to the provision of security.

We conclude that this action may be used in public procurement when the public contracting authority refuses to pay the sums agreed upon in the contract to its co-contractor, unless the administration claims that there is a serious dispute concerning the principal amount.

The granting of a financial advance relating to the account is, however, rejected where the contractor may be exposed to financial penalties because of delay in performing the contract.

Consequently, granting a financial advance in public procurement is linked to the contractor's completion of his obligations toward the administration. Therefore, the application for a

financial advance must be accompanied by a summary statement of the services performed or a detailed statement of the rights established in favour of the contractor.

It should be noted that Article 108 and the following articles of the Public Procurement Law authorized the holder of the contract, during performance of the contract, to request from the contracting authority financial advances for services performed, in accordance with certain conditions imposed by that law.

## **2. Characteristics of the Urgent Order for a Financial Advance**

After examining the conditions for the admissibility of the action for an interim financial advance, we now turn to the characteristics of the urgent order granting a financial advance. From Article 942 of the Code of Civil and Administrative Procedure, the characteristics of the urgent order issued for a financial advance may be derived.

### **A. As to its nature:**

It falls within the category of urgent orders aimed at taking a temporary measure consisting of obliging the administration to pay a financial advance to the claimant to enable him to manage his financial affairs while awaiting a decision in the action on the merits seeking to oblige the administration to pay his dues. It is therefore a measure whose purpose is to protect the creditor's financial rights.

As mentioned above, the legislator authorized, under the second paragraph of Article 942, the urgent applications judge, when granting a financial advance to the creditor, to make payment of that advance subject to the claimant's provision of security. It is understood from this that the request for security may be made by the opposing party, namely the defendant in the action for an advance, and the judge may order it of his own motion within the framework of his discretionary power and state the reasons for it in the order issued. The legislator did not specify the cases in which the judge intervenes to impose security or its type. In our personal view, if it appears to the urgent applications judge from the case file that the financial advance ordered may not be repaid if the claimant loses his action before the court deciding the merits, or if the amount of the debt awarded is less than the amount of the advance, security should be required.

### **B. As to its susceptibility to appeal:**

An appeal may be brought against an order granting or refusing an advance before the Council of State within fifteen (15) days from the date of official notification of the order, in accordance with Article 943 of the Code of Civil and Administrative Procedure. The Council of State may grant a financial advance when hearing the appeal and may also make payment of that advance subject to the provision of security, in accordance with Article 944. The Council of State may also order the suspension of execution of the order relating to the granting of the financial advance, pursuant to Article 945.

## **Second: Urgency in Matters of Administrative Contracts and Public Procurement (Référé en matière de passation des contrats et marchés)**

Proceedings on the merits in urgent matters are a special judicial procedure of European legislative origin. The direct reason for the emergence of the system of pre-contractual proceedings on the merits in urgent cases was the European legislator's desire to ensure the highest degree of transparency and competition when public procurement contracts and administrative contracts are concluded.

Since protecting the national economy requires protecting public funds from waste, whether through squandering or embezzlement, or through the conclusion of suspicious contracts and

transactions that do not comply with the laws governing them, the legislator, in order to protect public funds, granted the administrative judge broad powers to exercise supervision over administrative contracts and public procurement relating to public works, supplies and other projects concerning which the administration contracts with various bodies, whether private or public, for their implementation within its economic and social programmes. Judicial review extends throughout all stages of the contract, from its conclusion until its final performance.

The Algerian legislator regulated public procurement under Presidential Decree No. 15-247 of 16 September 2015, concerning the regulation of public procurement and public service delegations. Article 2 defines public procurement as: “Written contracts, within the meaning of the applicable legislation, concluded for consideration with economic operators under the conditions provided for in this decree, to meet the needs of the contracting authority in the fields of works, supplies, services and studies.”

To ensure greater effectiveness of administrative contracts and public procurement, the conditions relating to the pre-contractual stage, including publicity and competition, must be observed and respected. The process must be carried out transparently so that a large number of economic operators and bidders can participate and submit the best offer. This depends on expanding the process of announcement and publication and activating the committees responsible for examining offers and awarding tenders, while preserving their integrity against all temptations.

It should be noted that this action is called in French legislation “référé précontractuel,” that is, pre-contractual urgent proceedings in public procurement matters.

### **Theme Two: Characteristics of Legal Urgency in Public Procurement Matters**

Among the most important characteristics of legal urgency in public procurement disputes are the following:

#### **First: The Authority of the Judgment Issued in Legal Urgency Proceedings in Public Procurement Disputes**

The judgment issued in legal urgency proceedings concerning public procurement disputes arising at the stage of conclusion constitutes a final judgment deciding the substance of the right. It therefore has the same authority as a judgment issued by the administrative judiciary on the merits.

It has the authority of *res judicata* and is not a temporary judgment and does not concern precautionary measures, as is the case with judgments issued in urgent proceedings by their nature. This is what Article 300 of the Code of Civil and Administrative Procedure established as a general rule within Book One containing provisions common to all judicial bodies. If the judgment issued in legal urgency proceedings includes the annulment of an administrative decision issued by the contracting authority, that judgment also has the authority of an annulment judgment, which has general and absolute effect against all persons and all public authorities in the State. The judgment issued in legal urgency proceedings also bears the same characteristics as an urgent judgment: it is immediately enforceable, is not subject to opposition, and no objection may be made to its immediate enforcement.

As for methods of appeal, the legislator once again left ambiguity regarding the extent to which the judgment issued pursuant to this provision may be appealed. The source of this ambiguity is that in other cases the legislator expressly provided for appealability. For example, in the case of a financial advance, while in other cases he did not do so, as in public procurement under Article 946 of the Code of Civil and Administrative Procedure. We believe that the

orders are appealable so long as the following article provides a time limit for deciding the action; naturally, the time limit and procedures for appeal are subject to the general rules. This differs from the French legislator, who specified the legal nature of judgments issued in administrative urgent proceedings concerning public procurement disputes in this context, considering them judgments issued at first and final instance.

### **Second: Time Limits for Deciding Public Procurement Disputes within Legal Urgency Proceedings**

The legislator fixed the time limit for deciding public procurement disputes within legal urgency proceedings at twenty (20) days from the date on which the court is notified by the initiating application. Article 947 of the Code of Civil and Administrative Procedure provides: “The administrative court shall decide within twenty (20) days running from the date on which it is notified of the applications submitted to it pursuant to Article 946 above.” This is the same period adopted by the French legislator.

A period of twenty (20) days for deciding the dispute is important for the contracting authority, the public procurement project, the contracting operator and third parties, so that the interests of each of them, as far as they are concerned, are not disrupted. However, the legislator did not establish any procedural sanction for exceeding this period, although the period is very short and does not correspond to the importance and developments of the dispute.

In reality, the time required for adjudication is subject to the discretionary authority of the judicial body hearing the dispute and falls within the core of its powers, since every dispute differs from another and each dispute has its own required time, in view of the subject matter of the dispute, the documents it contains, and the examination and discussion required of the pleas raised, as well as the volume of files placed upon the judicial body.

The Algerian legislator is not accustomed to setting a period for deciding judicial disputes and used to require only that they be decided as soon as possible. However, in the Code of Civil and Administrative Procedure, we find that he fixed a time limit for deciding a particular type of action, as is the case here.

### **Third: The Procedure for Postponing the Signing of a Public Procurement Contract**

The legislator authorized the urgent applications court, when hearing a public procurement dispute arising at the stage of conclusion, to order the postponement of the signing of the public procurement contract, if notified accordingly, for a period not exceeding twenty (20) days, pursuant to the final paragraph of Article 946 of the Code of Civil and Administrative Procedure. This is one of the distinctive powers granted to the urgent judicial body.

In principle, it is noted that the period for postponing the signing of the public procurement contract is the same as the period prescribed for deciding the substance of the dispute before legal urgency proceedings. The procedure for postponing the conclusion of the contract until the dispute is decided may be studied from two angles: first, the purpose of granting the power to postpone the signing of the contract; and second, a comparison between postponing the signing of the contract and procedures for suspending execution of the challenged administrative decision.

1. The legislator's purpose in establishing special urgent procedures for public procurement disputes, essentially consisting of shortening the time limits for deciding cases, permitting challenges before the public procurement contract is concluded, and giving the judicial body

the power to postpone the signing of the contract, is to avoid a situation that would be difficult to remedy.

This is because, if a dispute arises seeking the annulment of one of the separable administrative decisions issued by the contracting authority during the conclusion stage, while at the same time the public procurement process has already been completed and entered into force, an annulment judgment may subsequently be issued after the contract has already taken effect.

In order to achieve the public interest of the public procurement project, protect public funds, guarantee the principle of equality, and enable the best choice of the contracting operator, the Algerian legislator established legal urgency procedures in public procurement matters and granted the urgent judicial body the power to postpone the conclusion of the public procurement contract until the appeal is decided within short time limits. He also permitted challenges to separable administrative decisions before the public procurement contract is concluded.

2. The second purpose raised by the procedure for postponing the conclusion of the public procurement contract concerns the extent to which an action may be brought to suspend execution of the challenged administrative decision. As is legally established, an administrative decision is immediately enforceable and may be executed upon its issuance despite an appeal being brought before the judiciary, as indicated by Article 833(1) of the Code of Civil and Administrative Procedure. The legislator permitted, when an action for annulment of an administrative decision is brought, the filing of a simultaneous action requesting suspension of execution of that challenged decision until the action for annulment is decided, as established by Article 833(2) and Article 834.

In this case, an action to suspend execution of the challenged administrative decision is ineffective, since the action on the merits relating to the challenge of that administrative decision is itself an urgent action decided rapidly by force of law. It is decided within twenty (20) days of the filing of the initiating application, which is faster than the action to suspend execution itself, which is to be decided only as soon as possible. The legislator replaced it with a more effective and more serious measure that is consistent with the speed of deciding the legality of the challenged decision: postponing the signing of the public procurement contract, that is, suspending the entire conclusion procedures rather than merely suspending execution of one specific administrative decision, for a period consistent with the time limit for deciding the action for annulment of that administrative decision.

We therefore conclude that the procedure for postponing the signing of a public procurement contract is a characteristic distinguishing disputes concerning administrative contracts in general and public procurement disputes in particular before legal urgent proceedings from other disputes of various kinds. It is among the important and considerable powers conferred on the urgent judiciary in this field.

### **Theme Three: The Importance of Administrative Urgency**

In this regard, Glasson, Tissier and Morel stated in their work that urgent proceedings constitute an essential safeguard, enabling every person who is presently threatened to seek from the president of the court the protection necessary against an imminent danger.

The importance of urgent proceedings has increased in our era owing to industrial and economic progress and the expansion and complexity of transactions between operators. This

has resulted in judicial, doctrinal and even legislative developments connected with urgent proceedings.

These considerations have led to an increase in the types of urgent cases, placing a burden on the urgent applications judge and making his task require effort to resolve the matters brought before him in various fields with speed and precision. The powers of the urgent applications judge have developed with the development of economic, commercial and financial conditions, and he has acquired broad freedom of assessment. The idea of affecting the substance of the right is no longer a restriction preventing him from granting the required protection.

Finally, the legislator recognized the usefulness of urgent proceedings and granted the urgent applications judge jurisdiction over matters that almost touch upon the substance of the right.

It appears from the foregoing that the system of urgent proceedings has become a successful remedy for eliminating the congestion and large number of cases, as well as a remedy for the slowness of litigation. It is therefore a basis for the protection of rights.

The importance of resorting to administrative urgent proceedings lies in the fact that they constitute an effective means of temporarily reconciling the position of the individual with that of the administration concerning a particular dispute, since judicial power balances the power of the individual against the power that characterizes the position of the administration.

### **Conclusion**

Through this study, we have examined some urgent cases, mentioned by way of example and not limitation, which are governed by special laws and are intended overall to establish protection for the rights of individuals against abuses arising from the administration's exercise of its public powers. The legislator regulated them in the Code of Civil and Administrative Procedure. Among these cases, we mention in particular:

- Urgency in matters of financial advances: this mainly concerns disputes relating to the rights of contractors to obtain their debts from the administration on the occasion of their performance of public projects.
- Urgency in matters of concluding contracts and public procurement: this is known in French legislation as pre-contractual urgent proceedings and concerns blatant violations by contracting authorities of their obligations relating to publicity or competition during the stage of concluding the contract.

We may add some important points: the Algerian legislator singled out a specific type of public procurement disputes and included it within urgent proceedings by express provision of law. The first paragraph of Article 946 of the Code of Civil and Administrative Procedure identified the category of public procurement disputes that falls within the jurisdiction of urgent proceedings by operation of law.

The new regulation of public procurement, particularly Article 7 thereof, also expanded the scope of the public institutions mentioned in Article 6, but maintained the exclusion from its provisions—namely the Public Procurement Law—of contracts concluded between those institutions themselves, because it is not possible in any event to make a comparison between the institutions themselves, although this approach is contrary to the principles of competition

and equality among operators, whether they are public legal persons, private legal persons or natural persons.

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