

Subcontracting in Public Procurement

Bakhadda Djelloul ¹, Pr. Bahmaoui cherif ²

^{1,2} Faculty of Law and Political Science, Department of Public Law
Univ -Ahmed Dria Adrar, Algeria

Email: bakhadda.djelloul@univ-adrar.edu.dz ; bahmaoui.cherif@univ-adra.edu.dz

Received: 23/08/2025 ; Accepted: 24/03/2026 ; Published: 15/04/2026

Abstract:

Subcontracting is a legal option that allows the contracting operator to assign part of the execution of the public contract to a third party, in accordance with the provisions of the Public Procurement Regulation 15-247, as well as Law 23-12 containing the Public Procurement Law, provided that prior written approval is obtained from the contracting authority. Algerian legislation requires that the main holder retain the largest share of the project, which strictly prohibits the total assignment of the contract to the subcontractor, while the main contracting operator remains solely and directly responsible before the contracting authority.

Through this research paper, we will attempt to answer a set of questions related to the subject of subcontracting in public procurement according to Algerian legislation.

Keywords: subcontracting, public contract, third party.

Introduction:

Public procurement has become one of the most important instruments of the State in achieving economic and social development, as it represents a means of embodying public policies, rationalizing public expenditure, and carrying out major projects. However, the complexity of these projects and the diversity of their technical and financial components have made it difficult for a single operator, regardless of its capabilities, to undertake their full implementation with the required efficiency. Hence, subcontracting has emerged as a legal and regulatory mechanism that allows the division of works and the assignment of part thereof to specialized operators, while preserving the unity of the contract and contractual liability.

The Algerian legislator recognized early on the economic and legal importance of subcontracting, particularly in supporting and promoting small and medium-sized enterprises, as they constitute a fundamental pillar of the national productive fabric and an effective tool for creating wealth, jobs, and transferring expertise. Therefore, the regulation of subcontracting moved from mere general provisions in the Civil Code to a specific and precise framework in public procurement legislation, embodied mainly in Presidential Decree No. 15-247 of September 16, 2015, and later strengthened by Law No. 23-12 relating to public procurement.

This legal framework has enshrined the principle of the partial nature of subcontracting by setting its maximum ceiling at forty percent (40%) of the total amount of the public contract, and by prohibiting recourse to it in certain cases, such as contracts for ordinary supplies.

Law No. 23-12 also introduced a new qualitative orientation with a protective economic dimension, consisting in obliging foreign enterprises submitting bids individually, unless there is a justification for the impossibility of doing so, to assign no less than thirty percent (30%) of the initial amount of the contract to enterprises governed by Algerian law, in consecration of the principle of economic integration, transfer of expertise, and localization of activity.

In return for expanding the scope of recourse to subcontracting, the legislator stressed the need to surround it with precise legal guarantees, by requiring prior declaration of the subcontractor, obtaining the express and written approval of the contracting authority, and verifying the professional, technical, and financial capacities of the subcontractor, while maintaining the full and exclusive liability of the contracting operator toward the contracting authority for the execution of the contract, including the part assigned to subcontracting.

Based on the foregoing, this article aims to study the subcontracting system in public procurement in light of Algerian legislation, by analyzing its concept and legal nature, explaining its conditions, limits, and procedures, highlighting its legal and economic effects, and evaluating its role in supporting national enterprises, especially in light of the developments introduced by Law No. 23-12.

This study relied on the analytical method as the most appropriate method for studying the legal texts governing subcontracting in public procurement, by analyzing the relevant legislative and regulatory provisions, foremost among which are Presidential Decree No. 15-247 relating to the regulation of public procurement and public service delegations, and Law No. 23-12 relating to public procurement, with reference to the general rules contained in the Algerian Civil Code.

In line with the problematic of the subject and its objectives, this study was divided into two sections as major axes: the conceptual framework of subcontracting in public procurement (Section One), and the subcontracting system in public procurement and its effects (Section Two).

Section One: The Conceptual Framework of Subcontracting in Public Procurement

The principle in a contract of enterprise is that the contractor, as the party who has undertaken to perform the work, executes his obligations personally, in compliance with the principle of personal consideration on which this type of contract is based, especially when the contractor's competence and technical expertise are a fundamental consideration for the employer. However, technical development and the complexity of projects, particularly in the field of public procurement, have created situations in which it becomes difficult for the original contractor to cover all aspects of the project, which requires him to seek the assistance of other specialized operators who undertake the execution of part of the works or services within what is known as subcontracting¹.

In this context, a distinction must be made between the relationship linking the contractor to his workers or engineers, which is subject to the provisions of labor law, and the relationship linking him to another contractor who is legally and organizationally independent from him and who undertakes the execution of part of the works under his own responsibility. This relationship constitutes the essence of the subcontracting or sub-enterprise contract. Accordingly, this section will address the definition of subcontracting (Subsection One), then its legal nature (Subsection Two), and finally the conditions for its validity within the framework of public procurement (Subsection Three).

Subsection One: Definition of Subcontracting

Subcontracting is known in Algerian legislation by several terms, including sub-enterprise or subcontracting². The legislator regulated it under the general rules of the Civil Code, particularly in Articles 564 and 565, as an exception to the principle that the contractor must personally perform his obligations. It means delegating a third party to carry out the works, wholly or partially, under a contract concluded between two legally independent contractors, namely the original contractor and

the subcontractor, whereby the former entrusts the execution of part of the works or services to the latter, due to the latter's special technical or technological competence.

Article 564 of the Algerian Civil Code expressly provides that: "The contractor may entrust the execution of the work, in whole or in part, to a subcontractor, unless a clause in the contract prevents him from doing so, or unless the nature of the work presupposes reliance on his personal competence. However, in this case, he remains liable for the subcontractor toward the employer."

It follows from this provision that the civil legislator permitted recourse to subcontracting, but restricted it by the absence of a prohibitive clause in the contract and by the condition that the nature of the work must not be based on the personal consideration of the contractor, while maintaining his full liability toward the employer. This reflects the subordinate nature of the subcontracting contract in relation to the original contract.

At the doctrinal level³, subcontracting has been defined as a contract whereby a person called the original contractor entrusts another person called the subcontractor with the execution of all or part of the subject matter of the contract concluded with the employer, without this giving rise to a direct contractual relationship between the latter and the subcontractor. This definition highlights the indirect nature of subcontracting and confirms the independence of the subcontract from the original contract in terms of parties, while remaining dependent on it in terms of subject matter and purpose. The United Nations Industrial Development Organization (UNIDO) also defined subcontracting as a form of industrial cooperation through which one or several enterprises are assigned to produce parts or components, or to provide complementary industrial services that are necessary for completing the final product of the ordering enterprise. This definition reveals the economic dimension of subcontracting, as a tool for organizing production, dividing labor, and achieving integration among enterprises.

Through these definitions, it becomes clear that subcontracting is based on three essential elements:

- The contracting authority (the project owner or employer),
- The contracting operator (the original contractor),
- The subcontractor (the sub-contractor or subcontracted party).

In addition, subcontracting presupposes the existence of two distinct contracts: an original contract linking the contracting authority to the contracting operator, and a subcontract linking the latter to the subcontractor. However, this distinction does not negate the unity of subject matter and objective, since the subcontractor undertakes to execute part of the works or services that constitute an integral part of the subject matter of the original contract. This makes subcontracting a branch subordinate to the original contract, which cannot be conceived independently of it⁴.

Historically, the concept of subcontracting has applied to several sectors, particularly the construction and public works sector, and then expanded to include various industrial sectors, in what is known as industrial subcontracting. This reflects the development of its role from a mere technical means into an economic and organizational tool with strategic dimensions.

In the field of public procurement, the Algerian legislator provided a more precise and stricter definition of subcontracting, taking into account the specificity of public funds and the requirements of public interest. Article 140,⁵ paragraph one, of Presidential Decree No. 15-247 relating to the regulation of public procurement and public service delegations provides that: "The contracting operator of the contracting authority may entrust the execution of part of the contract to a

subcontractor by means of a subcontracting contract, according to the conditions provided for in this decree.”

It is noted that this definition expressly enshrines the principle of the partial nature of subcontracting and subjects it to special legal conditions that distinguish it from subcontracting in the field of private contracts. The second paragraph of the same article also confirms this approach by setting the maximum limit for subcontracting at forty percent (40%) of the total amount of the public contract, thereby preventing the contract from being emptied of its substance and transferred entirely to a third party⁶.

Accordingly, subcontracting in public procurement is not merely an extension of the provisions of the Civil Code, but rather constitutes a special legal system based on reconciling the requirements of economic flexibility with the necessity of protecting public funds. It is subject to the supervision and control of the contracting authority, while the employer in public subcontracting remains among the persons exhaustively specified in public procurement legislation, and subcontracting is always linked to an existing public contract.

The original contract of enterprise differs from the subcontract in that the latter (the subcontracting contract) links two specialized professionals who share technical and professional knowledge, unlike the original contract, where the relationship is considered unequal due to the project owner’s lack of expertise (the contracting authority)⁷.

Public subcontracting differs from private subcontracting, as public subcontracting must arise from a public contract. While a private contract may be fully completed through subcontracting, a public contract may only be partially completed through subcontracting. This is what the second paragraph of Article 140 of the aforementioned decree provides: “In any event, subcontracting may not exceed forty percent (40%) of the total amount of the contract.”

The employer in public subcontracting must also be among the persons exhaustively provided for in the Public Procurement Law⁸, and the subcontracting must arise from a public contract.

Subsection Two: The Legal Nature of Subcontracting

The legal nature of the contract of enterprise is characterized by a degree of complexity, due to the different status of the contracting parties, particularly the status of the employer. If the latter is a public legal person, as is the case in public procurement, the original contract assumes the nature of an administrative contract and is subject to the rules of public law, with the resulting privileges and powers granted to the administration, such as the power of control, modification, and the imposition of penalties. However, if the employer is a private person, the contract of enterprise is subject to the rules of private law, whether civil or commercial, depending on the nature of the activity that is the subject of the contract.

As for the original contractor and the subcontractor, the general rule is that they acquire the status of traders whenever they professionally carry out a commercial or industrial activity, which is reflected in the legal nature of the relationship between them. On this basis, the subcontract is generally considered a commercial contract subject to the provisions of commercial law, even if the original contract is an administrative contract. Consequently, disputes arising from the subcontract fall within the jurisdiction of the judicial body competent to hear commercial disputes.

Given that the Algerian judicial system has not adopted an independent commercial judiciary, subject-matter jurisdiction is, in practice, vested in the commercial section of the court whenever the dispute concerns the execution or interpretation of a subcontract concluded between contractors.

However, this jurisdiction does not extend to disputes in which the administration is a party, as the latter remains subject to the jurisdiction of the administrative judiciary, considering that the relationship between it and the contracting operator is an administrative contractual relationship independent of the subcontract.

It should be noted that an exception to the commercial nature of the subcontract may arise where the subcontractor is a craftsman and not a trader, as is the case in certain works of a craft or traditional nature. In this case, the subcontract is described as a mixed contract, subject in principle to the rules governing mixed acts, while taking into account the application of protective rules for the non-trader party, in accordance with what has been established by doctrine and jurisprudence.

It follows from the foregoing that the legal nature of the subcontract is independent of the nature of the original contract, and that the approval of the contracting authority of the subcontracting does not create any direct contractual relationship between it and the subcontractor, nor does it affect the legal nature of the relationship existing between the latter and the original contractor⁹.

Subsection Three: Conditions for the Validity of Subcontracting in Public Procurement

In principle, the subcontract is subject to the general conditions for the formation of contracts provided for in the Civil Code, namely consent, capacity, subject matter, and cause. However, the specificity of public procurement and its close connection with the public interest and the protection of public funds prompted the Algerian legislator to surround subcontracting with a set of special conditions, which constitute additional restrictions on contractual freedom.

First: The Subject Matter in the Subcontract in Public Procurement

The subject matter of the subcontract must include all or part of the subject matter of the original contract. However, in public procurement, subcontracting may not cover all the work that is the subject of the original contract. Rather, the legislator required that subcontracting in public procurement be partial and in accordance with the specifications, while the original contractor remains obliged to execute the remaining part of the contract under penalty of liability¹⁰.

This restriction is justified by the need to preserve the unity of the contract and prevent it from being emptied of its substance, in addition to enabling the contracting authority to exercise effective control over the execution of the works. The legislator confirmed this approach by setting the maximum limit for subcontracting at forty percent (40%) of the total amount of the public contract.

Second: The Requirement of Prior Approval by the Contracting Authority

In private projects, the legislator requires the absence of a prohibitive clause preventing subcontracting, as provided for in the aforementioned Article 564 of the Civil Code. As for public procurement, the legislator requires the approval of the contracting authority of the subcontractor, in addition to the absence of a prohibitive clause in the contract. This is to enable the contracting authority to verify the specifications and qualifications of the subcontractor, as well as his material and human resources, and to ensure their conformity with the works that are the subject of the contract. It also allows verification that the subcontractor does not fall under any of the cases of exclusion from the contract specified in Article 75 of this decree¹¹.

The original contractor is the one who submits the request for acceptance of the subcontractor and approval of the payment terms to the contracting authority, while the subcontractor has no right other than to ensure that the request for his acceptance has been submitted in due time¹².

Article 143 of the aforementioned presidential decree required that the specifications authorize subcontracting and determine the main scope of its intervention. This clearly shows the extent of the

importance of the condition of prior approval by the contracting authority, and that it is an essential procedure with which the contracting partner must comply even before signing the final contract and beginning the execution of the works.

Third: The requirement of formality in subcontracting in public contracts

Unlike private subcontracting, in which formality is considered a condition of proof, writing is a condition for the formation of public subcontracting. Article 143 of this decree required that the contract be in writing and imposed on the original contractor the obligation to deliver a copy of the subcontracting contract to the contracting authority¹³.

Fourth: Subcontracting must be necessary (useful)

Subcontracting must be justified from a technical or craft perspective and must represent a real necessity for completing the project, not merely a means of circumventing the rules of public contracts. The usefulness of subcontracting is assessed in light of the nature of the project, its technical components, the extent of its complexity, and the level of specialization required to execute some of its parts.

Based on this principle, the legislator prohibited resorting to subcontracting in certain works that, by their nature, do not require being assigned to third parties, such as contracts for the acquisition of ordinary supplies available on the market and not manufactured according to special technical specifications, considering that such works do not require exceptional skills or expertise that would justify subcontracting.

Section Two: The subcontracting system in public contracts and its effects

The Algerian legislator did not merely regulate subcontracting in public contracts in terms of its concept and substantive conditions, but surrounded it with a set of precise formal and regulatory procedures, given that it represents an exception to the principle that the contract must be executed by the contracting partner himself, and because it may raise risks affecting the transparency of contracts and the protection of public funds.

These procedures are divided between obligations incumbent upon the contracting partner and others exercised by the contracting authority within the framework of its supervisory power, through the declaration of subcontracting (First Requirement), then the explicit approval or refusal thereof (Second Requirement), leading to the determination of the scope of the legal liability arising from it (Third Requirement).

First Requirement: Declaration of subcontracting

The declaration of subcontracting is an essential procedure in the public contracts system, and the burden of carrying it out falls on the contracting partner alone, as he is the only party directly linked by a contractual relationship with the contracting authority. The subcontractor has no original obligation to declare, except in the exceptional cases expressly specified by the legislator.

The declaration of subcontracting is made at one of two stages:

First: Declaration of subcontracting when submitting the bid

In this case, the bidder is obliged to disclose his intention to resort to subcontracting within his bid, either by including it in a special clause of the original contract or by referring to it in the bid documents, while specifying the nature of the works assigned to the subcontractor. It is understood from this procedure that the contracting partner has previously identified the subcontractor before the

conclusion of the final contract, which allows the contracting authority to assess the bid on a comprehensive basis that takes into account all parties involved in the execution of the contract ¹⁴.

Second: Declaration of subcontracting during the execution of the contract

The legislator has permitted, by way of exception, the declaration of subcontracting after the conclusion of the contract and the commencement of the execution of the works, provided that this is done before the full execution of the works. In this case, the contracting partner is obliged to submit a written declaration of subcontracting, usually by registered letter with acknowledgment of receipt, addressed to the contracting authority.

This declaration must include all the essential information provided for in Article 144 of Presidential Decree No. 15-247, namely:

- The name, surname, and nationality of the contracting partner,
- The name and headquarters of the subcontracting enterprise,
- The subject and amount of the services subject to subcontracting,
- The time limit and schedule for carrying out the services,
- The methods of applying financial penalties, where applicable,
- The nature of prices and the methods of payment and their revision,
- The methods of receiving the services,
- Guarantees, liabilities, and insurance,
- Methods of dispute settlement.

This precise enumeration aims to enable the contracting authority to have full knowledge of all elements of the subcontracting contract and to exercise effective control over the extent to which the completed works comply with the requirements of the contract.

In the event that the contracting partner breaches his obligation to declare subcontracting, the legislator required the subcontractor himself to declare his presence to the contracting authority, as confirmed by Article 142 of Presidential Decree 15-247. The latter was also required, whenever it becomes aware of the presence of an undeclared subcontractor at the contract execution site, to issue a formal notice to the contracting partner in order to remedy the situation within a period of eight (08) days; otherwise, it may take coercive measures against him, in protection of the principle of transparency and the proper execution of the contract.

Second Requirement: The express approval of the contracting authority for subcontracting

Article 143/2 of the aforementioned presidential decree required the necessity of express and written approval by the contracting authority, so that the subcontractor may receive his dues directly from the contracting authority. This also enables the latter to know the subcontractor, his material capacities and qualifications, and to extend its control over him. The contracting authority has discretionary power to accept or refuse subcontracting, depending on the nature of the contract and the type of the public contract.

This approval aims to achieve a number of objectives, including:

- Enabling the contracting authority to know the identity of the subcontractor,
- Verifying his professional, technical, and financial capacities,
- Ensuring that he is not subject to legally prescribed exclusion cases,
- Extending its control over the execution of the part assigned to subcontracting.

The Algerian legislator did not provide for the case of refusal of subcontracting and the administration's silence in responding, unlike the French legislator, who considered subcontracting

accepted by the administration if it did not announce its refusal by a written and reasoned decision within 21 days from the date of receipt of the declaration¹⁵.

Third Requirement: The responsibility of the subcontractor toward the contracting authority

Despite the contracting authority's approval of the subcontracting contract, this does not give rise to any direct contractual relationship between it and the subcontractor. The original contractual relationship remains exclusively between the contracting authority and the contracting partner and continues to produce all its legal effects.

The Algerian legislator expressly confirmed this principle in Article 141 of Presidential Decree 15-247, which stipulates that the contracting partner is solely responsible toward the contracting authority for the execution of the contract, including the part assigned to subcontracting. He may not invoke the subcontractor's breach of his obligations in order to evade or reduce his responsibility.

It is understood from this that subcontracting does not lead to a division of responsibility before the administration; rather, the latter remains faced with only one party, namely the contracting partner, in order to ensure the proper execution of the contract and protect the public interest¹⁶.

Conclusion:

This study concluded that subcontracting in public contracts represents one of the important legal and economic mechanisms adopted by the Algerian legislator with the aim of achieving a number of objectives, foremost among them the promotion of the national economic fabric, the support of small and medium-sized enterprises, and the improvement of the quality of public project implementation through benefiting from specialization and the division of labor. Through the legal framework governing public contracts, particularly Presidential Decree No. 15-247 and Law No. 23-12, the legislator sought to regulate recourse to subcontracting by surrounding it with precise conditions and procedures that ensure the protection of public funds and achieve a balance between economic flexibility and the requirements of transparency and control.

However, the study revealed, from a practical perspective, the existence of a gap between the legal text and actual implementation, as national subcontracting, especially industrial subcontracting, still suffers from limited recourse to it, in contrast to the preference of many economic operators for foreign subcontractors, on the grounds of the availability of expertise, specialization, and quality of services. This reality raises serious questions about the extent to which the real capacities possessed by national small and medium-sized enterprises are being exploited, as they have proven in many cases their ability to carry out works and services with the same required level of efficiency.

Practical practice has also shown the spread of what is known as disguised subcontracting, whereby some contractors and institutions awarded public contracts resort to assigning part of the works to subcontractors without declaring this to the contracting authority, in clear violation of legal and regulatory texts. These practices result in negative effects that affect the transparency of public contracts, weaken control mechanisms, infringe upon the rights of subcontractors, and empty the subcontracting system of its economic and developmental objectives.

In this context, what Law No. 23-12 introduced, by requiring foreign enterprises, in the event that they undertake to execute the contract individually, to assign a proportion of not less than thirty percent (30%) of the contract amount to enterprises subject to Algerian law, constitutes a positive legislative step that reflects a clear will to promote national subcontracting, transfer expertise, and

localize economic activity. However, the effectiveness of this approach remains dependent on proper implementation and strict administrative control.

Based on the foregoing, this study recommends the following:

- The need to strengthen and encourage recourse to subcontracting, especially national industrial subcontracting, as a real lever for promoting small and medium-sized enterprises and achieving economic integration.
- The introduction of additional legal and financial privileges in favor of contractors and operators who commit to resorting to declared subcontracting, especially when it benefits national enterprises.
- Strengthening control over the phenomenon of undeclared subcontracting and activating the deterrent mechanisms provided for by law in order to limit these practices.
- Providing technical and financial support to national small and medium-sized enterprises to enable them to effectively integrate into the public contracts system.
- In conclusion, it can be said that subcontracting, if properly organized and implemented, constitutes an effective tool for achieving economic efficiency and rationalizing public expenditure. However, achieving this objective remains conditional upon the integration of the legal text with practical implementation, and upon a genuine will to establish national subcontracting as a strategic option in the field of public contracts.

Footnotes:

The secondary contractor differs from the employees of the original contractor in that the latter's employees work under his supervision and direction, as they are considered his subordinates because they perform their work under his direction and supervision. Therefore, the basis of his liability for them is the general rules relating to the liability of the principal for his subordinate, as established in the Civil Code. As for the secondary contractor, he does not work under the supervision or direction of the original contractor, but rather works independently of him; therefore, he is not considered his subordinate, which requires that the original contractor not be considered liable for him according to the rules relating to the liability of the principal for the subordinate. See: Khawla Kazem Mohammed Al-Maamouri, *The Liability of the Contractor and the Subcontractor*, Journal of the University of Babylon, Humanities, Vol. 24, No. 1, 2016, p. 2.

It may be called subcontracting, subcontracted contracting, or secondary dealing, which is the designation used by the repealed Presidential Decree No. 10-236.

Anwar Al-Amrousi, *Contracts Relating to Work in Civil Law*, Mansha'at Al-Maaref, Alexandria, 2003, p. 105.

Allali Fatiha, Fatima Zahra Arrab, *Activating Industrial Subcontracting as a Strategic Option to Support and Promote Small and Medium-Sized Enterprises in Algeria*, National Forum at the University of Ouargla, unpublished, p. 5.

See Articles 140 to 144 of Presidential Decree No. 15-247 of September 16, 2015, regulating public contracts and public service delegations, Official Gazette, No. 50, p. 3.

Khawla Kazem Mohammed Al-Maamouri, *The Liability of the Contractor and the Subcontractor*, Journal of the University of Babylon, Humanities, Vol. 24, No. 1, 2016, p. 4.

Maza Hanan, *Subcontracting in the Construction Contract*, Doctoral Dissertation, University of Oran, 2015-2016, p. 22.

See Article 6 of the previous decree, which provides that: “The provisions of this chapter shall apply only to public contracts involving expenditures of: the State, territorial collectivities, public establishments of an administrative nature, and public establishments subject to the legislation governing commercial activity, when they are entrusted with carrying out an operation financed, wholly or partly, by a temporary or definitive contribution from the State or from territorial collectivities, and are referred to in the text as the contracting authority.”

Farha Zerouali Saleh, *The Complete Work on Algerian Commercial Law: Commercial Acts, the Trader, the Craftsman, Regulated Commercial Activities, the Commercial Register*, Ibn Khaldoun Publishing, Oran, 2003, p. 117.

See Articles 140 et seq. of the aforementioned Decree 15-247.

See Article 75 of the aforementioned Decree 15-247.

Maza Hanan, previously cited reference, p. 79.

See Article 143 of Decree 15-247.

F. LEFEBVRE, *Mémento pratique, Droit des affaires, Contrat et droit de l'entreprise*, ed. 2006, No. 467, p. 3155. Cited in Maza Hanan, previously cited reference, p. 80.

Art. 114-4: Law No. 75-1334 of December 31, 1975 relating to subcontracting, LORF, January 3, 1967, p. 148.

See Article 141 of the aforementioned presidential decree.