Chapter I

Administrative Contracts in General

Introduction

- This unit is intended to acquaint students with the **nature** generally of and the **formation** and **object of administrative contracts**. Administrative contracts are very much important in ETHIOPIA under current settings.
- Some people say **it is bad to have too much interference in the private sphere in the era of privatization**.
- The **government should regulate the market** being another argument.
- Leaving aside the literary arguments, legally **Ethiopia has devoted one title in its civil code** to specifically deal with administrative contracts.
- In addition to this, we have procurement proclamation to enable equitable, efficient and effective procurement. In this section, we will have something to say on Ethiopian administrative contract.

1.1 Brief Genesis of Administrative Contracts

- Though hard to locate the exact time, one can still validly locate **philosophical and economic backgrounds of administrative contracts**.
- Back in the days of **Adam Smith** who preached the **laissez faire argument** with the effect of diametrically insulating the state from the market, **the role of the state was exponentially limited to enabling the state to undertake only its "traditional" functions**.
- As per **Adam Smith, the state was advised to let the market alone**.
- The **state should put its hands off the market but without forgetting to create internal peace and order**, facilitating the market by formulating a peaceful environment and without directly intervening in the market.

- To this end, the **state should establish institutions like the police, courts and parliaments**. Such an impact on the economy as caused by leaving the market alone however would not outlive such a condition as the Great Depression.
- The **Great Depression proved the fact that markets cannot operate by their forces alone**-rather to some extent the **state should regulate the market.**
- Next generation political economists devised the **WELFARE state** where we have a **state** which regulates the market- that **provides public services** such as **education, health, transport, water, light, sanitation, recreation etc.**
- Thus, apart from its traditional functions, the state was also conferred with those additional functions listed above. Basically the state used to institutionalize its coercive force to carry out its protection function.
- **But with the growth in the type and nature of functions and because the appropriate way of attaining goals as the case may be is entering into contract.**
- Either by its coercive force or its right to enter in to contract the state strives to carry out its ever growing functions.
- To this end of utilizing its contracting capacity, government enters into a special type of contract called administrative contract. Note that it is from this background, apart from other things, that administrative contracts derive their peculiar feature.

1.2 Administrative Contracts and Other Forms of Contracts: General Overview

- **Because of the need to carry out its functions, government, via its branches, will embark upon different activities**, which inevitably will invite the interplay of its branches and the private sector.
- These **branches** otherwise **known as administrative agencies assist government to properly take its tasks of service provision among other things.**

- It is **therefore while these agencies carry out their functions that they use the law of administrative contracts to their ends**.
- **The ends are public services, the means of administrative contracts.**
- If this is so, administrative contracts are contracts under the strict sense of the law but only an "administrative" one (see for example Art. 1676(2) cum Art.1675 of Ethiopian civil code with Art. 3131 of the same).

But this nature of the contract i.e. being an administrative contract makes the same different from the beginning to the end from other types of contracts that we know.

- **Our inquiry therefore will be what is there in administrative contracts? What grain of difference does the qualification administrative add over non-qualified contracts?**
- One basic addition by the qualification is associated with **prerogative** (**privilege**) matters.
- Because **administrative agencies favorably enjoy the presumption of acting on behalf of the public** and because **public interest is overriding** enough to put aside even basic principles of the law the agencies will enter into an arrangement where the platform is squarely fitted to their play than to the other contracting party.
- When talking about administrative contracts, hence, one is talking about a **contract where the two parties are unequal.**
- Being a **contract between unequal parties from the onset, at the end of the day, it will end up entitling parties in unequal manner**.
- If this is so, how should we define administrative contracts? Well as noted earlier the general contract title of the civil code is applicable to this case because of Articles 1676, 3131 and Art. 1675.

Definition

Art.1675

"A contract is an agreement whereby two or more persons as between themselves create, vary or extinguish obligations of a proprietary nature".

- Administrative contracts do share all of the above elements. The differences, however, extend beyond the requirements of Art. 1675 far in to the requirements of **Art. 3132** which partly reads as: **"A contract shall be deemed to be an administrative contract where"**
    a. It is **expressly qualified as such by the law or by the parties**; or
    b. It is **connected with an activity of the public service** and **implies a permanent participation of the party** contracting with the administrative authorities in the execution of such service.

- Let us examine the elements of Art.3132: "**Expressly qualified as such by the law or the parties**"
- According to this expression, a contract (remember Art.1675) will be an administrative contract if the law expressly qualifies it as an administrative contract.
- To this end, **the law clearly enumerates what can be considered as administrative contract**. But **what if the law expressly disqualifies a contract to be an administrative contract?** Both instances are the experiences of Ethiopia.
- In the civil code, we have such articles as **Article 3207 (public service) and 3244 (public work) which expressly qualify contracts as administrative contracts**.
- As to the second instance, we have the Mining Proclamation No.52/1993 which disqualifies contracts concluded by the administrative authorities with other parties under Art. 55(2).

- The second implication of Art. 3132 (1) is that parties may qualify expressly a contract as an administrative contract. An issue worth raising at this juncture will be **'are all contracts administrative contracts merely because they are qualified as such by the parties? '**
- Among other things, **a contract qualified as such by the parties on face value cannot be considered as an administrative contract unless one of the parties is an administrative authority**.
- For one other reason to be consequently discussed i.e. **for content consideration a contract merely qualified as an administrative contract by the parties will not also be an administrative contract.** What about a contract that involves an administrative authority but not qualified as such by the parties? Stated otherwise **are all contracts that make one of the parties an administrative authority administrative contracts?**

René David says

> *As a French legal scholar and as I think it fit, in our classification of law, public law should be distinguished from private law. Especially it is important to separate civil law from administrative law…**contracts made by public officials have this [special trait] which enable us call them administrative contracts and treat them separately from civil law**.[emphasis]*

- This, as it may, the civil code proceeds to say-**" … Connected with an activity of the public service** and **implies a permanent participation of the party contracting with the administrative authorities in the execution of such service**"
- The previous element is more or less concerned with the form of the contract, meaning the name the parties give to their contract when they first form it. The form it takes confers the contract a special nature.

- Here we are concerned with the content of the contract that is its object which determines the nature of the contract.
- Based on the **object** and the **manner** of meeting their object together with the **type of the parties** and their **manner of participation** in executing the object of the contract, we have another mechanism of distinguishing administrative contracts from ordinary contracts.
- **The object**: this is one of the ways which is helpful to distinguish administrative contracts from the rest of **the** contracts. Art. 3207 (1) identifies one of the objects as an activity of a public service". In turn we have to consider what a public service is in our law.

Public service

- Any activity which a public community has decided to perform for the reason that it to be necessary in the general interest and considered that private initiative was inadequate for carrying it out shall constitute a public service.
- **According to Art 3207(1) two reasons make "any activity" a "public service"** without which the activity cannot be considered so. What are these reasons?
- One of these reasons is **necessity**. This necessity should be the need of the general interest. So **anything necessary and considered as such by a public community to the general interest** will fulfill the first requirement of Art. 3207(1).
- The second reason is **inadequacy on the part of the private sector**. Thus a public service is any activity but which private individuals on their initiative cannot carry out among other things because of financial constraints.
- Thus **only a contract that has made its object "an activity of the public service…" will have the chance to qualify as an administrative contract**.
- Next to this, **the manner of participation on the part of the contractor determines the nature of the contract**. As such, a contract to be an administrative contract should imply a **permanent participation of the**

contractor… in the execution of such service. Let us in turn see what permanent participation is.

Permanent participation

- Does permanent under Art. 3132(b) implies bondage? How long should a contract last?
- Letting a contract to last forever jeopardizes the basic rights of an individual. **Contracts should not be servitudes**. Our first consideration therefore should be the individual. Thus we are saying that permanent participation of Art. 3132(b) must not imply the indefinite and forever nature of the relationship. Further "permanent" **should imply continuous, uninterrupted, regular and normal participation of the contractor** in the relationship and the expansion of a public service.
- One other issue worth mentioning is **the implication the "or" conjunctive has under Art. 3132(a) & (b).**
- Does the conjunctive make the requirements optional or should we expect the cumulative applications of sub-articles (a) & (b)?
- To elucidate, **if we are to make the requirements under Art. 3132 optional then we are saying that mere qualification of a contract as an administrative contract will make the same an administrative contract**.
- **Sticking to the second extreme will however force us to consider all the elements under Art. 3132 and their affirmative existence to say a contract and administrative contract.**
- **Which one position do you think is reasonable? Why?**
- No less important is the difference between **"administrative agencies" and "public enterprises".** We say this is important because the law prescribes in addition the nature of one of the parties to an administrative contract. **As observed above, the law says one of the parties to an administrative contract should be an administrative authority.**

- But what is an administrative authority? Does it also mean public enterprise? Consider Art 2(f) of Proclamation No. 649/2009- "Procuring entity means public body, which is partly or wholly financed by Federal Government budget, higher education institutions and public institutions of like nature".
- From this it is possible to infer that **at least two things make an entity an administrative body.** The first is the **source of income of the entity**. If the entity partly or wholly derives its income from the government, there is a possibility to consider it a public body which can enter into administrative contracts. On the other hand **the purpose of the organ makes it an administrative body**.

Comparison: Genre and View Comparison

- Here our basic concern will be **comparing and contrasting administrative contracts and other types of contracts** on one hand, and **the common law and civil law on the other hand**.
- **Administrative contracts are similar to other types of contracts** because of **their formation, validity requirements and the form.**
- **On the other hand, administrative contracts are different from other contracts** because of **their formation, content and execution.**
- Let us briefly explain the points- But first what do you think are the **views of the two legal systems towards administrative contracts?**
- **The common law views administrative contracts just like other ordinary contracts** whose consequences will show up to be the treatment of parties as equal members to the venture. **No party will enjoy priority**. **Both are equal parties to and in the case**.
- As a consequent incidence, **the common law requires no new or special law governing administrative contracts**. There is only one contract law regime that governs all the instances.
- These outlooks will naturally lead to the adjudication of cases that involve administrative contracts by the ordinary courts of law.

- **Perspective change is observable under the civil law system where parties to administrative contracts are unequal, whose case will be governed by a special regime and adjudicated by special tribunals (i.e. administrative tribunals). This is specially the case in France.**

1.3 Formation of Administrative Contracts.

- Normally, the requirements under Art. 1678 are those, which determine the viability of any contract. **Under this very normal condition, exceptional situations are envisaged with regard to formality requirements**. In addition to consent and object requirements, the law also shows the possibility of agreeing in favor of a given form or a form by the normal operations of the law [art.1678 (a) and Art. 1719 by virtue of Art. 1676]. Thus, **the law either prescribes adherence to a certain form (Arts. 1724 & 1725), or parties may agree to make their contracts in a written form**.
- **Art.1724 makes mandatory that contracts with administrative authorities be made following a written form.** Any contract to which a government agency is a party, including any type of employment contract, should be made in writing.
- As was noted before, Art. 1676 warrants the use of Title XII on contracts in General by explicitly stating "… regardless of the nature thereof and the parties there to." Because of this, Art. 1678 and consequent provisions that govern the formation of a valid contract will also be valuable in our consideration. **In addition, Articles 3140-3145 and 3134-3136 will be considered**.

1.3.1 Validity Requirements

Consent

- These justifications can be gathered from Art. **1679** and Art. **1680**, while the former talks about the **constitutive** nature of consent, the latter talks about the **evidentiary** role of the same. **Read Art. 3134 and identify the role played by consent. What is the role?**

- Under Art. 3134, it is the contract concluded by the administrative agencies that proves the existence of consent. Meaning mere conclusion of a contract by an administrative body implies the existence of consent on the part of the administrative body. It partly reads:

"…, the conclusion of a contract by the administrative authorities implies an express manifestation of will on their part"

- Hence, we derive consent from the specific form that the contract follows. Because Art.1724 prescribes the making of an administrative contract in a written form, this is indicative of the existence of consent on the part of the administrative agencies.
- As a formal and not simple agreement the **law does not require the mere existence of consent but its manifestation in some particular form.**
- The law requires therefore proving **consent as expressed** by the parties. **What can be counted as special under administrative contracts however may be the insufficiency of implied consent.**
- **On the part of administrative contacts always one has to prove the existence of express consent.** To be specific, Art.3134 (2) says ***"Where an authority competent to approve a contract keeps silent, such silence shall not, in the absence of a formal provision, be deemed to amount to approval."***

Capacity

- **Administrative contracts are made by artificial persons** be it the administrative agency or the contractor which is usually a business organization.
- Capacity, under such circumstances, means a different thing. It cannot be about a mental state nor can it be about chronology. Rather, **capacity is all about establishment, registration or license.**
- Generally, **capacity is either legal or technical**. Let us begin with the contractor.

- Basically any juridical or physical person that wants to conclude a contract with administrative agencies should have: **(Art.28 of Proclamation No. 649/2009)**
    A. Technical and professional capacity
    B. Legal capacity
    C. Financial capacity
    D. Fiscal capacity

What about administrative authorities? What capacity should they have?

a. **The administrative agency should have legal personality which means it should be established through a proclamation or regulation.**
b. Next to this validity question and after its positive determination **the agency should possess the capacity to enter into contracts**.
c. **Such capacity may emanate from law or practice** (i.e. specific activities or functions). Sometimes capacity may also emanate from authorization.
d. **An administrative agency is still duty bound to assert its financial capacity.** To this end **"procuring entities shall be responsible for certifying the availability of funds to support the procurement activity before signing a contract "(Art.7(1) (e) of Proclamation No. 430/2005) but now repealed.**

- Here it is worth raising two questions. The first is, **"Does lack of credit have a consequence of invalidating administrative contract?" the second is Can such an act be counted as ultra vies?**
- To address these questions, it is good to consider articles **3142 & 401 of the civil code and Art.7 (1) (e) of the proclamation.** In a crystal clear phraseology, **Art. 3142 validates an administrative contract formulated regardless of credit requirement.** To be specific, **a contract concluded by an administrative authority shall be valid not withstanding that such authority has not received the necessary credits for the performance of the contract**.

- On the other hand, Art. 401(1) tries to expose what an ultra vires constitutes. Thus, Acts performed by the bodies referred to in this chapter are in excess of the powers given to them by law or without the absence of the conditions or formalities required by law shall be of no effect.
- **Art 401 serves at least two purposes. Firstly it tries to tell us what ultra vires activities are. Next to this, it sanctions the activities by declaring them as nearly void.**
- At other times, consent might not be this. Rather consent might be approval (Art. 3144) whereby no consent is expected to be expressed until and unless "…such approval is given.
- This is usually the case "where the conclusion of the contract is subjected to the necessity of a further approval…"

Object

- The object of a valid contract should be lawful and possible next to being defined (determined). Art 1711 leaves the parties to freely determine the object of their contracts the extent of the freedom however being "the restrictions and prohibitions as are provided by law."
- You can therefore infer from this that both parties involved in a contract have a say on the object of the contract. **Art.1711** thus underscores the fact that object determination is not one-way traffic. Peculiar **however to administrative contracts, administrative agencies are entitled to formulate in advance model specification, general clauses and common directives (Art 3135)**.
- **Predominantly administrative contracts have objects determined by administrative agencies.**
- **However, it is good to note the fact that the legal limit under Art. 1716 is applicable to objects determined by administrative contracts. Can you justify this assertion?**

- Next to insuring the participation of parties in determining the object of their contracts, the law also wants to maintain the integrity of the object on the face of the law. **Though determined by anyone, still the object should be clearly stated in an understandable manner (Art.1714).**
- **An administrative contract should also have a possible and lawful object.**

Form

- The requirements of the law here are two. **The contract should be made in writing and it should be registered.**
- **We can explain of the two fold purposes of the law.**
    - Designed as a pre-appointed evidence of the fact of consent and of its forms to the intent that this method of defining rights and liabilities may be provided with the safeguards of permanence, Certainty and publicity. Because a contract is law (Art.1731) and because some of the features of a good law with an "internal morality" per Lon Fuller are permanence, determinacy and publicity writing down a contract caters "the law" these qualities. **The quality of publicity conferred on contracts by following Art. 1724 does also serve the ends of Art 12 of the FDRE constitution by manifesting the transparency theory.**
- **Any necessary formality has the effect of drawing a sharp line between the preliminary negotiations and the actual agreement** and so prevents the parties from drifting by inadvertence into unconsidered consent. What is there in the document expresses the consent. One cannot later modify the consent as written by the one expressed orally.
- **On top of the prescription under Art 1724, some administrative contracts should be formed following procedures of tender.** This will be discussed in depth in our consequent discussion of "modalities of formation."

1.3.2 Modalities of Formation

- Some administrative contracts need additional modalities of formation. Accordingly, we have instances when administrative contracts are concluded **following a procedure of tender.**
- As art 3147(1) makes it clear by utilizing "may be…" it is optional that such a procedure is followed. To show the possibility however the law reads **"Administrative contracts (may be) concluded by the procedure of allocation by tender"**
- Once however we are channeled to make an administrative contract by the procedure of allocation by tender, we will act to the contrary i.e. fail short of allocating by tender, "… under pain of nullity."
- **The natural questions will be "Why are we channeled as such and when are we channeled?"**
- To begin with the second, we are forced to conclude an administrative contract by allocation "… whenever the law imposes such obligation".
- Let us consider the full text **of Art 3147(2). "(Administrative contracts) shall be concluded by (the procedure of allocation by tender)…, whenever the law imposes such obligation."**
- Hence once the law dictates us to conclude an administrative contract by the procedure of allocation by tender we have to do it in that way the consequence of not following the diction being **nullity**.
- Among other things the law prescribes to meet the objectives of transparency and taking into account, the sensitivity of the obligation. Thus **tender minimizes potential dealings between administrative officials and the other contracting party**. And secondly because after all the contract is to be concluded to provide the best for the public, the **procedure of tender aims at selecting the best contracting party in terms of reasonable price and modest quality**.
- By taking these rationales into account the law prescribes adherence to the procedure with the procedure under Art.3148-3169. **To this end, administrative**

contracts that should be made by the procedure of allocation are governed by Articles 3148-3169.

- If the contract is to be concluded after allocation, Art.3148 tells us that "the allocation shall be notified to the public in the manner prescribed by administrative regulations or in default… in the manner which appears the most appropriate".
- The law, in this case, is concerned **not only with the publicity issue** but even **with the mechanism of attaining this publicity.**
- **The minimum threshold of the content of the notice of allocation is available under Art. 3149 fashioned in a mandatory spirit but effectuates in an optional manner i.e. what happens if the notice fails to include one of the lists under Art.3149?**

One other issue worth noting is the status of this publication under Art. 3148. **Should we consider it as an offer or as a declaration of intention?** Note that an offer has a quite different legal consequence from a declaration of intention. See for example Art.1690 and 1687 on this issue.

After administrative agencies declare their intention by notifying the public about the allocation, **"The contractors or suppliers who intend to present themselves as tenderers shall deposit in the place indicated and within the time specified by the specifications (a declaration of their intention) to tender and their tender." (Art.3153).**

"The declaration of intention (offer) to tender shall indicate the name, first name, qualifications and address of the candidate." (Art.3154 (1)]

"The [tender] shall contain an offer of the price and the undertakings of the candidate" [Art. 3155(1)]

The above provisions show us the need to comply with formality requirements on the event of declaring our intention. Because they are about declaration of intention, we

should not think of the formation of an administrative contract at this level. What else should we consider?

As to Art.3159, for example, "The office of allocations shall firstly take cognizance of the declarations of intention to tender." To verify whether these have been regularly deposited and whether the tenderer fulfill the conditions required for admission to the allocation. **"This verification is not to determine the successful tenderer. Rather it is to determine admission to the allocation"**.

A provisional successful tenderer is the one who makes the "most advantageous tender for the administrative authorities (Art 3164 (1). Among other things the most advantageous tender is determined by the offered price. To this end Article 3164(2) reads "for this purpose, the office shall take into account the price offered and all the modalities of the tender in conformity with the specifications".

Even the designation of a provisional successful tenderer does not imply the conclusion of an administrative contract.

For that matter the office (of allocation) need not designate any provisional successful tenderer where regulations of the allocation prescribe that the administrative authorities do not intend to negotiate beyond a certain price. (Art 3165(1)).

On the advent of approval, the contract shall be concluded. Art. 3168 says the successful tenderer will no more be qualified as a provisional but a permanent successful tenderer.

This being one aspect of forming administrative contracts as governed by the civil code, we have other modalities of forming administrative contracts under proclamation No 649/2009. We will briefly consider the procedures under this proclamation.

1.3.3 Process of forming administrative contracts under proclamation No. 649/2009

- **Under private contracts, parties have at every liberty** to choose their would be contracting party. This is not the case under administrative contracts.
- The manner of selecting the prospective contracting party will have in view such considerations as **ensuring the economic and efficient use of public fund** and making **public procurement in a manner, which is fair, transparent and non-discriminatory** (Preamble of Proclamation No. 649/2009).
- Administrative contracts, therefore, have this view in advance thereby limiting contracting parties from freely picking up their prospective counter parts.
- Under article 2(5) of the proclamation No. 649/2009 **"procurement" is defined as mean obtaining goods, works, consultancy or other services through purchasing, hiring or obtaining by any other contractual means"**. Hence, procurement is not concerned only in purchasing of goods, works or services. It is given a wider meaning than possibly known in ordinarily parlance an equivalent of purchasing.
- According to the proclamation, the **rule of procurement is "open bidding". Article 33(2).** of the proclamation stipulates; "except as otherwise provided in this proclamation, the procuring entity shall [use] open bidding as the preferred procedure of procurement".
- The instances whereby open **bidding may be disregarded are laid down under Article 3(2).** And it should be taken into account that **due to their sensitive and secretive nature** the purchase of goods, services or works **relating to "national security or defense"** can be made in a different procedure than laid down by the proclamation.
- There are certain types of government contracts to which the contracting methods and the procedure indicated in the Proclamation and the Civil Code do not apply. These are:-

1. **Contracts relating to national security and defense**
   - Article 3(2)(a) of Proclamation No. 649/2009 provides that the MoFED may in the interest of national security and defense permit the use of a different contracting procedure than those recognized by the Proclamation.
2. **Contracts financed by external source**
   - This refers to **contracts financed by loan or grant obtained from other states and international organizations**.
   - **Article 6** of the Proclamation provides that if **the provisions of the proclamation conflict with an obligation of the government of Ethiopia** arising out of an agreement**, the provisions of the agreement shall prevail**.
3. **Contracts between government bodies for the supply of goods, execution of work, provision of consultancy or services for consideration.**
   - This is the last category of contracts that are excluded from the scope of application of the rules that apply to administrative contracts is **contract concluded by an administrative body with another administrative body** for the supply of goods or services or for the performance of work.[1]

Tendering is made the preferred method of contracting by administrative authorities because it has its own advantages. These are:-

1. **The essence of tendering is competition**.
2. **It will help to ensure transparency and accountability in the contracting process and avoid collusion, partiality and other harmful practices in the contracting process**.
3. **It gives equal chance of participation in public works financed by the tax payers' money**.

The proclamation under its **Article 33 recognizes six modalities of procurement**. The first one is open bidding. The other five modalities of procurement are to be used exceptionally only when certain conditions are fulfilled. These are:-

[1] Supra note 35, Article 3(2)(b)

1. Open bidding (Articles 35 and 48)
2. Restricted tendering (Articles 49 and 50)
3. Direct Procurement (Articles 51 and 52)
4. Request for Proposal procedure (Articles 53 and 54)
5. Request for Price Quotation procedure (Articles 55 and 56)
6. Two-stage bidding (Articles 57 and 58)

- Administrative authorities have to use open bidding procedure. However, they can also use on fulfillment of certain specified conditions mentioned respectively in Articles 49, 51, 53, 55, and 57 of the Proclamation, one or the other forms of contracting methods indicated above.

General terms of business are general terms and conditions to be prepared by individual administrative bodies as per Article 3135 of the Civil Code and which specify the condition of performance of the contracts that individual administrative authorities conclude. **They are of three types**: -

a. **Model specifications**[2]
b. **General clauses and conditions**[3]
c. **Common directives**[4]

- **These general terms are to be prepared in advance by individual administrative authorities** to be part of the contract to which they apply and they have to be incorporated in all the contracts to which they apply and **contractors intending to participate in the contract have to accept them or not contract at all.**
- The **effects of the general terms of business differ** according to **whether they relate to the conclusion of the contract or to the interpretation, content and execution of the contract**.[5]

[2] Supra note 3, Article 3136(1)
[3] Supra note 3, Article 3136(2)
[4] Supra note 3, Article 3136(3)
[5] Supra note 3, Articles 3137 – 3139

- **Administrative authorities can make modifications to the general business** terms that they have drawn up. **Such modification will not affect the rights and obligations** of the parties to an administrative contract where **the modification is made subsequently to the conclusion of the contract.**[6]
- The specification[7] may pertain to:
    - **Technical specification** of the good, work or service to be procured (technical specification), and
    - **The competence required from contractors** interested in the contract (Specification as to competence)
    - Clearly describe the administrative body's **requirements with respect to quality, performance, safety and, where necessary, dimensions, symbols, terminology, packing, marking, and labelling or the process and method of production and requirements relating to conformity assessment procedures.**
    - Include the **qualifications which are required for admission to tender and the eliminating tests to which the tender submitted by bidders will be subjected**.[8]
- So far we have studied the documents that administrative authorities should prepare before they proceed to enter into contract by choosing one or the other of the contracting methods that we mentioned above.
- Now let us turn to study the **conditions and procedures of the various contracting methods recognized by the law**.

[6] Supra note 3, Article 3139
[7] Supra note 35, Article 29(1-4)
[8] Supra note 3, Article 3152

1. Open Bidding

- In principle, all procurements shall be undertaken in open bidding. The proclamation under Article 35(1) dictates that **"invitation to bid shall be advertised in at least one national newspaper of general circulation".** The bidding shall be considered as open if it is advertised in such a way as to allow as many bidders as possible to competitively participate. **(See Articles 35 – 48)**
- So, administrative authorities have to always use open bidding in entering to contract, unless the contract is one that has to be concluded using one or the other of methods of contracting provided from **Article 49 – 58** of Proclamation No. 649/2009.
- Procedures which administrative authorities should follow when they use open bidding method:

A. Preparation of bidding documents

- Bidding document is **a document prepared by a contracting administrative body** and **contains a specification of the desired object of procurement**.[9] Article 37 of the same proclamation provides that, **in order to make the competition among bidders on the basis of complete, neutral and objective terms** the **bidding document shall contain sufficient information, and in particular it must include:**
    i. Instruction for the preparation and submission of bids;
    ii. Information about the final date for submission of bids by bidders, the address to which the bid must be sent, the date, hour and place of opening of the bid, as well as an announcement that bidders or their representatives are allowed to attend the bid opening ceremony;
    iii. Bid submission forms and, where applicable, forms of bid security to be provided;

[9] Supra note 35, Article 2(12)

iv. The number of copies to be submitted with the original bid;
v. The general and specific conditions of contract;
vi. Specifications of requirements, including time limit for delivery or completion of the task, as appropriate;
vii. Evidence to be provided by bidders to demonstrate its qualification as well as its fiscal and legal standing;
viii. The period during which the bid remains in force;
ix. The criteria and the points to each criterion for evaluation of bids and award of the contract;
x. A reservation to the effect that the contracting administrative authority may reject all bids at any time prior to the notification of the award; and
xi. The price adjustments that may be made during contract implementation and the condition under which such price adjustments can be made.

B. Advertising invitation to bid

- The invitation to bid has to be advertised **at least one time in a national news paper of general circulation which is published in the language the bidding document is prepared or, where appropriate on a national radio or television**.[10]

The **invitation to bid must as a minimum contain** the following particulars[11]:

i. The name and address of the administrative body making the invitation to bid;
ii. A brief description of the goods, works or services to be procured;
iii. The means and conditions for obtaining the bidding documents and the place from which they may be obtained;
iv. The place and deadline for the submission of bids; and
v. The place and time for opening of bids, along with an announcement that bidders or their representatives are allowed to attend at the opening of bids.

[10] Supra note 35, Article 35 (1&2)
[11] Supra note 35, Article 36

- Once the invitation to bid is advertised **the bidding documents must be available to interested contractors free of charge or at a price not exceeding the cost of reproduction and delivery of such documents to interested bidders**.
- **Once the invitation to bid is advertised the contracting administrative authority cannot freely modify the bidding documents.** However, since contracts that administrative authorities contracts have to be in the interest of the public, the necessary modification can be made to the bidding document when that is necessary to protect the interest of the public.
- So, at any time prior to the deadlines for submission of bids, **the public body may, on its own initiative or in response to an inquiry by a candidate having purchased the bidding documents, modify bidding documents by issuing an addendum, which becomes an integral part of the bidding documents**.
- **The modification shall immediately be communicated to all interested bidders** having purchased the bidding documents and when appropriate a reasonable extension of the deadline for submission of bid shall be made.[12]
- **Nevertheless, the administrative authorities are not allowed to make modifications to the specifications.**[13] Where the modification is necessary, it may be made but a new invitation to bid has to be made.

C. Receipt of bids

- The next step, after advertisement, is receipt by the contracting administrative authority of bids submitted by bidders. **Bidders have to submit their bid in writing, signed and in sealed envelope, to the place and before the deadline stated in the invitation to bid**.[14]
- **Normally bids have to put their bid document in the bid but where it becomes impossible to put the bid document in the bid box due to its large size, the**

[12] Supra note 35, Article 39
[13] Supra note 3, Article 3151
[14] Supra note 35, Article 41(1)

administrative authority shall give receipt to the bidder indicating the time and date on which the bid document was submitted.[15]

The bid that interested contractors submit should consist of the following items:

a. Declaration of intention to tender[16]

This is a kind of cover letter to the bid that individual bidders submit and represents a formal declaration of intention to take part in the tender. It shall indicate the full name, qualification and address of the bidder, and references shall be annexed thereto.

b. Bid document[17]

The bid or tender document is the document in which the bidder specifies his offer of the price and the terms and conditions which he is willing to be bound by.

c. Bid bond/security[18]

- Bidders have to submit together with their bid a **bid bond or security**. As the **purpose of the bid bond is to discourage irresponsible bidders, the amount of the bid security should be such as to discourage irresponsible bidders**.
- **Bid security is not required for all types of contracts**. Sub-article 3 of Article 40 provides that contracts in respect of which bid security is required and the **amount of the bid security thereof shall be determined by a directive to be issued by the MoFED**.
- The **bid security can be in the form of cash deposit or bid guarantee**. The bid security that is to be made in the form of bid guarantee can, depending on the preference of the bidder, be in the form of **casher's certified check (CPO)** from a recognized bank, **letter of credit (LC) or bank guarantee**.

[15] Supra note 35, Article 41(2)
[16] Supra note 3, Articles 3153 and 3154
[17] Supra note 3, Article 3155 and 3156
[18] Supra note 35, Article 40

The bid security will be forfeited if a bidder withdraws his bid within the validity period of the bid or **in case of a successful bidder, if he repudiates the contract or fails to furnish performance or contract security.**[19]

- At last, the candidate that submitted a bid cannot withdraw or modify until the result of the bid is known.[20]
- As indicated in Article 3167(3) of the Civil Code, it is the designation of the successful bidder that will release other bidders from the obligation they entered into by submitting bid.
- **However, a bidder may expressly limit in his bid the period for which he binds himself by the tender he submitted. In such cases the bidder will be bound by the offer he made in the bid only for such period as he fixed in the bid.**

D. Opening of bids

- After the deadline for the submission of bids, the next step in the open bidding process is the **opening, evaluation** and **examination of bids**. **All the bids received before the deadline for submission of bids shall be opened** by the staff(s) of the Public Procurement and Property Administration Unit who is/are in charge of carrying out procurement activities of the administrative body.
- The **opening of the bid** shall be done immediately after the deadline for submission of bids and **in the time and place indicated in the bidding document or in the invitation to bid**.[21]
- As provided under Article 3158 of the Civil Code the **opening of the bid shall be held in public.** The process of opening the bid involves **unsealing of the envelops** that contain the bids, **reading aloud** the name of the bidder and the total amount of each bid, discounts offered and any such information that is necessary to let the bidders know their relative rank and record the facts.[22] **Where**, however, **technical and financial proposals are submitted in two**

[19] Supra note 35, Article 40(3)
[20] Supra note 3, Article 3156(1)
[21] Supra note 35, Article 42
[22] Supra note 35, Article 42(2)

separate envelops, the **envelope containing the price offered by the bidder shall be read after the evaluation of the technical proposal**.

E. Examination and evaluation of bids and selection of the successful bidder

- The **purpose** of the examination and evaluation of bids is **to identify the responsive bids and select the most advantageous bid and award the contract to the bidder.**
- Information relating to the examination, clarification, and evaluation of bids and recommendations for award **must not be disclosed** to bidders or other persons not officially concerned with the process **until the successful bidder is announced.**[23]
- The assessment of whether a bid is in conformity with the salient requirements indicated in the bidding document and decision to admit or to exclude a bid, as non-responsive, from comparison is the power of the contracting administrative authority through the contracting officer in charge.
- **In no case can, however, the administrative authority admit into competition when**[24]**:**
    a) The bidder failed to demonstrate that he is qualified,
    b) The bidder does not accept correction of arithmetic errors, and
    c) The bid is not responsive

These cases are out rightly excluded by the law maker.

At the end of the evaluation and comparison of the responsive bids the best bid will be selected. The successful bid will be[25]**:**

a) the bid that is found to be **responsive to the technical requirements and with the lowest evaluated price**;

[23] Supra note 35, Article 43& 44
[24] Supra note 35, Article 43(5)
[25] Supra note 35, Article 43(8)

b) where this is stipulated in the bidding documents by the contracting administrative authority, **the bid offering better economic advantage ascertained on the basis of factors affecting the economic value of the bid, other than price, which have been specified in the bidding documents** and which are quantifiable and can be expressed in terms of money;

c) Where it is ascertained in post evaluation of bids **that the legal, financial and technical standing of the candidate conforms to the requirements** stated in the bidding documents prepared by the contracting administrative body.

- Normally, at the end of bid process the administrative authority has to designate the successful bidder. **The notification of award to be given to the successful bidder shall specify the time within which the contract must be signed.**
- The unsuccessful bidders shall also be informed as to who the successful bidder is and why they have lost the bid.[26]
- The bid bond of the unsuccessful bidders will also be released.
- **The administrative authority, however, need not designate the successful tenderer when the bidding document prepared by the contracting administrative authority stipulates that the administrative authority does not intend to contract beyond a certain price.**[27]
- There are two options for the administrative **body if it is found that two or more bidders have the same points or result.**
  - The first option is to **select the successful bidder by lot** from among the bidders that have equal points.
  - **Absent such stipulation** in the bidding documents, **the administrative authority has to announce a new bid.**[28]

[26] Supra note 35, Article 46(1)
[27] Supra note 3, Article 3165(1)
[28] Supra note 3, Article 3166

- Even though the administrative body that caused the tender to be made should announce the successful tenderer, the identification of the successful bidder has no the effect of concluding the contract.[29] **It has only the effect of the identification of the best offeror with whom the contract may be concluded.**[30]
- It has also the effect of releasing the other tenderers from the obligation they entered into by submitting tender.[31] **The contract will only be deemed concluded when the administration approves the result of the tender.**[32] But, this may not always be the case because **on some matters negotiation may be required** before the formal conclusion of the contract.[33] However, the administrative body is not allowed negotiating with the successful bidder on the price offered and on other issues related to price.[34]
- Once the result is approved, the successful bidder, on some types of contracts, has to supply contract security so as to make good any damage the administrative body may sustain as a result of default by the contractor under the contract.[35]

2. Restricted tendering

Restricted tendering is to be undertaken by administrative bodies when one of the following conditions is fulfilled[36]:

a) If it can be established that the required object of **procurement is available only with limited suppliers**. In such cases, it is preferable to engage in the tender process by **inviting the limited number of potential bidders to bid than wasting time and money.**

[29] Supra note 3, Article 3167(1)
[30] Supra note 3, Article 3167(2)
[31] Supra note 3, Article 3167(3)
[32] Supra note 3, Article 3168
[33] Supra note 3, Article 3168(2)
[34] Supra note 35, Art. 45
[35] Supra note 35, Art. 47
[36] Supra note 35, Article 49

b) **When the cost of procurement does not exceed the threshold specified in respect of restricted tendering in the procurement directive to be issued by the MoFED**.

c) **Where a repeated advertisement of open bidding fails to attract bidders**.

The procedure of restricted tendering is the same as open tendering except that it involves the following special procedures stipulated in Article 50 of Proclamation no. 649/2009. These are:-

a. The manner of communication to interested bidders

The method of invitation to bid is different in case of restricted tendering i.e**. the letter of invitation to bid will be sent to all such suppliers.**[37]

b. The time allowed for the preparation of bids by the invited bidders

It shall not be less than the minimum number of days stated in the procurement directive. If, however, **all the suppliers invited to participate in the bid have submitted their bids before the closing date, the administrative body can open the bid before the minimum number of days expire, by giving bidders prior notice.**[38]

3. Request for Proposal Method

- This is the other method of contracting as recognized by proclamation No. 649/2009. According to Article 53 of this proclamation, administrative bodies will have to **use this method of procurement for the conclusion of contracts intended to obtain consultancy services or contracts for which the component of the consultancy services constitutes more than 50% of the contract**. This is because, **in case of procurement of consultancy service quality is more important beyond price**.

[37] Ibid.
[38] Supra note 35

- So, the **administrative body may request the potential bidders to come up with their own proposal**. By this approach, the administrative body will be able to identify the consultant that fits its requirements.
- According to Article 54(2) **the administrative body should send request for proposal to not less than three** and **not more than seven candidates selected by the administrative body itself.** Where the value of the contract is above a threshold to be determined by the procurement directive to be issued by the Ministry of Finance and Economic Development, **the request for proposal shall be sent after inviting candidates to express their interest for participation in the bid and only to those candidates that expressed their interest.**[39]

As required under Article 54(3), the request for proposal that is to be addressed to candidates shall contain the following information:-

a) The name and address of the contracting administrative authority;
b) Description of the services required by way of terms of reference (ToR);
c) In case of consultancy assignments which may involve potential conflict of interest, a reminder that candidates for such assignments must exclude themselves from procurement of goods and works which may follow as a result of or in connection with the consultancy agreement;
d) The criteria for evaluating the proposals, the relative weight to be give to price and other criteria, and the manner in which they will be applied in the evaluation of the proposals; and,
e) Place and deadline for the submission of proposals.

The administrative body has to select the candidate whose proposal is most advantageous determined in accordance with the criteria and procedures set forth in the request for proposals.[40]

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[39] Supra note 35, Art. 54(1)
[40] Supra note 35, Art. 54(6)

4. Price Quotation Procedure (*Pro forma* procurement)

As stipulated in Article 55 of Proclamation No. 649/2009, for administrative bodies to use price quotation method of contracting two cumulative conditions must be fulfilled:

1. The procurement **must relate to readily available goods or works or services for which there is an established market,** and
2. The **estimated value of the contract should not exceed the amount stated in the procurement directive**.

- When using price quotation procedure, **administrative bodies have to request price quotations from as many candidates as possible**, but from **at least three candidates and these must be from the registered suppliers list.**[41]
- The request shall contain a clear statement of the requirements of the administrative body as to quality, quantity, terms and time of delivery of the goods, works, consultancy or other services as well as other special requirements.[42]
- The contracting administrative authority shall give adequate time to the candidates in which to prepare their bid (price quotations). The administrative body shall ensure that equal opportunity of participation in public procurement is given to all candidates engaged in the business.[43]

5. Two-Stage Bidding

According to Article 57 of Proclamation No. 649/2009, there are **four independent conditions** for the use of two-stage bidding. These are:

1) When it is **not feasible for the procurement body to formulate detailed specifications** for goods or works and in the case of services to identify their characteristics, in order to obtain the most satisfactory solution to its procurement needs;

[41] Supra note 35, Article 56
[42] Ibid.
[43] Supra note 35, Art. 56(2)

2) When the administrative body **seeks to enter into a contract for the purpose of research, experiment, study or development** except where the contract includes the production of goods in quantities sufficient to establish their commercial viability and to recover the research and development costs;
3) Where **bid proceedings have been initiated but no bids are submitted as a result of the nature of the object of procurement not being clearly described** or **where all bids are rejected due to failure on the part of the administrative body concerned to draw up a clear and complete specification**;
4) Because of the technical character of the required goods or works or because of the nature of the consultancy or other services it is necessary for the public body to negotiate with the suppliers.

6. Direct Procurement

- **Direct procurement is an exception to the general rule that competitive bidding must be used in public procurement**. Competitive bidding may not be feasible on some matters despite its advantages. In such cases it is necessary to resort to direct procurement method. The fact that direct procurement does not involve competitive bidding makes it different from the other methods of contracting. So, there is no need of invitation for submission of bids, evaluation and comparison of bids and selection of one candidate from among the bidders in direct procurement.

Administrative bodies can use direct procurement only under the following conditions:[44]

a) When the goods, works or services is **available only from one candidate**;
b) For **additional deliveries of goods by the original supplier** which are intended either as parts of replacement for existing supplies, services or installation or as the extension of existing supplies, services or installation, **where a change of supplies would compel the administrative body equipment or service not**

[44] Supra note 35, Article 51

meeting requirements of interchangeability with the already existing equipment or services;

c) When **additional works, which have been not included in the initial contract have, through unforeseeable circumstances, become necessary since the separation of the additional works from the initial contract would be difficult for technical or economic reasons;**

d) For new works consisting of the **repetition of similar works which conform to a basic project of which an initial contract has been awarded on the basis of open or restricted tendering;**

e) **For continuation of consultancy services**, where the original contract has been satisfactorily performed and the continuation is likely to lead to gains in economy and efficiency;

f) When the need for **procurement is one of pressing emergency** in which delay would create serious problems and therefore injurious to the performance of the public body;

g) Where situations **arise in which shopping becomes necessary to meet the special needs of the administrative body**;

h) For purchase of **goods made under exceptionally advantageous conditions which only arise in the very short term**. This condition is intended to cover unusual disposal by firms, which are not normally suppliers.

i) Micro procurements- **minor procurements the value of which does not exceed the amount to be stated in the procurement directives.**

2.4. Object of Administrative Contracts

Provisions of the law that govern the object of contracts in general require the parties to conclude a contract that has a possible, defined and lawful object. On top of that, Articles 3170 and 3171 deal with lack of object and unlawfulness of object. But within the realms of unlawfulness of object, Article 3143 prescribes aggravated failures to comply with administrative laws or regulations that dictate about the necessities of authorization. **As to Article 3143 such a contract concluded in the absence of an**

authorization shall be of no effect as if the object of the contract is unlawful. The assumption here is the agency is acting ultra vires.

2.4.1. Absence of Object

- There is no mistake in holding to the effect that when an object (cause) is absent from a contract when **the object is an impossible object in the first place.** Thus if parties agree to do or to refrain to do a certain act which in reality is impossible the law considers such a contract as a contract without object. Absence manifests itself at least in two ways. An object might be absent from the beginning or the object of a contract may vanish in the course of time.
- **A contract shall be null on the ground of lack of cause where, at the time when it is made, it makes it impossible to attain the result desired by the administrative authorities and known to the other contracting party.**
- Article 3170 views the object of the contract from the angle of the rationales of administrative contracts. Because administrative contracts are concluded aiming at serving the public, a public that cannot be properly served for reasons mentioned in our introduction if left in the hands of private individuals. Thus the object of administrative contracts should be purposive. And this purpose is all about serving the public via administrative contracts. Accordingly," … the result desired by the administrative authorities…" thereof is this issue of purposive ness"

2.4.2. Unlawfulness of Object

As mentioned earlier an object of any contract should be possible as it should also be lawful. **Article 1716(1) reads "[a] contract shall be of no effect where the obligations of the parties or one of them are unlawful or immoral."**

This being the general rule, the picture changes when we consider administrative contracts as envisaged under Article 3171.

- As opposed to Article 1717 which says "the motive for which the parties entered into a contract shall not be taken in to account in determining the unlawful or immoral nature of their obligations", **Article 3171(1) basically views the nature**

of the object from the perspective of its motive. Thus, a contract shall be null on the ground of unlawful cause where it is made by the administrative authorities with [an unlawful object in view.[45]

- One instance of unlawful motive is available under Article 3171 (2). If the " contract is made by the administrative authorities with a view to procuring advantages of a pecuniary nature to the other contracting party and not for a reason of general interest" then such a view is an unlawful view which plays in favor of nullifying the contract. As per the clarifications of view on this matter by **Rene David, "these two Articles (i.e. Articles 3170 and 3171) are devised to protect public interest from possible mistakes committed by administrative authorities and the dealings made by authorities and individuals to thwart public interest and promote individual interest".** These two provisions are not sufficient to avoid the potential dealings. This is even conceded by the drafter of the civil code. However, Rene David tries to mitigate the issue by calling upon the liberal economic system that the country was following. As such he argued by saying too much intervention seems impossible.

[45] Supra note 3, Article 3171 (1)