

## CRIMES OF ECONOMIC OPERATORS IN THE FIELD OF PUBLIC CONTRACTS: INFLUENCE PEDDLING AND BRIBERY

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Received: 06/01/2024

Accepted: 28/06/2024

Published: 27/07/2024

### **Abstract**

*Public contracts are among the means utilized by the administration to meet its needs and implement the state's economic and social policies. Their subject matter is closely linked to public expenditures, which are organized under Law No. 23-12 dated 05/08/2023, defining the general rules related to public contracts. The importance of public contracts is highlighted as they serve as tools for implementing national and local development plans. Public contracts are also recognized as a vital area prone to various forms of corruption.*

*This research paper is dedicated to exploring crimes in the field of public contracts, focusing specifically on crimes committed by economic operators. These include the crime of exploiting the influence of public officials to obtain unjustified advantages in public contracts and the crime of bribery, which are considered corruption-related crimes. Their prevention and combat are covered by Law No. 06-01, issued February 20, 2006, which is a supplement to an amendment to Law No. 06-01 covering the prevention and combat of corruption.*

**Keywords:** *Public Contracts; Economic Operator; Influence Peddling; Bribery.*

### INTRODUCTION

Corruption, especially administrative and financial, has become a global issue in the context of commercial and financial openness in the global economy. Additionally, decentralization in decision-making and the distribution of authorities among a large number of employees and managers have, in one way or another, provided a conducive environment for the spread of its manifestations, such as bribery, favoritism, and mediation. Public contracts are among the most fertile fields susceptible to corruption due to the large sums of money involved, which attract corrupt individuals. Since the public contracts sector is a primary pathway for public funds, it becomes a vital area for all forms of corruption. This has led legislators to criminalize various violations related to public contracts. This was evident through the amendment of the Penal Code by Law No. 01-09 issued on June 26, 2001, which introduced a set of articles that collectively criminalize and suppress violations committed during the conclusion or execution of public contracts.

However, in line with international policies aimed at combating corruption-related crimes, Algeria issued Law No. 06-01 dated February 20, 2006, concerning the prevention and fight against corruption, as amended and supplemented. This law was a result of Algeria's ratification on April 19, 2004, through a Presidential Decree, of the United Nations Convention against Corruption adopted by the United Nations General Assembly in New York on October 31, 2003. This law established specific provisions for criminalizing violations committed in the field of public contracts, thereby abolishing the Penal Code provisions that stipulated the same criminalization. It also set a group of standards on which public contracts should be based, as outlined in Article 09 of the law.

Therefore, this research paper is dedicated to specifically addressing the crimes committed by economic operators in the field of public contracts, which are combated under Articles 26 and 27 of the aforementioned Law on the Prevention and Fight against Corruption. These crimes are the

exploitation of public officials' influence to obtain unjustified advantages in public contracts and the crime of bribery. This will be done by examining their elements, purposes, suppression, and methods of proof related to them.

### Study Problem

The problem of the study can be formulated in the following questions:

- What are the crimes committed by economic operators in the field of public contracts? What are their elements, what are their purposes?
- How has the Algerian legislator combated them according to the Law on the Prevention and Fight against Corruption?

### 1. Crime of Exploiting Public Officials' Influence to Obtain Unjustified Advantages in Public Contracts

The crime of influence peddling is stipulated in Article 32 of Law No. 06/01 concerning the prevention and fight against corruption ([Article 06-01 of Law No. 11-15, 2006](#)). This crime affects public functions in exchange for benefits, money, or other privileges.

The crime of exploiting public officials' influence to obtain unjustified advantages is the counterpart to the crime of granting unjustified advantages committed by the public official. The public official grants an unjustified advantage to an economic operator in the context of a public contract at various stages. This crime closely mirrors the crime of favoritism, representing the party that receives and benefits from the unjustified advantage.

The crime of exploiting public officials' influence for unjustified advantages is linked to the procedures and stages of public contracts. As the contract progresses, the role of the perpetrator and the nature of the unjustified advantage and its purpose change. Before the contract is concluded, the perpetrator is a bidder offering a proposal for evaluation. During the execution stage, the perpetrator becomes a contractor obligated to execute the contract according to its terms. The perpetrator in this crime is the economic operator interacting with the administration in the context of a public contract, being a bidder before the conclusion and a contractor afterward. Each stage has its own rules, which the public official breaches to grant an advantage to the economic operator who exploits it. The unjustified advantage is one that violates the legal provisions governing public contracts, differing according to the stage and purpose of the public contract.

The public official commits the crime of favoritism by granting an unjustified advantage to the economic operator, an act punished under Article 26, paragraph 2, of the Law on the Prevention and Fight against Corruption, which states: "Any trader, industrialist, craftsman, contractor from the private sector, or generally any natural or legal person who concludes a contract or deal with the state, local authorities, public institutions, or bodies governed by public law, or public economic institutions and industrial and commercial public institutions, and benefits from the authority or influence of the officials of the mentioned bodies to increase the prices they usually apply or to modify in their favor the quality of materials, services, delivery, or supply terms ([Article 26, Paragraph 2 of Law No. 06/01, 2006](#))."

This crime was previously included in Article 128 bis, paragraph 02, of the Penal Code, which was repealed by the Anti-Corruption Law.

It is essential to study this crime in terms of its elements and the penalties prescribed:

#### 1.1 Elements of the Crime

For the crime of exploiting public officials' influence to obtain unjustified advantages in public contracts to be established, three elements must be present: the perpetrator's status, the material element, and the moral element.

##### 1.1.1 Perpetrator's Status

According to paragraph 2 of Article 26 of the aforementioned Anti-Corruption Law, the perpetrator must be a trader, industrialist, craftsman, or contractor from the private sector, or generally any natural or legal person from the private sector. These individuals are referred to as economic operators or contracting parties when entering into a public contract or agreement as per Article 02

of Law No. 23-12 dated 05/08/2023, which defines the general rules related to public contracts ([Article 02 of Law No. 23-12, 2023](#)).

The legislator initially limited the perpetrator's status to traders, industrialists, contractors, or craftsmen and then generalized it to any natural or legal person entering into a contract with any of the entities mentioned in the article. A natural person refers to anyone entering into a contract with public institutions and holding the status of a trader or craftsman, whether possessing a commercial register or a craftsman card. They are usually contracted for performing certain works or providing simple services, such as renovation works or supplying simple equipment to the administration, or acting as a subcontractor in a public contract according to Article 82 of Law No. 23-12 ([Article 82 of Law No. 23-12, 2023](#)).

A legal person typically refers to service companies, equipment suppliers, and contracting firms with a commercial register and financial and material capabilities enabling them to enter into contracts or agreements with public institutions ([Bousqiaa, 2011, p. 151](#)).

It should be noted that the status of the perpetrator, who can be held accountable for the crime of exploiting public officials' influence to obtain unjustified advantages, must be a private sector natural or legal person, excluding public sector legal entities ([Berrah & Zaabi, 2021, p. 275](#)).

### 1.1.2 Material Element

The material element of this crime is achieved when the perpetrator concludes a contract or deal with the state, local authorities, public institutions, bodies governed by public law, public economic institutions, or industrial and commercial public institutions and benefits from the authority or influence of the officials of these bodies to obtain unjustified advantages.

Therefore, the material element is based on two components: the criminal behavior and its purpose.

#### A. Criminal Behavior

The criminal behavior in the crime of exploiting public officials' influence to obtain unjustified advantages in public contracts involves the perpetrator's use of the authority, influence, or power of state officials or employees of the associated institutions when concluding a contract or deal with these institutions.

State officials, as referenced in this context, include anyone working in these institutions who has authority or influence in contract or deal conclusion or contributes to their preparation. This includes directors of these institutions, heads of departments, office managers, engineers, technicians, and administrative staff of various ranks.

For public contracts, there is usually a department or office dedicated to public contracts in every administrative body or public sector institution. This department is overseen by a department or office head and comprises engineers, technicians, and administrative staff tasked with preparing contract procedures or any contracts entered into by this administration.

These officials often have a direct connection with the contract or deal and have authority or influence in its conclusion as they possess all relevant information about the contract, particularly concerning the capabilities of the competitors.

It is worth noting that the influence does not need to be real; the crime is committed even if the influence is alleged, whether the perpetrator knows it is alleged or mistakenly believes in its validity.

#### B. Purpose of Exploiting Public Officials' Influence

Article 26, paragraph 2, requires that for the material element of the crime to be established, the perpetrator must exploit the influence, authority, or power of state officials or associated institutions to:

- **Increase Prices:** For example, prices related to construction contracts are calculated based on unit prices as per the pre-prepared specifications. The contractor may propose higher prices than those in the national market, exploiting their relationship with the institution's director or one of its officials.
- **Alter the Quality of Materials:** This involves changing the quality of materials required by the administration in terms of quality and type (specified in the contract's conditions). The perpetrator

provides lower quality materials at the same prices, exploiting the authority or influence of the administration officials.

- **Alter the Quality of Services:** This pertains to service contracts and deals. The perpetrator concludes a contract with the state or one of its institutions as specified in Article 26, paragraph 2, for a particular type of service, such as bi-monthly computer maintenance. The perpetrator reduces the frequency to once every four months, exploiting their relationship with an institution official (Zuleikha, 2011-2012, p. 171).
- **Alter Delivery or Supply Deadlines:** Delivery or supply deadlines pertain to supply contracts and are usually specified in the contract's conditions. If the contractor fails to meet their obligations or delays delivery, penalties are imposed. The perpetrator delays the delivery without penalties, exploiting the authority or influence of the institution's responsible official, such as a friend. This also applies to construction contracts, where the contractor proposes a completion period stated in the contract but delays the work without serious reasons (Majdoub, 2021, p. 325).
- **Passing Forged or Incorrect Documents to Secure the Contract:** To secure the contract, the economic operator may bribe the public official to pass forged or incorrect documents essential to the administrative, technical, or financial file. This misrepresentation of financial capability, equipment, worker competence, or hiding criminal records is aimed at presenting a false image of the operator's capacity.
- **1.1.3 Moral Element**
- The crime of exploiting public officials' influence is an intentional crime that requires both general and specific criminal intent.
- **General Criminal Intent:** General criminal intent involves knowledge and will. This means the perpetrator must be aware of the authority and influence of the public officials in concluding the contract or deal and must willfully choose to exploit this authority or influence for their benefit.
- **Specific Criminal Intent:** Specific criminal intent is the perpetrator's intention to obtain unjustified advantages. This goes beyond mere knowledge and will, requiring a clear intent to benefit unlawfully.

Like other crimes, the judge must detail in the judgment the elements of the crime of exploiting public officials' influence. This includes the perpetrator's status, the authority or influence of the public official considering their position and relationship with the perpetrator, and the moral element showing the perpetrator's criminal intent to secure a conviction.

## 1.2 Suppression of the Crime

### 1.2.1 Penalty

Article 26 of the Anti-Corruption Law, as amended and supplemented by Law No. 11-15 dated 02/08/2011, punishes the perpetrator of the crime of exploiting public officials' influence to obtain unjustified advantages in public contracts with imprisonment ranging from two to ten years and a fine from 200,000 DZD to 1,000,000 DZD for natural persons.

For legal persons, referring to Article 53 of the Anti-Corruption Law and Article 18 bis of the Penal Code, the penalty is equal to one to five times the maximum fine prescribed for natural persons. Therefore, the penalty for a legal person committing the crime of exploiting public officials' influence ranges from 1,000,000 DZD to 5,000,000 DZD (Article 18 of Law No. 06/01, 2006).

The same provisions applicable to the crime of favoritism regarding aggravated penalties, exemptions or reductions, confiscation of criminal proceeds, annulment of contracts and deals, participation, attempts, statute of limitations, and procedural measures also apply to this crime, as stipulated in the Anti-Corruption Law.

### 1.2.2 Proof of the Crime

Proving this crime depends on establishing the relationship between the perpetrator and the state official whose authority or influence was exploited to conclude the contract or deal. Proving the material element, which involves the purpose of exploiting public officials' influence (such as price increases or changes in service or material quality), can often be done through expert evaluation.

Judges must carefully review the case file, scrutinize the statements of the accused and witnesses if any, to deduce the crime's elements and consequently convict the perpetrator.



### 1.3 Bribery in Public Contracts (Active Bribery)

Referring to Article 25 of Law No. 06-01 concerning the avoidance and combat of corruption, the first paragraph addresses active bribery (the briber), while the second paragraph addresses passive bribery (the bribee). The Algerian legislator adopts the dual-crime doctrine, separating active bribery from passive bribery (Majdoub & Baaziz, 2017, p. 15).

The focus of this research paper is active bribery committed by economic operators in public contracts. According to the first paragraph of Article 25, active bribery involves any person who directly or indirectly, makes a public official a promise, an offer, or an unfair advantage, for the benefit of the official or another person or entity to perform or refrain from performing an act within their duties (Article 25 of Law No. 06/01, 2006).

Bribery is defined by the United Nations Convention against Corruption as promising, offering, or providing a public official with an unfair advantage, directly or indirectly, for the official's or another person's benefit to carry out or abstain from carrying out an act within the official responsibilities. (Abdelali, 2012-2013, p. 18).

#### 1.3.1 Elements of the Crime

As with other corruption crimes, bribery in public contracts consists of three elements: the status of the perpetrator (presumed element), the material element, and the moral element.

##### A. Status of the Perpetrator

According to the second paragraph of Article 25 of the Anti-Corruption Law, the perpetrator in active bribery related to public contracts must be any person who promises, offers, or gives an undue advantage to a public official, directly or indirectly, for the official's benefit or another person or entity to perform or refrain from performing an act within their duties.

The perpetrator is considered a briber if they offer or give a gift to a public official to obtain a contract or deal (Tounsi, 2018, p. 80).

It's important to note that Article 128 bis 1 of the repealed Penal Code did not specify the perpetrator's status, unlike Article 27 of the Anti-Corruption Law (Bousqiaa, 2004, p. 84).

##### B. Material Element

The material element of this crime involves the perpetrator offering or attempting to offer any remuneration or benefit, directly or indirectly, during the preparation or negotiation of a contract or deal with the state, local authorities, or public economic institutions.

Therefore, the material element consists of two components:

- Criminal Behavior: This involves the perpetrator offering or attempting to offer any remuneration or benefit, directly or indirectly.
- Remuneration or Benefit: The law does not specify their nature, but remuneration generally refers to payment offered to obtain or perform a particular act, typically in the form of money. A benefit refers to any advantage gained from performing an act.
- The act is considered committed regardless of the type of remuneration or benefit received or attempted to be received by the public official, whether material or immaterial, specific or unspecified. For instance, remuneration could be a car, money, or a check, while a benefit could be intangible, like promoting the official to a higher position.

##### C. Occasion

The material element of active bribery offered by an economic operator in public contracts is complete when remuneration or a benefit is offered or attempted during the preparation or negotiation of a contract or deal on behalf of the state, local authorities, or public institutions as mentioned in Article 27.

The preparation or negotiation of contracts or deals is usually handled by officials directly involved in these processes, as previously discussed in the crime of exploiting public officials' influence.

Thus, the occasion of offering a bribe is specifically during the preparation or negotiation of a contract or deal.

##### D. Moral Element

For the crime of bribery in public contracts to be established, the perpetrator must have general criminal intent, which involves knowledge and will. This is achieved when the perpetrator's will is

directed towards offering or attempting to offer remuneration or benefit, knowing that it is unjustified and illegal (Boudhan, 2010, p. 30).

#### **1.4 Suppression of the Crime**

##### **1.4.1 Penalty**

Article 25 of the Anti-Corruption Law states: "Shall be punished with imprisonment from two (02) to ten (10) years, and a fine from 200,000 DZD to 1,000,000 DZD:

- Any person who promises, offers, or gives a public official an undue advantage, directly or indirectly, whether for the benefit of the official or another person or entity, to perform or refrain from performing an act within their duties.
- Any public official who requests or accepts, directly or indirectly, an undue advantage, whether for themselves or another person or entity, to perform or refrain from performing an act within their duties."

Furthermore, Article 27 of the Anti-Corruption Law punishes the perpetrator of bribery, whether active or passive, in the field of public contracts with imprisonment from ten (10) to twenty (20) years and a fine from 1,000,000 DZD to 2,000,000 DZD for natural persons.

For legal persons, referring to Article 53 of the Anti-Corruption Law and Article 18 bis of the Penal Code, the penalty for a legal person in felony and misdemeanor cases is a fine equal to one (01) to five (05) times the maximum fine prescribed for a natural person. Thus, for the crime of bribery in public contracts, which is considered a misdemeanor, the penalty for a legal person ranges from 2,000,000 DZD to 10,000,000 DZD.

These provisions represent the primary penalties for the crime of bribery in public contracts for both natural and legal persons. Notably, they represent the maximum penalties stipulated in the Anti-Corruption Law, with imprisonment ranging from 10 to 20 years, equating to the penalties for other corruption crimes under aggravated circumstances as specified in Article 48. Additionally, the fine for this crime is doubled compared to other corruption crimes.

Thus, the penalties for this crime differ from those for passive bribery, which are punishable by imprisonment from two to ten years and a fine from 200,000 DZD to 1,000,000 DZD for natural persons, with similar provisions for legal persons.

The same provisions applicable to the crime of favoritism regarding exemptions or reductions in penalties, supplementary penalties, confiscation of criminal proceeds, participation, annulment of contracts and deals, and procedural measures also apply to the crime of bribery in public contracts.

##### **1.4.2 Restitution**

Paragraph 03 of Article 51 of the Anti-Corruption Law states: "The judicial authority shall order the restitution of what has been embezzled or the value of the benefit or profit obtained, even if it has been transferred to the convict's assets, their descendants, siblings, spouse, or in-laws, whether those assets remain in their original form or have been converted into other assets."

Therefore, upon convicting the perpetrator of bribery in public contracts, the judge must order the restitution of any commission received for providing the service, whether held by the perpetrator or one of the persons mentioned in paragraph 03 of Article 51. The context of the text implies that restitution is mandatory, even if the word "must" is not explicitly stated.

##### **1.4.3 Statute of Limitations for Public Prosecution**

Paragraphs 1 and 2 of Article 54 of the Anti-Corruption Law state that public prosecution for crimes specified in this law does not expire if the proceeds of the crime are transferred abroad. Otherwise, the provisions of the Code of Criminal Procedure apply.

Given that bribery in public contracts is analogous to bribery of public officials, as the legislator grants both the status of bribery, the statute of limitations does not apply to the public prosecution for bribery in public contracts as per Article 08 bis of the Code of Criminal Procedure, which states: "Public prosecution does not expire in felonies and misdemeanors described as terrorist acts, sabotage, organized transnational crime, bribery, and embezzlement of public funds."

Thus, the public prosecution for the misdemeanor of bribery in public contracts is not subject to the statute of limitations.



#### 1.4.4 Statute of Limitations for Penalties

Similarly, the statute of limitations for penalties, as stated in paragraphs 1 and 2 of Article 54 of the Anti-Corruption Law, does not apply if the criminal proceeds are transferred abroad. Otherwise, the provisions of the Code of Criminal Procedure apply.

According to Article 612 bis of the Code of Criminal Procedure: "Penalties for felonies and misdemeanors described as terrorist acts, sabotage, organized transnational crime, bribery, and embezzlement of public funds do not expire."

Therefore, penalties imposed upon conviction for the crime of bribery in public contracts are not subject to the statute of limitations.

It is worth noting that Article 128 bis/1 of the repealed Penal Code described the crime of receiving commissions from public contracts as a felony, punishable by temporary imprisonment from 5 to 20 years and a fine from 100,000 DZD to 5,000,000 DZD.

In the context of deterrence and combating crimes related to public contracts, Law No. 23-12 emphasizes the necessity of internal and external oversight and supervisory control as mechanisms to monitor public contracts, both before and after their execution. These measures aim to deter the commission of crimes by both economic operators and public officials. The law also introduced an electronic platform for public contracts, intended to ensure transparency and integrity through digitization and technology in the study, preparation, and execution of public contracts.

### CONCLUSION

Public contracts serve as a mechanism for implementing public expenditures, thus the legislator has surrounded them with numerous oversight procedures, both pre- and post-execution. Despite these measures, fraudulent practices persist, whether by employees directly involved in the contracts or by economic operators engaging in corrupt practices to secure public contracts, as discussed in this research paper. This has led the legislator to criminalize various violations related to public contracts, as evidenced by the amendment of the Penal Code through Law No. 01-09 issued on June 26, 2001, which introduced a set of articles criminalizing and suppressing violations committed during the conclusion or execution of public contracts.

However, in alignment with international policies aimed at combating corruption-related crimes, Algeria issued Law No. 06-01 dated February 20, 2006, concerning the prevention and fight against corruption, as amended and supplemented. The legislator has also emphasized the necessity of updating procedures in the field of public contracts. To prevent or reduce these crimes, a set of measures and recommendations must be implemented, including:

- Updating procedures in the field of public contracts and activating the Public Contracts Regulatory Authority as stipulated in the Public Contracts Law.
- Strengthening the role of internal and external oversight, as well as supervisory control as provided by Law No. 23-12 on public contracts.
- Organizing training sessions for employees and public officials responsible for preparing, concluding, and executing public contracts, and developing a code of ethics and professional conduct for public officials involved, in line with the principle of enhancing procedural transparency.
- Enhancing procedural transparency and access to public procurement, and respecting the principle of competition.
- Mandating the establishment and activation of the electronic portal for public contracts to promote digitization, ensuring transparency and monitoring of contracts from announcement to completion.
- Ensuring pre- and post-execution oversight of public contracts to mitigate the phenomenon of poor contract execution as agreed upon in the specifications.
- Imposing stricter custodial sentences instead of financial penalties, as they are more effective in deterrence.

These recommendations aim to enhance transparency, accountability, and the overall integrity of the public contracting process, thus contributing to the effective prevention and combat of corruption in public contracts.

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