

## Judicial Oversight of Separate Administrative Decisions at the Conclusion of the Public Transaction

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### Abstract:

This article aims to highlight one of the most important mechanisms for exercising judicial oversight by the administrative judge over the legality of the actions and procedures of the contracting authority involved in the formation of the public transaction. This oversight ensures that the administration adheres to the principle of legality and the rule of law. It focuses on separate administrative decisions issued by the contracting authority during the preliminary phase of concluding a public transaction, including the decision to announce the transaction, the award decision, and the exclusion decision from participation. These decisions can be challenged separately, independent of the transaction itself and its various components. They are subject to review by the judge of legality rather than the judge responsible for the overall operation (the full jurisdiction judge).

**Keywords:** Public contracts, separate decisions, conclusion phase, cancellation appeal, full jurisdiction.

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### Introduction:

Administrative contracts are numerous and varied, with public contracts being among the most significant. The Algerian legislator has organized these contracts under Presidential Decree 15/247 concerning the regulation of public contracts and public service delegations, as well as Law No. 23/12, which sets forth the general rules related to public contracts. Public contracts are characterized by undergoing several stages and processes aimed at ensuring the fundamental principles, which include equality in the treatment of candidates and transparency in procedures.

Before reaching the stage of concluding public contracts, the contracting authority undertakes a series of procedures and makes numerous decisions, such as announcing the contract and its conditions, the temporary award decision, decisions of the evaluation committees, and the decision to award the contract, as well as selecting the contractor. These decisions, issued unilaterally by the contracting authority, are integral to the public

contract and part of its structure. It is inconceivable to consider these procedures and decisions without their realization in the public contract, which can be separated and contested independently from the contract due to abuse of power if they exhibit any forms of illegality. These are the separate administrative decisions innovated by French jurisprudence to allow the administrative judge to examine the legality of these decisions issued during this phase.

Based on this, we pose the following question:

To what extent can separate administrative decisions be contested during the preliminary phase of concluding a public contract?

To answer this question, we can rely on several sub-questions, the most important of which are:

- What is meant by separate administrative decisions regarding public contracts?
- What are the criteria for determining separate administrative decisions?
- What are the types of separate administrative decisions in the preliminary phase of public contracts?

We will address these issues through the following outline:

Chapter One: The Concept of Separate Administrative Decisions Regarding Public Contracts

1. Definition of separate administrative decisions regarding public contracts
2. Criteria for determining separate administrative decisions

Chapter Two: Types of Separate Administrative Decisions Regarding Public Contracts

1. Decisions that precede the conclusion of the contract
2. Decisions related to the conclusion or non-conclusion of the contract

Chapter Three: Conditions for Accepting Cancellation Claims Against Separate Administrative Decisions Regarding Public Contracts

1. Directing the claim against the separable decision rather than the contract
2. The decision in question must be separable from the contract
3. The standing of the plaintiff in the cancellation claim against separate administrative decisions regarding public contracts

## **Chapter One: The Concept of Separate Administrative Decisions Regarding Public Contracts**

The emergence of the theory of separate administrative decisions regarding administrative<sup>1</sup> contracts is credited to the French Council of State, which innovated it to extend its

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<sup>1</sup> - George Shafik Sari, *Separable Decisions in Administrative Law*, Dar Al-Nahda Al-Arabia, Egypt, 2002, p. 46.  
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oversight over certain legal actions taken by the administration without waiting for the completion of the operation itself and contesting it in its entirety<sup>2</sup>.

### **1. Definition of Separate Administrative Decisions in Public Contracts:**

Separate administrative decisions are defined in general terms concerning administrative contracts and specifically regarding public contracts. Dr. Georges Chafik Sari defines them as<sup>3</sup> “legal acts issued solely by the administration—or public authority in general—within a complex process, with the possibility of isolating these acts to constitute separate, independent decisions that are valid for producing a specific legal effect, as an individual legal act that is complete and final in itself, without affecting the other components of the process or hindering or preventing the desired legal effects from being achieved, i.e., the legal results for which the administration completed this process.”

On the other hand, Dr. Mohamed Suleiman Al-Tamawi defines them as “decisions that the administration issues while in the process of contracting, aimed at preparing to conclude the contract or allowing its conclusion or preventing it. These decisions are not ends in themselves; they are integrated into the contracting process.”<sup>4</sup>

Dr. Mahmoud Al-Jabouri states that “acts that contain more than one action can produce a legal effect while simultaneously contributing with others to form a common effect. This includes administrative decisions issued by the administration in preparation for concluding an administrative contract or allowing it to be executed.”<sup>5</sup>

Dr. Khaloufi Rashid defines it as “those administrative acts that, even if directly related to administrative contracts, are individual acts that can be subject to oversight through an action for abuse of power if the elements of an administrative decision are present.”<sup>6</sup>

Separate administrative decisions regarding public contracts are defined as follows: they are administrative decisions made in connection with the conclusion of a public contract, aimed at preparing for the conclusion of the contract, allowing its conclusion, or preventing it. These decisions are issued by the contracting authority or the body authorized by law to issue them. Despite their relation to the contract, these decisions are

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<sup>2</sup>- Muslimani Muhammad Ahmad Ibrahim, *Administrative Decisions Capable of Separation in Complex Legal Operations: A Comparative Study*, Dar Al-Jami'a Al-Jadida, Egypt, 2014, pp. 25-26.

<sup>3</sup>- George Shafik Sari, *Op. Cit.*, pp. 43-44.

<sup>4</sup>- Abu Bakr Al-Siddiq Omar, *Judicial Control over Administrative Authority in Concluding Administrative Contracts through Tendering*, Al-Halabi Legal Publications, p. 19.

<sup>5</sup>- Habib Ibrahim Hamada Al-Dulaimi, *Administrative Decisions Capable of Separation from the Administrative Contract (A Comparative Study)*, 1st edition, Dar Al-Ayam for Publishing and Distribution, Iraq, 2016, p. 44.

<sup>6</sup>- Rashid Khloufi, *Law of Administrative Disputes (Conditions for Accepting Administrative Lawsuits)*, 3rd edition, University Publications Bureau, Algeria, 2009, p. 76.

independent and capable of producing separate legal effects, allowing for independent challenges before the judge for abuse of power<sup>7</sup>.

From the above, separate administrative decisions regarding public contracts can be defined as administrative decisions that contribute to the formation of the contract, issued by the contracting authority in preparation for the conclusion of the contract or allowing its execution. There is no hindrance to separating these decisions and challenging them independently through a cancellation action, separate from the public contract.

### **Second: Criteria for Determining Separate Administrative Decisions**

Separate administrative decisions can be identified and distinguished from administrative contracts in general, and public contracts in particular, by two criteria: the personal criterion and the objective criterion.

#### **1. Personal Criterion (Subjective):**

The subjective or personal determination of separability focuses on the legal status and personal capacity of the plaintiff filing a cancellation action against separate and unlawful administrative decisions before the competent judicial authorities.

The personal criterion for determining separate administrative decisions consists of several elements, such as: the element of standing and the position of others in the contractual process, the element of the plaintiff's right to defense in court against separate and unlawful administrative decisions, and the element of the specific use of the cancellation action against these separate and unlawful administrative decisions before the relevant judicial authorities to protect their rights more than the use of full jurisdiction actions. Each element will be detailed individually<sup>8</sup>.

#### **2. Objective and Material Criterion:**

The objective determination of separability focuses on the administrative decision itself, without considering the status of the plaintiff<sup>9</sup>.

According to this criterion, the separability of administrative decisions from the administrative contract is considered an objective matter left to the discretion of the judge of fact. This is because many administrative decisions are made by the administrative authority within the framework of the contractual process, which may appear to be a single inseparable entity, yet the reality necessitates treating each decision individually<sup>10</sup>.

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<sup>7</sup>- Sharif Soumia, *Judicial Oversight on Public Procurement Disputes* Master's Thesis in Law, Department of Administrative Disputes Law, Faculty of Law and Political Science, University of Tizi Ouzou, 2016, p. 16.

<sup>8</sup>- Ammar Aouabdi, *The General Theory of Administrative Disputes in the Algerian Judicial System*, Part Two, University Publications Bureau, Algeria, p. 442.

<sup>9</sup>- Talib Ben Diab Ikram, *Separable Administrative Decisions and Their Applications to Public Contracts*, Master's Thesis in Advanced Public Law, Supervised by Abderrahmane Azawi, Faculty of Law and Political Science, University of Abou Bakr Belkaid Tlemcen, 2016-2017, p. 49.

<sup>10</sup>- Habib Ibrahim Hamada Al-Dulaimi, *Op. Cit.* pp. 46-47.

Examples of the objective material elements that constitute this criterion in determining separable administrative decisions include the following:

- **The Effectiveness of Administrative Decisions in Forming and Existing Administrative Processes:** This means that if a decision related to the administrative contract is challenged, the judge of fact should consider whether the contested decision constitutes an important and essential element of the subject matter of the case before him, such that it cannot be separated from the dispute. In such cases, the judge does not allow for the separation of that decision in a way that would lead to the rejection of the cancellation appeal against it. This is typically the case for administrative decisions issued during the execution of the administrative contract. However, if the contested decision does not hold such significance and produces only secondary results that do not affect the contract itself, there is no impediment to treating that decision separately and appealing it independently from the contract<sup>11</sup>.

Thus, preliminary acts such as announcing a tender, receiving bids, verifying their conditions, comparing bids, and awarding the contract are conducted through administrative decisions made by the administration to express its intent and must proceed according to the applicable administrative regulations. These separable decisions can indeed be challenged independently through a cancellation action separate from administrative contract actions, as such decisions do not play a fundamental and essential role in the formation and conclusion of contracts<sup>12</sup>.

- **The Suitability and Preference of the Cancellation Action for the Plaintiff Over Full Jurisdiction Actions:** This element refers to the effectiveness in genuinely protecting the rights and interests of the plaintiff in the cancellation action, as well as the ease and simplicity of judicial procedures and cost-efficiency in initiating the action to defend the personal rights and interests of the plaintiff<sup>13</sup>.

- **The Nature of Administrative Decisions in Terms of Generality and Individuality:** This element indicates that the competent judge in the cancellation action can utilize it to identify and separate the administrative decisions materially and objectively. The administrative judiciary considers general decisions or administrative regulations issued in connection with composite administrative actions as always separable administrative

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<sup>11</sup>- Same reference, p. 47.

<sup>12</sup>- Nour Al-Wujud Karim Al-Nafs, *Judicial Oversight of Administrative Actions Separated from the Contract*, Master's Thesis in State and Public Institutions, Supervised by Hamid Ben Ali, Faculty of Law, Ben Aknoun University, Algeria, 2012-2013, p. 16.

<sup>13</sup>- Ammar Aouabdi, *Op. Cit.*, p. 447.

decisions, based on the premise that these decisions are general and abstract, relating to general legal statuses regarding their creation, modification, or cancellation<sup>14</sup>.

**-Here's the English translation of your text:**

Jurisdiction of Administrative Courts in Disputes Concerning Composite Administrative Decisions and Their Separability from Contracts\*\*

One of the material and objective elements for determining separable administrative decisions and separating them from composite administrative processes is the issue of jurisdiction. Composite administrative decisions related to the contractual process are distinct from the administrative composite action, allowing for a cancellation action against them before the competent administrative courts. This is based on the premise that administrative courts are the primary judicial bodies authorized to examine and rule on cancellation actions, especially when the administration issues such decisions in its capacity as a public authority. These decisions are manifestations of public authority, logically necessitating that ordinary courts do not have jurisdiction over such disputes. Consequently, the competent judge can rely on this element to separate composite administrative decisions from the original contractual process in order to determine whether to accept or reject the cancellation action directed at the composite administrative decisions that are separable from the contract<sup>15</sup>.

**Chapter Two: Types of Separate Administrative Decisions Regarding Public Contracts**

The separable administrative decisions in the formation process of public contracts, issued by the administration during the preliminary phase of concluding the public transaction, vary, including decisions related to the conclusion or non-conclusion of the contract that can be appealed for cancellation due to abuse of power or violation of the principle of legality.

**1. Decisions Preceding the Conclusion of the Contract**

- Decision to Choose the Method of Conclusion

The administration may be legally obligated to resort to a specific method for concluding the contract, such as opting for simple agreement or agreement after consultation, rather than calling for tenders. There is no issue if the administration has discretionary authority and freedom in choosing the best method for concluding its contracts. However, a problem arises if the law obliges the administration to adopt a method such as simple agreement or agreement after consultation, and the administration

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<sup>14</sup>- Same reference, p. 448.

<sup>15</sup>- Nour Al-Wujud Karim Al-Nafs, Op. Cit. p. 20.

violates this provision by following the tendering method. In this case, a cancellation action may be filed against those decisions due to legal violations<sup>16</sup>.

## **2. Decision to Announce the Contract:**

This is a contracting invitation directed by the administration seeking to announce specific specifications for general contracting conditions to the public or a specific category<sup>17</sup>, according to the method of contracting used by the administration and necessary for actual needs and public interest. This procedure is considered a mandatory preliminary formal procedure, as stipulated in Article 62 of Presidential Decree 15/247 and reinforced by Article 46 of Law No. 12/23, which sets forth general rules regarding public contracts<sup>18</sup>. The announcement is one of the most important procedures for concluding public contracts, embodying the principle of competition and its complementary principles of equality and transparency—principles that ensure the effectiveness of public procurement and the proper use of public funds, as stated in Article 5 of Presidential Decree 15/247 and Law 12/23. These are considered principles of good governance in public contracts.

Consequently, administrative courts view the announcement of the contract as a separable administrative decision from the overall contractual process. It represents a formal and essential procedure necessary for the enforcement of the administrative decision, and violating the essential formalities of the administrative decision leads to its potential annulment<sup>19</sup>.

## **3. Decision to Exclude Bids:**

This is a decision issued by the administration that involves the exclusion of one of the submitted bids for reasons specified by the administration in the decision. It is an objective decision, as it does not target a specific individual but is directed at bids that do not meet the conditions set by law or that are submitted after the specified deadline<sup>20</sup>. The Algerian legislator refers to this as the “decision to reject submitted bids” in Law No. 15/247 on public contracts. The exclusion of submitted bids in the tender process may arise from the following cases:

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<sup>16</sup>- Same reference, p. 23.

<sup>17</sup>- Talib Ben Diab Ikram, *Op. Cit.*, p. 102.

<sup>18</sup>- Law No. 23/23, dated 18 Muharram 1445 corresponding to August 5, 2023, establishing the general rules regarding public contracts, *Official Gazette*, No. 51.

<sup>19</sup>- Taybi Souad Amirouch, *Oversight of Separable Administrative Decisions Issued During the Preliminary Phase of Public Contracts*, *Professor Research Journal for Legal and Political Studies*, Vol. 4, No. 1, 2019, p. 78.

<sup>20</sup>- Ibrahim Ahmad Hassan, *Cancellation Jurisdiction in the Context of Administrative Contracts: A Comparative Study*, *Doctoral Thesis in Legal Science*, Supervised by Ahmed Ismail, Faculty of Law, University of Damascus, 2012, p. 146.

- Non-compliance of the bid with the required conditions, which include the time frame (e.g., submitting the bid after the specified deadline), the method and place of bid submission, and the conditions related to the form and content of commitments<sup>21</sup>.
- Cases where bids do not meet the requirements of the functional program or technical specifications or the effectiveness that must be achieved as stipulated in the specifications documents (in the case of awarding the contract through selective consultation)<sup>22</sup>.
- Cases of rejecting bids based on the proposal of the bid-opening and evaluation committee, as outlined in Article 72 of Decree 15/247 and Article 48 of Law 12/23.
- Cases where the bid is submitted by a foreign contractor without a commitment to meet the investment condition in the same field of activity within a partnership with an entity subject to Algerian law, where the majority of its capital is held by resident Algerians, as specified in Article 84 of Decree 15/247<sup>23</sup> and Article 57 of Law 12/23.

Thus, decisions issued to exclude certain bids in a specific contracting process on the grounds of non-compliance with the conditions or late submissions are considered administrative decisions that can be challenged independently through a cancellation action. This has been recognized by the French Council of State, which has allowed challenges from contractors or suppliers who were unlawfully excluded from participating in the tender by appealing the tender decision itself<sup>24</sup>.

Moreover, the administrative decision to exclude certain bids must be lawful and free from any defects that would permit a cancellation action<sup>25</sup>. There is no barrier to appealing the administrative decision to exclude a bid from the tender if it is issued unlawfully. The French Council of State has annulled an administrative decision excluding a bid from a tender due to a legal dispute between the administration and the bidder, which rendered the exclusion decision tainted by abuse of power<sup>26</sup>.

It is noteworthy that actions preceding or following the administrative decision that is separable from the administrative contract cannot be challenged for cancellation, including preparatory actions for the decision, instructions, periodic publications, and advisory opinions. Similarly, preliminary actions preceding the conclusion of the contract that do

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<sup>21</sup>- Articles 65, 66, Presidential Decree 15/247 dated September 16, 2015, concerning the regulation of public contracts and public facility delegations, Official Gazette No. 50 issued on September 20, 2015.

<sup>22</sup>- Article 67 of Presidential Decree 15/247, same reference.

<sup>23</sup>- Talib Ben Diab Ikram, Op. Cit. p. 97.

<sup>24</sup>- Muhammad Samir Muhammad Jumaa, Cancellation of Separable Administrative Decisions, Dar Al-Jami'a Al-Jadida, Egypt, 2013, pp. 177-178.

<sup>25</sup>- Jamal Abbas Ahmed Othman, The General Theory and Its Applications in the Field of Cancellation of Administrative Contracts in Jurisprudence and State Council Jurisprudence, Arab Modern Office, Egypt, 2007, p. 345.

<sup>26</sup>- Habib Ibrahim Hamada Al-Dulaimi, Op. Cit. p. 102.

not have the nature of administrative decisions, such as investigative procedures prior to the contract's finalization and signing, cannot be appealed for cancellation<sup>27</sup>.

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#### **4. Decision to Exclude from Participation in Public Contracts:**

These are deprivation decisions issued by the administration that exclude certain individuals from participating in tenders or auctions. This can be a personal action directed at a specific individual or a general action applicable to an unlimited number of tenders, for a limited or unlimited duration, depending on the circumstances. The exclusion may stem from defective execution of a prior obligation, such as serious errors committed by the individual (or related to public interest), or as a preventive measure concerning public interest<sup>28</sup>. This is outlined in Article 75 of Presidential Decree 15/247 and Article 51 of Law 23/12 concerning exclusion from participation in public contracts, whether the exclusion is temporary or permanent. Therefore, administrative decisions that deprive certain individuals from entering tenders or remove others from the lists of those not allowed to contract are decisions that can be challenged for cancellation<sup>29</sup>.

This has been recognized by both the French and Egyptian Councils of State. The Egyptian Administrative Court has clarified in one of its rulings that one of the fundamental principles governing public tenders is the announcement of freedom of competition and equality among competitors. The right to compete means that individuals have the right to submit bids without the administration preventing anyone or excluding them from competition. Exclusion and deprivation decisions are subject to review by the administrative judiciary or can be challenged before it for cancellation due to abuse of power, especially if the decision was made for the public good or for reasons unrelated to it, such as political reasons, as the grounds for exclusion or deprivation must be justified<sup>30</sup>. In general, all administrative decisions issued to exclude certain individuals or bids must be lawful and should not violate the principle of equality among competitors, which is one of the fundamental principles underpinning public tenders and auctions. This principle obligates the administration to accept bids that meet all required conditions. Thus, any violation of this principle by the administration may lead to the annulment of the tender or auction procedures<sup>31</sup>.

#### **5. Temporary Award Decision:**

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<sup>27</sup>- Muhammad Al-Sanari, Recent Developments in the Appeal for Cancellation in Administrative Contracts, Dar Al-Nahda Al-Arabia, Egypt, pp. 45-46.

<sup>28</sup>- Abu Bakr Al-Siddiq Omar, Op. Cit., p. 35.

<sup>29</sup>- Jamal Abbas Ahmed Othman, Op. Cit., p. 344.

<sup>30</sup>- Habib Ibrahim Hamada Al-Dulaimi, Op. Cit. p. 100.

<sup>31</sup>- Same reference, pp. 102-103.

This is an informational procedure under which the contracting administration notifies contractors and the public of its temporary and non-final selection of a contractor, based on the highest scores for the financial and technical offers<sup>32</sup>. It serves as a tool to communicate the results of the evaluation of the technical and financial offers to the contractor awarded the contract temporarily. The other contractors who did not win the public contract can review the detailed results of the evaluation of their nominations and offers by being invited to contact the contracting authority within three days from the date of publication of the temporary award notice<sup>33</sup>.

Thus, the administrative judiciary considers the temporary award decision to be a separable administrative decision that can be independently challenged for cancellation<sup>34</sup>, as it possesses the characteristics of an administrative decision. The French administrative court ruled in the case of CHALON SUR MARNE that the studies contract concluded on October 6, 1993, was annulled because the temporary award decision followed illegal negotiations during the submission of offers, meaning it did not comply with legal provisions<sup>35</sup>.

## **Second: Decisions regarding concluding or not concluding the transaction**

### **1. The decision issued to approve or conclude the contract**

This is the decision that involves approving the results of the award and concluding the contract. It is not necessary for this decision to be explicit; it can also be implicit (which is common), as the signing of the contract by the competent authority is always preceded by an assumed decision to conclude the contract itself<sup>36</sup>.

It is noted that the French administrative judiciary has adopted the concept of separating the administrative contract from the decision to conclude the contract. It considers the decision to conclude the contract as an act separate from the administrative contract, and this decision can be formally separated from the contract, such as an explicit decision issued by the competent authority in the contracting administration approving the conclusion of the contract. This approval decision is considered the final commitment of the contracting administration. Alternatively, this decision may not be formally separated from the contract, meaning there is no explicit decision from the contracting administration to conclude the contract; in this case, the decision to conclude the contract

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<sup>32</sup>- Talib Ben Diab Ikram, Op. Cit. p. 107.

<sup>33</sup>- Taybi Souad Amirouch, Op. Cit., p. 78.

<sup>34</sup>- Debbash Charles, Ricci Jean Claude, Administrative Litigation, 6th edition, DALLOZ, Paris, 1994, p. 584.

<sup>35</sup>- Talib Ben Diab Ikram, Op. Cit., p. 107.

<sup>36</sup>- Ibrahim Ahmad Hassan, Op. Cit. p. 164.

is manifested through the contract itself, making it inseparable materially from the contract, although it can be conceptually and legally separated<sup>37</sup>.

The Egyptian administrative judiciary has adopted the same approach as the French judiciary regarding decisions issued during contracting, including decisions to conclude contracts. The Egyptian Administrative Court ruled on January 18, 1956, that “the decision issued by the administrative authority to conclude a contract represents the administration’s expression of its binding will while performing its legally prescribed functions with the aim of producing a specific legal effect.”<sup>38</sup>

The Algerian legislator has adopted this type of decision (conclusion decisions) in the field of public contracts, as stipulated in Article 4 of Presidential Decree 15/247: “Contracts shall not be final unless approved by the competent authority.”

It is noteworthy that although the Algerian legislator defines the conclusion decision as an administrative decision made in the form of approval by the competent authority, it does not explicitly mention its legal nature (as an administrative decision separable from the contract).

Consequently, the decision of the competent authority to approve the contract represents an administrative decision that is separable from the contract and thus can be independently challenged for cancellation, separate from full jurisdiction actions. The French Council of State has gone to great lengths in separating contract conclusion decisions when it ruled on the signing of the contract itself and allowed cancellation actions against it, based on the premise that the signing of the contract is preceded by an implicit decision from the competent authority to conclude that contract. In this case, there is no tangible decision, but the signature reflects its existence, and the integration of this decision within the contract does not prevent its hypothetical or conceptual separation<sup>39</sup>.

## **2. Decisions Related to Rejecting the Conclusion of the Contract:**

While the signing of an administrative contract usually requires the issuance of an administrative decision—whether explicitly or implicitly—the refusal to sign that contract also necessitates the issuance of an administrative decision to that effect. This decision can be issued explicitly or implicitly and is considered separable from the administrative contract, allowing for a cancellation challenge before the administrative judiciary<sup>40</sup>.

The administration generally enjoys discretionary authority regarding the conclusion of the administrative contract or its refusal if public interest so requires. It has the right to

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<sup>37</sup>- Farouk Muhammad Al-Maaliqi, *Theory of Connected and Separated Actions and Their Applications in Administrative Disputes*, 1st edition, Modern Book Institution, Lebanon, 2014, p. 310.

<sup>38</sup>- Muhammad Ahmad Ibrahim Muslimani, *Administrative Decisions Dar Al-Fikr Al-Jami'i*, Egypt, 2017, p. 958.

<sup>39</sup>- Nour Al-Wujud Karim Al-Nafs, *Op. Cit.* p. 27.

<sup>40</sup>- Habib Ibrahim Hamada Al-Dulaimi, *Op. Cit.* p. 120.

choose and determine the appropriate time and circumstances for concluding the contract. However, the administration may be obligated to conclude a contract but may refuse to do so, meaning that it refuses to issue the decision even though the law requires it<sup>41</sup>.

Therefore, if the administration is required to award the contract to the best bidder among other offers but is not obliged to contract with that bidder if public interest so dictates, the decision to refuse contracting here is a final decision that can be challenged for cancellation if there is a ground of illegality in that decision<sup>42</sup>.

The Egyptian Council of State has also accepted challenges against decisions to reject the conclusion of contracts, recognizing them as independent and separate from the contracting process itself, whether the contract is administrative or civil<sup>43</sup>. The Egyptian Administrative Court ruled that administrative bodies have discretionary authority in concluding contracts after evaluating bids and awarding them to the best offer. Thus, they may, in the interest of public benefit, cancel the tender without any obligation on the part of the bidder to compel the conclusion of the contract or demand compensation. The court concluded that the ministry's decision to cancel the public tender fell within the minister's discretionary authority in concluding the contract and did not violate the law or involve abuse of power<sup>44</sup>.

This was also recognized by the Algerian legislator in Article 73 of Presidential Decree 15/247 regarding the administration's discretionary authority to decide whether to conclude a contract or not, as stated in Article 49 of Law 23/12.

Additionally, some contracting authorities in the process of concluding their contracts are subject to oversight exercised in the form of contract approval. The administrative judiciary considers administrative decisions issued by the oversight authority as separable from the contract concluded by the administration, whether these decisions relate to licensing or contract approval or aim to refuse the conclusion of the administrative contract. Thus, they can be challenged independently of the contracting process, as these administrative decisions reflect the administration's unilateral will, i.e., its authority<sup>45</sup>.

This was affirmed by a ruling from the Administrative Chamber of the Supreme Court dated April 18, 1996, in the case of the Transport Company, where the court deemed the decision issued by the oversight authority, which refused to approve a local council's resolution, as an administrative decision capable of separation.

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<sup>41</sup>- Abu Bakr Al-Siddiq Omar, *Op. Cit.*, p. 33.

<sup>42</sup>- Nour Al-Wujud Karim Al-Nafs, same reference, p. 29.

<sup>43</sup>- Shaaban Ahmad Ramadan, *The Permissibility of the Cancellation Appeal in Administrative Contract Disputes* 2nd edition, Dar Al-Nahda Al-Arabia, Egypt, 2016, p. 61.

<sup>44</sup>- Nour Al-Wujud Karim Al-Nafs, *Op. Cit.*, p. 29.

<sup>45</sup>- Farouk Muhammad Al-Maaliqi, *Op. Cit.* pp. 299-300.

### **Chapter Three: Conditions for Accepting Cancellation Actions Against Administrative Decisions Separably Related to Public Contracts**

The cancellation action is a legal lawsuit that is subject to specific conditions and procedures for it to be accepted and applied. The competent judge cannot accept to review and rule on a cancellation action unless the conditions for its acceptance are met<sup>46</sup>. These conditions include the general conditions applicable to all administrative decisions, such as the cancellation action being directed against a separable administrative decision, the conditions related to the plaintiff, the requirement for prior administrative grievance, and the time limit.

In addition to these general conditions, there are specific conditions related to the cancellation of decisions that are separable from public contracts, given the unique nature of these administrative decisions and their connection to the contracts. Consequently, it cannot be assumed that these decisions are subject to the general conditions for cancellation actions without considering this specificity, which includes:

#### **1. Directing the Action Against the Separably Related Decision, Not the Contract:**

The cancellation action must be directed against the separable administrative decision, meaning that the issue of directing the cancellation request towards the contract itself should be excluded. This has been established by the administrative judiciary in France and Egypt, where the Administrative Court has affirmed that the legal act that can be the subject of a cancellation action is the decision issued solely by the administration's will, not the contract, which requires the agreement of two or more parties<sup>47</sup>.

#### **2. The Decision Subject to the Action Must Be Capable of Separation from the Contract:**

This means that the administrative decision at issue must be separable from the contract, implying that it must be effective and capable of being the subject of a cancellation action<sup>48</sup>. This condition is satisfied in two cases:

- The decision is issued by a body that has the authority to issue it without needing to be ratified by another body.

- The decision is proposed by a body with the authority to do so, and then it is confirmed by the oversight body in the manner specified by law<sup>49</sup>.

The process of concluding a public contract involves issuing several decisions, but only the final decisions are the ones that can be challenged for cancellation.

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<sup>46</sup>- Ammar Aouabdi, Op. Cit., p. 156.

<sup>47</sup>- Yaqub Sahar Jabbar, The Separable Administrative Decision and Its Effect on Others, Al-Ghary for Economic and Administrative Sciences, Kufa, p. 186.

<sup>48</sup>- Yaqub Sahar Jabbar, same reference, p. 187.

<sup>49</sup>- Muhammad Samir Muhammad Jumaa, Op. Cit., p. 202.

### **3. The Status of the Appellant in the Cancellation Action Against Administrative Decisions Separably Related to Public Contracts:**

The principle is that the cancellation action against decisions separable from the contract is primarily established for the benefit of third parties (those not involved in the administrative contract) due to the absence of a parallel lawsuit, meaning that there is no possibility of resorting to the contract judge. In contrast, the party contracted with the administration has the right to file a lawsuit before the competent full jurisdiction (the contract judge) regarding that matter<sup>50</sup>.

The term “third party” refers to any entity outside the public contract that has a serious and legitimate interest in canceling the administrative decision separable from the contract. Such parties may challenge decisions that contribute to the formation of the contract according to the theory of separable administrative decisions, provided they have a direct interest in the appeal and that this interest is personal<sup>51</sup>.

The cancellation action filed by a third party (outside the contract) is a delicate matter since such a challenge can only occur after the contract has been concluded. At this stage, the status of the party contracted with the administration and the status of the third party become clear. In the phase prior to the conclusion of the contract, all applicants wishing to contract with the administration are in similar positions, and each has an interest in the possibility of being contracted with by the administration. Once the contract is concluded, the position of the third party can be clearly defined, allowing for a more straightforward examination of the challenge they present<sup>52</sup>.

The general rule is the relativity of the contract’s effects regarding both the parties involved and the subject matter. A contract does not create rights and obligations for anyone other than those explicitly stated within it and only affects its parties. Additionally, the accepted principle within the realm of administrative contracts is that the effects of the contract are primarily limited to the administration and the contracting party, meaning contracts do not affect the rights of third parties nor impose obligations on them. The extension of the contract’s effects to third parties is an exception. Consequently, third parties (those outside the contract) cannot invoke the contract action (full jurisdiction). Thus, the natural context for applying the concept of separable administrative decisions lies in the appeals of third parties before the cancellation judge<sup>53</sup>.

#### **Conclusion:**

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<sup>50</sup>- Habib Ibrahim Hamada Al-Dulaimi, Op. Cit., p. 71.

<sup>51</sup>- Magdy Al-Shami, *Separable Decisions (Between Administrative Contracts and Judicial Oversight)*, 1st edition, Al-Wafa Legal Library, Egypt, 2019, pp. 252-253.

<sup>52</sup>- Habib Ibrahim Hamada Al-Dulaimi, Op. Cit., p. 63.

<sup>53</sup>- Muhammad Samir Muhammad Jumaa, *Cancellation of Separable Administrative Decisions*, Dar Al-Jami'a Al-Jadida, Egypt, 2013, p. 188.

In conclusion, the administrative judge's oversight of disputes related to public contracts varies depending on the stage of the contract. This oversight focuses on administrative decisions during the contract conclusion phase, where the contracting authority issues administrative decisions known as separable administrative decisions. It also extends to contractual actions after the contract has been signed and comes into effect.

The administrative judge's oversight of public contract disputes has evolved from a stage where the contract was viewed as a whole, subjecting all disputes to the contract judge's oversight. With the development of legal theory and practice, the theory of separable administrative decisions was introduced, allowing for the distinction of these administrative decisions and subjecting them to the cancellation judge's review for abuse of power. This evolution reflects the importance of protecting the rights of contracting parties and ensuring transparency and integrity in the management of public contracts.

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