

## **THE TERMS OF PUBLIC CONTRACTS REGULATION**

Yousef Reza Adibzadeh, Qafour Khoeini

*1- PhD student in Theology and Private Law of Kharazmi University of Tehran*

*2- Faculty member of Law Department of Persian Literature School of Kharazmi University of Tehran*

**ABSTRACT:** Public contracts are contracts which one of the parties are the government and non-government public institutions, and have a commercial and economic aspect. In signing this contract, the conditions are public interest protection and government benefit and for this reason in terms of jurisdiction and contract formality is subject to a special system so that the agreement of competent authority in signing it and procedural formality obedience are parts of contract authenticity conditions. Non-compliance with regulations has invalid sanction and if it is collusion and misuse, officials will have criminal responsibility and offender organization will also have civil liability against the party.

**KEYWORDS:** Public Contract, Jurisdiction, Procedural Formality, Auction, Tender, Invalidity.

### **INTRODUCTION**

Whether obedience of procedural formality in public contracts is mandatory or not? In order to answer this question, it should be explained that there are several laws about agreement or contract in our rules. In article 10 penal code mentioned: "private contracts than those who have signed it, is valid if it is not against the law definitely" and also article 219 penal code says that: "those agreements which are situated according to the law, is indispensable between the parties and their surrogate unless is voided with the parties consent or is terminated legally" that this articles indicates that the parties volition warrant the parties authenticity. Legally, agreement is defined as one or more individuals against one or more other persons committed to an affair and accept them (Article 183 penal code) that Based on this definition, each agreement have two basic conditions:

1 - Arises as a result of two or more persons agreement.

2 - The result and purpose of agreement is to create commitment.

On the other hand, many of the contracts are not contract traditionally and require specific jurisdictions and compliance of tender and auction rules for contract regulation, and parties as a two free and equal human, don't have the opportunity to negotiate about the contract terms and regulate its results. For example, in governmental contracts that prepare the provisions and obligations from before and offer it to the public, and on part of the contract impose his/her wish on another, can you call such a contract, an agreement? In order to answer to this question, it should be noted that in most contracts, both parties are in unequal

positions and one part can impose its conditions better on another and will not disorganize the agreement concept, to the extent that even legislature has recognized the transactions from urgency.

Due to the necessity of coordinating law with social, economic, political and etc changes and in order to meet the present needs of current community relations in contracts which its part is the government and public institutions, if the contract apply the government rule and incumbency, in this line a document called "Convention" predict and regulate that mostly is in legal form for submission and implementation of development projects that executive systems to be able to support and protect of people's rights appropriately. In other words in government transactions, the state pre-conditions for the conclusion of its contracts in order to apply its rule that if a party of this contract is bona fide, it can take part in the contracts, it implicate that procedural formality compliance plays a major role in government contracts.

As mentioned in the introduction to this discussion, procedural formality compliance is required in conclusion of government contracts. Here, to clarify the issue, we first describe the general nature of contracts briefly and then present the private and public law contracts and their types.

### **THE LEGAL NATURE OF CONTRACTS**

Legal actions are events that will occur by people's will and compromise and its legal effects are also followed by the same will and compromise. Legal action which will appear as a result of mutual agreement is called "the

contract" and the act which will realize with one will is "unilateral obligation".

**AGREEMENT OR CONTRACT**

Agreement is a legal action that is required two or more volitions to conclude and create the desired effect. At least two volitions redact the terms of the contract and an agreed effect will obtain by these two contacts. Such as dealing which is a kind of contract (contract of sale), accordingly in order to realize the contract, not only the presence of at least two volitions is necessary, but also the presence of following two conditions are necessary:

- 1- Such volitions which agree to each other should have a written aspect. It means that the subject of volition should be to create the legal effect, rather inform it and writing is against informing. For example, if one of the parties confesses that he/she created a right in the past, and the other confirm his statements, this agreement should not be a contract. Because the parties have the same opinions about "information for right" not in its writing. (Article 191 of the Civil Code).
- 2- The desired effect should caused by mutual agreement. So, if one volition be able to create any right, legal action should not be considered a contract. Although another volition can destroy it. For example, in the contractual will, delegate authority to the executor will only be done by the testator's volition. However, the executor can also reject it in testator's lifetime and disappear the created effect. (Acquired from 834 article of penal code).

Yet, if the executor accepted the position given to him, or not use his/her administration authority, cannot be claimed that the will is the agreement. Because delegate authority to the executor needs his/her acceptance (is among unilateral obligations) and executor rejection prevents the authority of administration.

**THE BASIC TERMS OF CONTRACTS**

According to the article 190 of the Civil Code, the following requirements are essential for authenticity of each transaction:

- 1- The intention of the parties and their consent
- 2- The legal capacity of the parties
- 3- A certain subject that is transacted
- 4- Legitimacy to deal

**A) The intention of the parties and their consent**

According to article 191 of the Civil Code, "the contract realizes to intend for writing and on the joined condition to what implicate on intention".

"Creation" is against the "informing" and suggests that volition's topic must be creating legal effect not inform of it.

Proving the contract to be true, volatility expression and notice will be sufficient and notice it to one part of the contract is not required unless it is required to compromise. Also, the "intent" is different from "consent" and is "the will of create a legal nature". The lack of intent causes the void of contract. Therefore, a formal contract where the parties do not intend to conclude a contract is "void" whereas the lack of consent causes "the lack of influence in the contract".

Remarkably, it is the common will of the parties which determine the type of contracts and its legal conditions, if parties to a contract conceal the nature of the contract in order to tax evasion or other incentives, what actually happen, is the real intention subject.

**B) The legal capacity of parties**

Article 210 of the Civil Code provides that "parties must have the legal capacity to contract".

Legal capacity is two types:

- 1- Legal capacity of enjoyment
- 2- Legal capacity of vindication

**1- legal capacity of enjoyment (enjoyment right)**

Legal capacity of enjoyment is the one's qualification to have the right and under article 956 of the Civil Code, "Legal capacity to possess rights begins with the human being born alive and ends with death." Also, under article 957 of the Civil Code: "pregnancy will also have the right to enjoy if that is born alive."

**2- legal capacity of vindication (vindication right)**

Legal capacity of vindication if the person's qualification to implement civil rights and under article 958 of the Civil Code, "Every human being will be benefit from civil rights, but no one can enforce and perform their rights unless they have legal capacity."

In law, wherever the legal capacity is mentioned absolutely, it means "legal capacity of vindication", unless disprove it. Moreover, under article 211 of the Civil Code, "because the parties account as inhabitant, must be mature, wise and brave." In public law is used of jurisdiction which have the organizational aspect rather than legal capacity that has personal aspect.

**C) A certain subject that is deal**

According to article 214 of the Civil Code, "the item of transaction must be a property or action

so that each of the parties agrees to commit or perform it." A transaction may include two or one item. Also, the transaction item must have economic value and include legal and lawful benefit. Determine the rule of being legal is subjected to the time and space standards and rules.

It should be noted that buying and selling something that it is not worthwhile in common law but it has financial and moral value in the view of buyer and seller and selling it, is reasonable (such as memorial and family photos), is right.

The transaction item must be "possible to deliver" as well. The possible to deliver is conditioned at the time of implementing commitment and delivery time, not at the time of signing the contract and indeed it has a path rather subjectivism, it means that if the client is not able to deliver, the transaction is correct.

The transaction item also must be "definite" and if it is indefinite, the transaction will be canceled (except in the special cases that brief knowledge is enough) and this being definite is purposed of three points of which include: material, quantity and quality. Accordingly, the transaction item must be definite at the signing contract for the parties and it is not enough that can be appear after the contract.

In cases where the transaction subject is "general", it is enough to determine the quality, material and basic description, and describing the quality of goods can be ambiguous in the contract, in which case, the choice is for debtor.

It is important to note that the property being transact must exist at the time of the transaction if it is "the certain itself" or "the general itself", otherwise the transaction will be canceled. (Understood from article 361 of the Civil Code)

The transaction item must be "certain", namely not be uncertain, otherwise the transaction is void. The transaction item must be transferable and as a whole and except in special cases, endowed property or public property cannot be sold.

#### **D) The legality of transaction aim**

"The aim of transaction" or in other words, motive or incentive of the transaction is the indirect aim of transactor from the contract. Article 217 of the Civil Code provides that "it not necessary to specify the transaction aim but if it is specified, it must be legitimate otherwise the transaction is void". Article 218 of the Civil Code provides in this regard: "If it is determined that the transaction is conducted with liability evasion intent ostensibly, that transaction is void».

### **TYPES OF CONTRACTS**

Civil law has placed such contracts as the sentence subject long time ago that people required it, which is entitled "prescribed contracts" and has provided its correct terms and effects. For surrounding on the occurrence circumstances and transactions effects, it is necessary to classify contracts. In most laws, contracts are divided into different types in term of the contract terms and kinds of commitment result from it that will be referred to some of these divisions which are required in this article:

- 1- Binding and lawful agreements
- 2- Gratuitous and non-gratuitous agreements
- 3- Consensual agreement and contract under seal (formal contract)
- 4- Certain and uncertain agreements
- 5- Vesting processor rights and directive agreements
- 6- Absolute and conditional agreements
- 7- Ready and quick contracts
- 8- Adhesion contracts

#### **(A) Consensual agreement and contract under seal (formal contract)**

As illustrated, the key, necessary and adequate elements for contract conclusion and all the contracts is the agreement of two volitions. (Acquired from article 190 of the Civil Code) Thus, the principle of our law is that contract will occur with compromise and will of the parties and does not require special procedures. The largest group of contracts are called "consensual contracts or informal" because the parties consent is sufficient to occur, such as the sale of movable properties. For distinguishing consensual contracts, the conditions of contract is important not prove it.

On the other hand, in some contracts, the agreement of parties is valid if it expressed in a special form and with specific formalities. In this type of contract that is called "formal contract", the form of contract is necessary to conclude and an agreement which does not possess a special form of agreement is void, though the two sides admit it. For example, the transfer of the registered estate (immovable) must be done by an official document and registered in the property office (the provisions of article 22 of the registration act) and before the formalities, transfer has no effect even between the parties relationship, and the state knows owner whom immovable property is registered in the property office with his/her name.

#### **(B) Certain and uncertain contracts**

"Certain contracts" are contracts in which have a special name in law and the legislature has defined the contract conditions and its effects, such as contract of sale, exchange, lease, loan, guaranty, draft, mortgage, deposit, corporate and peace.

In this group of contracts, it is not necessary to mention all rights and obligations of the parties in the agreement. Because legislator has attempted to do it itself and provided what he found fair and reasonable as supplemental law and often imperative law in the contract results.

On the other hand, "uncertain contracts" have no special title and form in law and its conditions and results are determined based on the general rules of contracts and the principles of volition jurisdiction. The necessities of social life have led to form uncertain contracts which have private aspects and the parties define the commandments and its results between themselves compromisably. Such as contracts about book publishing, transfer of goodwill, counsel and so on.

Article 10 of the Civil Code provides that "private agreements as to those who have signed it are valid, if it will not unlawful". So to make a commitment, it is not required to define one's compromise. Private contract to be signed in any form, is subject to the general rules of contracts in the present rights, and the parties jurisdiction is important in the view of both sides of the contract.

Finally, sometimes some of uncertain contract may be combination of certain contracts. For example, hotel accommodation contract seems a combination of lease, buying food and ... contracts.

**(C) Legal relationship description (type of contract)**

Common volition of the parties defines the type of contract with its legal conditions that accordingly, its provisions and commandments will be specified. Such as lease contract, contract of sale but we can't trusted to these descriptions always, because sometimes they cannot describe the contracted legal rights, yet sometimes their benefits require to hide this description if they form donation contract as one of the gratuitous contracts for tax payment evasion, the court will identify the type of contract.

In jurisprudence, Transaction criterions is not based on the words (ie, signing a contract with a specific term is not a standard for transaction, however the criterion is the intention of the parties and such terms are valid that discover of the intention of the parties, so the criterion should be the purpose realization. Sometimes, it is observed that is used of memorandum of

agreement or treaty in the government contracts in the title of contract. This term uses in international law for moral or polite agreements, these agreement are also called for political transactions which sign by the executive branch usually and have political characteristics, and due to limits in which above mentioned power have in term of internal constitutional law and or by considering the international conditions and circumstances, particularly as to the parties country, they are reluctant to make commitment for their international law, mostly will sign such an agreement.

In Iran, guardian council responses to the commission and parliament questions that whether memorandum agreements which are signed by the state agents or foreign parties, are considered as a component of contract?: "If memorandum make a commitment, is like a contract and the above mentioned terms should be observed in the constitution law toward it."

The question is whether such agreements are the promise of contract or not?

Promise means agreement and treaty verbally and the promise of agreement is divided into two main groups legally:

1 - Where the purpose of a preliminary contract is just to make a commitment for signing the original contract such as letter of intent

2-Where one of the parties composes the final contract terms and its conditions, he/she will relegate the contract to the other party. Thus, when he/she contents to the contract terms, it will happened without the other volition or sign. Such as car rental that is conditioned at the end, if the tenant is willing, can posses it by paying a certain amount. Rent is along with promise of sale and the realization of sale promise is dependent to the tenant volition. And in cases where no term is available, the guarantor can determine a reasonable deadline for acceptance or contract conclusion along with the notification to the beneficiary. Until after its ending, the obligation is removed.

Most of the government contracts date are considered as agreements and promises, are not coincided with the contract promise.

**THE PLACE OF PRIVATE LAW CONTRACTS AND PUBLIC LAW CONTRACTS**

Government organizations and public institutions perform various legal actions to meet their needs, various legal actions. Part of their legal actions, such as administrative decisions, issuance of regulations and administrative circulars and ... acts is as unilateral actions (unilateral obligation) however the other part is done like the contracts and agreements (bilateral actions). In the recent

case, the contracts of government and public organizations are twofold:

**Part I:** private law contracts are followed by the rules of private law. Such as partial sales, leasing services, mortgage, power of attorney, company, etc that these kind of contracts conclude only to manage the private properties of state or municipality, and is obeyed the same civil law or commercial law in them; this type of contracts are most common in business and guild organizations of the state.

**Part II: Public legal contracts**

Are important and great contracts that obey a special system which are called public (or administrative) contracts. Such agreements are subjected to certain formalities that have been inserted in trading regulations of government and or organizations or public institutions and violation of the contract systems not only invalidate such transactions but also may provide civil and criminal liability for the signatories of these contracts.

**A) The definition of public contract**

Public contracts are such agreements in which one side is the government and the other side is a private legal person, both internal and foreign. Public contracts should not be confused with an international agreement (treaty). International contract is an agreement between the government and a private legal part. Public contract has a commercial and economic aspect.

**B) Types of public contracts**

Some of these contracts that are common in the government, municipality and other organizations, include:

**1- Contracts of employment**

It is a contract under which a certain person is employed with a certain hire and a certain period by the government or municipality. Such as contract employment (paragraph "b" of article 45 of the civil service management act approved in the Islamic parliament 30/09/2007).

**2- labor contracts**

According to article 7 of the labor law, labor contracts are oral or written contract whereby employee works for employer to receive fees during a temporary or non-temporary time.

In permanent works, if a time is not mentioned in the contract, the contract will be permanent. However, the maximum temporary duration for temporary works will be prepared by the ministry of labor and approved by the Cabinet. Also, if a certain period is stipulated in the contract extension, the contract will be valid for

that term and permanency of work doesn't influence on this case.

Any legal change in the status of workshop ownership like sale or transfer in any way, the change of production, integration in other institutions, national workshops, the owner dies and so on, is not effective in the contract relation of workers whom their contracts has finalized and the new employer will be the successor of former employer's obligations and rights.

It is important to note that in cases where the municipality perform a job by contract, the contractor will perform the work, is obliged to conclude his/her contract with the contractor somehow the contractor committed to apply all the provisions of the labor law for its employees. Workers claims are the components of priority dues and employers are required to pay contractors to workers debt to vote authority from the place of contractor claims including performance guarantee.

If contract giver sign an agreement with the contractor contrast to the above discipline or pay in full before the expiration of 45 days from temporary delivery, will be liable to pay contractor debts in comparison with workers.

**3- Contracts of studies, research, compilation and translation:**

In many of these contracts that the government or municipality regulate and exchange them with others, trade freedom is very limited and general principles and terms is unchangeable.

**4- contract work**

Is a contract under which public authority assign a job or selling a commodity at certain conditions alongside of wage or price and at a certain time to a certain person or persons named contractor. The subject of contract may be building or transport or road construction or provision of goods or doing another job. (Article 11 of the income tax act 1960)

**5- concession**

Concession is a contract whereby administration or its affiliates assign the operation of a public utility and or benefit from a national wealth to a certain person or persons exclusively, based on certain conditions. And in face of his/her labor will receive funds from consumers or the government. Or give part of its share to the government. The first item is electric license and the second item like mining or fishing.

**(D) The discipline of administrative contracting**

The principle in private law is contract freedom and if every person has the legal capacity, has the right to deal with whomever he/she wish or

for whatever conditions he/she want but in the public rights contracts, this freedom that is available among the people, will be deprived from them and signing public contracts have formal contracts so that they should be observed and otherwise, contract is canceled generally. For example, not only municipality cannot choose its contractor arbitrarily but also cannot determine the terms of contract to its own willing. So contracts and transactions freedom in the private law is original and in public law is exception. Article 44 of the economic system constitution has separated the public part from the private and union parts and article 45 of the mentioned act give spoils and public wealth to the Islamic government and according to the constitution principles, public government must comply with the public interests in public transactions. These interests have been considering the jurisdiction and procedural formality in signing the public contracts that have been predicted in normal law.

In cases which represents the requirement of procedural formalities obedience in public contracts, we can refer to the single article act of how Islamic parliament administer the contract conclusion in administrative systems approved on 01.10.2002 that later, we would describe it in detail.

#### **The control of Islamic parliament and the economic council**

Under the single article act of how Islamic parliament administer the contract conclusion in administrative systems approved on 01.10.2002; all administrative systems of mentioned country in article 2 of regulation law part of the government financial rules that undertake a contract amounted to more than twenty million dollars or its equivalent as receiving a cash loan, usance, sales, reciprocal, finance or any other method of financing with foreign legal and artificial persons, are required to inform program, budgetary, calculations and economic commissions and specialized commissions for the Islamic parliament from their actions in all processes of mentioned contracts. According to article 78 of regulation law, public companies are also obliged to approve their over 8 billion Rials projects by the economy council.

#### **Contracts formalities based on transactions quantity**

Each person to do his/her special affairs has the right to deal with whomever he/she wish or for whatever conditions he/she want anyone but the government has not this freedom in its transactions and cannot choose its own contractor arbitrarily or define some terms of

contract to its own wish because of the necessity of observing the envy of public treasury and more control on government deals, than public property is not embezzled. The main actions of government are auction and tender's formalities which there are different forms according to the contract peak. According to article 79 of the public audit act, the transactions of ministries and government institutions such as buying and selling, lease and rent, wages and etc should be done through auctions or tenders unless in cases that has excepted by obedience the terms and conditions, even independent executive systems which have specific regulations for financial transactions, has such requirements based on contractual financial regulations.

#### **Classification of government transactions**

Government transactions are divided into three categories due to article 3 of tenders holding law adopted in 23/01/2004 of expediency council:

- 1- Partial deals:** transactions that is less than twenty million Rials to the price of 1382.
- 2- Medium deals:** are deals that the amount of transaction is more than the maximum amount of partial deals and does not exceed ten times of the value of partial deals.
- 3- Major deals:** are deals that their original estimated amount is more than ten times of the maximum value of partial deals. Meanwhile, the ministry of Economic and finance Affairs is required to propose the transactions quantity to the cabinet at the beginning of each year, based on the price index of goods and services which are announced by central bank.

The form of tender and auction in each above-mentioned category is subjected to the certain terms that will be explained. The aforesaid quantity in free trade zones are as follows:

- A- Partial deals to five million Rials
- B- Medium deals between five million Rials to one hundred million Rials
- C- Major deals above a hundred million Rials

Other formalities concerning the contracts of free zones such as transactions method, public tender, limited tender, transactions commission, auction, tender, and auction and tender abdication items, and the term of contract in accordance with contract regulations of free trade zones organizations approved in 14.01.1997 the majority of supreme council member ministers of free trade-industrial zones are done.

Other system transactions which have their own trade regulations such as universities and higher education institutions, some public companies

and etc conduct according to the relevant laws and regulations.

In transactions of nongovernmental public entities and institutions, the rules of financial regulations and transactions related to the current credits of non-governmental public institutions and entities which approved by cabinet council in 21 July 2001, must be executed necessarily (Appendix 27).

The maximum of partial, medium and major trades is determined as the subject of article (1) municipal finance regulations by virtue of 1 June, 1997 act- According to the amendment quantity of articles 80 and 86, public audit act and its subsequent changes.

Pursuant to article 3 of the contractual act of free trade zones approved in 31 December 1997 the majority of supreme council member ministers of free trade-industrial zones, the quantity of organization transactions are as follows:

- A- Partial deals to five million Rials
- B- Medium deals between five million Rials to one hundred million Rials
- C- Major deals above a hundred million Rials

### **Auction**

Auction is the most important formalities required in most governmental contracts where the commodity is sold through a public announcement among the candidates to the person who offers the highest price itself. Auction is held in both writing and verbal. Auction will be held in written and oral forms.

**Written auction:** needs certain formalities, such as offering or cash bailing or commission constitution and or minutes regulation.

**Oral auction:** is used in urgent and less important cases and have any formalities of written auction.

### **Auction formalities**

Due to the provisions of article 82 of public audit act and financial and transactional regulations of executive systems that have independent legal personality against the law, auction in all types of transaction (minor, medium and large) is doing in the following ways:

**First: in partial deals:** The sale officer is obliged to visit volunteers and contract after a thorough investigation of cost by regarding the government advantages and sign the documents with his/her full specification and committed that the contract is done with the highest price. In systems which have independent artificial person due to its own trading financial regulations that generally is done with the highest possible price to the seller's liability and detection, and confirmation of higher-ranking.

**Second: in medium deals:** Trading is done as auction thus first, information about the type and characteristics of transaction and the time and place of auction is notify the public by advertisement, and then is proceed to auction and price determination. Transaction item should be evaluated before and auction from specified price begins and will be given to a buyer who bid the highest price. It is essential to illustrate this matter that the highest bidding price must be higher or equal to the evaluated price, otherwise, the auction should be repeated again with prior notice, and if a better or higher bid than the evaluated price is not give for a second time, should be re-evaluated and again, if a better or higher bid is not provide spite of further evaluation, it is done by the highest executive authority in auction abdication way.

Due to the special trading financial regulations, some auction governmental systems of medium trading, is paid to the highest possible price to the seller's liability and detection, and confirmation of higher-ranking and approval of a higher authority, rather auction formalities.

**Third: in major deals:** Auction in major deals through advertising in compliance with article of government transactions regulations that tender explanation is mentioned in major transactions. In transactions financial regulations of special executive systems is conducted usually by advertising public auction, bidding relevant commission and the approval of chief executive besides of his/her specific guidelines observing.

### **Tender**

Like auction, tender is one of the important and essential formalities of government contracts in which the government wants to somehow acquire objects and goods that the cost is minimal.

tender is twofold:

**First: public tender:** is a system where the action or purchasing needed goods of the government is putting in competition through public notification among possible volunteers of contractor, until the contract is signed with someone who offers the lowest price.

**Second - limited tender:** is like public tender except that in limited tender, a government department or organization does not organize the competition but choose individuals who are appropriate to participate in the tender, with his/her liberty and just put such contractor in competition to sign the contract with who offers the lowest price.

### **How to bid**

According to article 11 of bidding Law as well as specific regulations of executive agencies that have legal independent identity lawfully, tender

on a variety of triple transactions (minor, medium and large) is done as follows:

**A- Partial deals:** In partial transaction, contractor is obliged to visit goods sellers or performers the needed actions and contract after a thorough investigation of goods cost or required actions by regarding the government advantages. The contractor should sign the bottom of cost document with his/her first name, last name, job and date, and mention that the contract is done with the lowest price.

**B- Medium deals:** contractor must provide a written price inquiry from at least three sellers or performers of required job on a separate sheet. Contractor write the transaction specifications in the price inquiry and the goods sellers or performer the action will write the lowest price in the inquiry with announced validation time and sign the sheet by mentioning his/her complete address and the date.

Contractor should sign the bottom of price inquiry sheet by mentioning his/her first name, last name, job and the date and state that he prepares the price inquiry.

After doing the above, if the he/she knows the obtained minimum price in price inquiry, responsible for supplies department or his/her fellow official, the transaction will be done by contracting or taking factor, and if it is not possible to obtain three inquiries, with supplied department of his/her fellow official validity, he/she will suffice to the available numbers.

**C- In major deals:** will be done with public bidding notification or sending an invitation (Limited tender) to the minister or the highest post of executive system and or legitimate authorities on their behalf. In public tender, the subject of transaction is notify to public through advertising and everyone can participate in, however, in limited tender, the transaction is just made between a number that their jurisdiction has been confirmed before by the bidding system to participate in contract. And for this purpose, an invitation is sent for them to participate in the tender if they wish.

**Transactions exempt from auctions**

According to article 79 of the public audit act, the transaction is a general and essential principle through an auction or tender but in some cases, another method is predicted which will be explained below.

Such transactions in which the contract party is a ministry or government organization or company.

According to article 3 of the public audit act, a government agency is a specific organizational unit that creates lawfully and manages under one of the triple forces, is not as a ministry.

According to article 4 of the public audit act and the following notes, that public company is a certain organizational unit which is established as a company lawfully or is nationalized by law or competent court's rule or being confiscated and is known as a public company and more than 50% of its capital is owned to the government. Any business enterprise that is created through public companies investment, as long as more than 50% of its shares are owned by public companies, is known as a public company.

This kind of firms that have been created or are creating through dormant partnership or contract of farm letting and such like in order to exploit those deposits to the banks and credit institutions and insurance companies, will not public in terms of this law.

In contracts where is performed to the assessment and responsibility of the highest executive post or legitimate authorities on their behalf as the following principles:

**A-** Public and non-governmental institutions and organizations and subsidiary bodies that more than 50% of their shares or assets or property is owned by the aforesaid institutions and organizations.

**B-** Consumption and distribution cooperative firms of ministerial, public institutions and companies staff that are established and managed based on the laws and regulations observed by cooperative companies.

**C-** Consumption and distribution cooperative firms and institutions that are establish and manage under direct supervision of the government.

About paragraphs 1 and 2 are required that seller or supplier have the transaction merchandise or prepare and distribute it.

It is necessary to explain the following items for paragraph 2:

**First-** Due to article 35 of third economic, social and cultural development plan's law: "it should not be discriminated between public and general organizations and companies, and cooperative and private sector in job referral and contracting by the public sector."

**Second-** According to article 2 of non-intervention staff law, the transactions of employees consumption and distribution companies that are exempted from tender and auction, are approve only in affairs of cooperation and under the statue.

**Third-** In the exception to the above and cooperative enterprises for duties, support and

services, recognition and the responsibility of the highest executive post or legitimate authorities on their behalf is required that the contract be affordable and good through not performing the auction and tender according to the act of cabinet council dated 26.11.2002.

**Forth-** The diagnosis and the responsibility of the highest level post or legitimacy authority on their behalf will not be transferable to another.

In purchasing goods and services and rights that is unique and may not have the same types by recognizing and responsibilities of minister or the highest post in executive system or legitimacy authorities on their behalf.

In purchasing or renting immovable property by recognizing and responsibility of minister or the highest post in executive system or legitimacy authorities on their behalf which is done with the opinion of justice official expert or proficient and warrantor expert of the relative field.

The requirement of this paragraph realization is getting the opinion of justice official expert or proficient and warrantor expert or the responsibility of aforementioned officials; otherwise does not include the exception.

In buying art Services in conformity with Islamic criteria and beaux industries and expert services In buying public exclusive goods and or other goods that have exclusive seller and for them, public relevant organizations may be determined and declared certain price.

In goods that are made by government factories and in the freight and transfer by road where the relevant public organizations is determined a price for them.

In the cost of air and sea transport, travel expenses and so on, if there is a fixed rate.

In repairing fixed and mobile machines to the assessment and responsibility of minister or the highest post in executive systems in the center or province and or legitimacy authorities on their behalf.

In purchasing of spare parts to replace or supplement existing mobile and fixed machinery equipment and tools as well as instruments, tools and precision measuring devices and practical and technical laboratory accessories, and etc, by determining the transaction price, at least by one proficient and warrantor expert of the relevant major that will be selected by the minister or the highest post in executive systems in the center or province and or legitimacy authorities on their behalf, after the approval of authorities in this item.

In deals which must be covered to the cabinet council discretion to consider the government advantage and interest.

It will be done in printing and bookbinding under a specific regulations that is approve by

cabinet council with the proposal of Islamic guidance ministry and the confirmation of economy and finance minister.

In selling goods and services which are produced and presented directly by the ministries and public institutions, their sales rate is determined by the relevant authorities.

#### **Auction or tender abdication**

In accordance with article 83 of the public audit act and article 27 of holding tenders rule; "In cases that bidding or auction is not possible or expedient according to the board justification report in cases 27 and 84 (this laws), the deal can be done in another way and in this case, the board in compliance with the government advantage and interest determines and states the arrangement of these contracts in compliance with other relevant provisions in any case or generally for one type of goods or service.»

The other mentioned methods of above article, with the implication of financial and administrative instructions, are as follows:

Deal with a particular person or company if the selected contractor be qualified in the list of contractors.

Operating a deal directly and so that the bidder organ can operate it directly or by contractor by providing needed materials, tools and services of development project.

Deal through written price inquiry and thus the bidder organ call upon three qualified person and goods and services owner separately and privately to give information, and sign the contract with each party that is the government advantage and interest.

According to article 86 of the contracts audit law more than 260 million Rials, the subject of article 84 required the approval of the highest executive post or minister or the organization manager will be valid after three-member board approval, and excluding items will also be done according to the specific regulations.

In foreign transactions besides of complete regarding of article 13 requirements of fourth plan act, contracts with more than a million dollars value should be done only by limited or international tender, but in the exception that will be confirmed only by three-member committee consisting of economy minister, secretary of the ministry and chairman of management and planning department organization.

In free trade zones, foreign transactions are also happen up to a million dollars after gaining three counts of price inquiry from foreign sellers or buyers over a million dollars through international tender after approval by the

transactions commission and approved by the chief executive officer and the board of directors. How to accept and review the applications for executive agencies will be about the licensing of tender and auction formalities abdication in accordance with meeting approvals dated 11.02.2002 of the economic council.

#### **D) The effect and consequences of non-performing tender and auction**

Tender and auction rules and regulations include jus cogens and public order that government agents can't revoke it and a transaction which has not tender or auction or its abdication formalities, nobody would have the right to confirm it.

Due to article 10 of the civil code, private contracts than those who have signed it, if is not against the law, is valid. Therefore, fail to perform tender and auction due to the law clear duties and the rule of jurisprudence, is not valid. According to the allocation of jurisdiction principle and the rule of law, actions outside the authority and jurisdiction limit of any artificial person, lacks legitimacy and is sentenced to a nullity.

According to the contract nullity, as a result of failing to perform tender and auction due to the civil liability act, offender public organizations are sentenced to the court decision and obliged to pay all damages resulting from the contract disorganization, to the lost individual. In addition, the liable to compensate total damages to both parties will be the offender or nonchalant employee.

#### **E) Non-conformity of procedural conditions in public contracts within judicial procedure of Iran**

In Iranian judicial procedure, non conformity of procedural conditions causes contract nullity, according to general board judgment of administrative justice court to No. 368/81 - 01/05/2002, the economic council act is revoked because of procedural conditions non-conformity. "Expressly to article 79 of the public audit act approved in 1987, all the transactions of ministries and public organizations including buying and selling, rent, lease, contractor, wages and etc except in specified law cases should be done through a tender or auction and in compliance of formalities and legal requirements. Whereas zinc and lead mine assignment of Angavan located in 127 km west of Zanjan in order to extract and exploit the mineral zinc and lead, has been the public major transactions, (C) paragraph subject of article 80 of the law, thus based on paragraph (C) of the act, need to transfer the above mentioned mine

through auction and with confirmation, stabilization and announced notify of the rules and regulations revoke and the above-mentioned mine assignment with conditions that does not contain the certainty in regarding the government and public treasury advantage and interest, has not legal popularity, approved in 16.01.1998 economic council stating that the mentioned mine assignment through tender formalities abdication is specified against the law and outside the jurisdiction limit of the council and is revoked by virtue of the second part of article 25 administrative justice court.

#### **F) Abuse(collusion -benefit gain) in tender and auction**

According to the collusion penal code in public transactions approved in 09/06/1969, the punishment for collusion in public transaction, government companies and relative institutions for government employees is three years imprisonment, all damages compensation and dismissal of public services, governmental companies and institutions, municipality and fines which are equivalent the property have received.

According to article 110 of the penal code of armed forces crimes, the punishment of military forces whose are conspiring with each other in transactions or tender or auctions of armed forces, will be compensation, also fines equivalent to the payment which have received as a result of collusion, and two to ten years imprisonment.

If military investigators in finances are committed a collusion in tenders or auctions or involved in committing it and or discover the collusion, If they conceal, will be sentenced to imprisonment according to article 111 of the mentioned Law.

Pursuant to the provisions of article 603 of the Islamic penal code, each of employees and persons responsible for the management and supervision of the ministries and public organizations and departments that provide in auctions and tenders under each topic, including commission or fee and brokerage or remuneration for himself or another inside or outside of the country through an agreement or contract or special arrangements or other individuals or agents or their branches, is sentenced to pay twice the obtained money and profits and imprisonment punishment from three months to five years or monetary penalty.

#### **CONCLUSION**

Capacity in civil rights and public law is different which is interpreted as jurisdiction and some procedural conditions based on subjective laws,

particularly in the area of public rights and national wealth enforcement which are mainly followed by the overall concept of spoils, are the terms of contract validity with law Identification and assessment its being jus cogens, mainly its disobedience causes administrative actions invalidity. Wherein the law is not explicit, it should be recognized whether formal terms are the elements of a legal action or not, and also are about the regulation of organization internal affairs or not? If the first, non conformity of formalities is the tools of legal action invalidity. And otherwise, the legal action is correct and will only lead to disciplinary liability of offenders, that if there are criminal aspects such as criminal collusion and so on, it will deserve to punishment.

As previously mentioned, the freedom of procedural formalities observance in private law is principle and in public law is an exception. According to the constitution, normal laws, judicial procedure and legal doctrine, failure to regard the rules of jurisdiction and procedural formalities in public contracts arrangement causes contract invalidity.

#### REFERENCES

- Harrisi. Principles of contract law. Tehran, 2005.
- Hosseini SI. Governing Principles in public contracts. Tehran, 2008.
- Rahmanian M. The article of contractor requirements and obligations recorded to the contract in public contractor contract transactions. Tehran, 2005.
- Roshan M. Nonconformity of Procedural formalities in public transactions. Tehran 2012.
- Shahidi M. Formation of contracts and obligations. First Vol. Tehran, 2009.
- Tabatabai Motmani M. Administrative law. Tehran, 2010.
- Ziaei Bigdelli MR. Public International Law. Tehran, 2006.
- Maraghei AFH. Translation and Description of titles. Tehran, 2010.
- Katouzian N. General rules of contracts, Volume I and II. Tehran, 2005.
- Katouzian N. Civil law in the current legal order. Tehran, 2005.