

ORDER
Order No. 2004-559 of 17 June 2004 on partnership contracts

NOR: ECOX0400035R

Version consolidated on 30 July 2008

The President of the French Republic,

Following the report of the Prime Minister and the *Ministre d'Etat*, Minister of the Economy, Finance and Industry,

Having regard to the Constitution, in particular Article 38;

Having regard to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;

Having regard to the Penal Code;

Having regard to the Local Authority Code;

Having regard to the Public Health Code;

Having regard to the Labour Code;

Having regard to the Administrative Justice Code;

Having regard to the Public Domain Code;

Having regard to the Monetary and Financial Code;

Having regard to the General Tax Code;

Having regard to Law No. 85-704 of 12 July 1985 as amended relating to public works management and its relation to private project management;

Having regard to Law No. 2003-591 of 2 July 2003 giving the Government authority to simplify the law, in particular Article 6;

After consulting the Council of State [*Conseil d'Etat*];

After consulting the Council of Ministers [*conseil des ministres*],

TITLE I: PARTNERSHIP CONTRACTS BY THE STATE AND STATE-RUN ENTITIES.

Article 1

Amended by Law No 2009-179 of 17 February 2009 – Art. 14

Amended by Law No 2009-179 of 17 February 2009 – Art. 15

I. - A partnership contract is an administrative contract under which the State or a State-run entity entrusts to a third party, for a period set according to investment amortization or agreed financing terms, a comprehensive project related to the construction or conversion, upkeep, maintenance, operation or management of works, equipment or intangible assets necessary to public service, as well as to the total or partial financing of the latter, with the exception of any form of equity financing.

It may also have as its object all or a part of the design of such works, equipment or intangible assets as well as the provision of services for which the public body is responsible under its public sector mission.

II. – The co-contracting party of the public body shall assume the operational responsibility for the works to be carried out. Upon a decision taken by the State, it may be charged with acquiring the property required to carry out the operation, including, as necessary, by exercising its powers of expropriation.

It may be assigned, with its consent, all or a part of the contracts executed by the public body in fulfilling its public sector mission.

The co-contracting party shall receive payment from the public body throughout the term of the contract. Payment shall be tied to performance objectives assigned to the co-contracting party.

A partnership contract may provide for a power of attorney granted by the public body to the co-contracting party to collect, for and on behalf of the former, payments made by the end user for services and due to the public body.

III. – Should a project come under the shared authority of more than one public body, the concerned bodies may designate by agreement one of them to conduct the preliminary needs assessment, lead

the award procedure, sign the contract and, as applicable, monitor its performance. Said agreement shall state the conditions of such a transfer of authority and fix its term.

Article 2

Amended by Law No 2008-735 of 28 July 2008 - Art. 2

I. – Partnership contracts shall require a preliminary needs assessment, conducted with the assistance of one of the expert bodies created by decree, which states the economic, financial, legal and administrative grounds of the public body's decision to launch an award procedure for such a contract. Each expert body shall determine, in its particular field of competence, a methodology establishing the criteria for the assessment in conditions provided by the minister in charge of the economy. This assessment shall include a comparative analysis of the various options, particularly in terms of total cost exclusive of tax, sharing of risks and performance, as well as sustainable development issues. If in response to an unforeseeable situation, this assessment may be succinct.

II. – partnership contracts may only be signed in those situations where the preliminary needs assessment conclusively shows that:

1° Given the degree of complexity of the project, the public body is not objectively in a position to define unaided and in advance the technical means to meet its needs or to make the financial or legal arrangements for the project;

2° Or that the project is a matter of urgency, involving making up for a delay, detrimental to the general interest, affecting the completion of public facilities or the performance of a public service mission, irrespective of the causes of the delay, or responding to an unforeseeable situation;

3° Or that, given the project characteristics, the requirements of the public service for which the public body is responsible, or the inadequacies and difficulties observed in carrying out comparable projects, resorting to such a contract presents a more favourable balance of advantages versus disadvantages compared to other kinds of public procurement contracts. The criterion of deferred payment shall not alone constitute an advantage.

Article 3

Amended by Law No 2008-735 of 28 July 2008 - Art. 3

Award procedures for partnership contracts are subject to the principles of free access, equal treatment of candidates and procedural transparency. Such principles ensure efficiency in public procurement and the proper use of public monies.

Such procedures shall be preceded by a contract notice allowing the submission of a number of competitive tenders under those conditions provided by decree.

Article 4

Amended by Law No. 2008-735 of 28 July 2008 - Art. 4

The following are barred from tendering for partnership contracts:

a) Legal persons who, in the last five years, have received a final conviction for an offence set forth in Articles 222-38, 222-40, 313-1 to 313-3, 314-1 to 314-3, 324-1 to 324-6, 421-2-1, the second subparagraph of Article 421-5, Article 433-1, the second subparagraph of Article 433-2, the eighth

subparagraph of Article 434-9, the second subparagraph of Article 434-9-1, Articles 435-3, 435-4, 435-9, 435-10, 441-1 to 441-7, by the first and second subparagraphs of Article 441-8, Article 441-9, Articles 445-1 and 450-1 of the Penal Code and Article 1741 of the General Tax Code;

b) Legal persons who, in the last five years, have been convicted of an offence set forth in Articles 8221-1, L. 8221-3, L. 8221-5, L. 8231-1, L. 8241-1 and L. 8251-1 of the Labour Code and recorded on Form No. 2 of their French criminal record (*bulletin n° 2 du casier judiciaire*);

c) Legal persons in court-ordered liquidation proceedings or placed under bankruptcy reorganization proceedings or having been subject to comparable proceedings under foreign law;

d) Legal persons who, as of 31 December of the year preceding that in which the award procedure was launched, had not submitted the required tax and social security declarations or had not paid the taxes and contributions due as of that date. The list of applicable taxes and contributions is set according to conditions provided by decree;

e) Legal persons convicted under subparagraph 5 of Article 131-39 of the Penal Code.

The provisions of this Article apply to legal person candidates as well as legal persons participating in a candidate group.

Article 5

Amended by Law No. 2008-735 of 28 July 2008 - Art. 5

Partnership contracts may be awarded under a competitive dialogue, invitation to tender or negotiated procedure as per the conditions contained in Article 7.

If, given the degree of complexity of the project and regardless of the partnership contract eligibility criteria under Article 2 authorising the use of such a contract, the public body is not objectively in a position to define unaided and in advance the technical means to meet its needs or make the financial or legal arrangements for the project, it may elect to proceed by competitive dialogue as per the conditions set forth in paragraph I of Article 7 herein. Its selected procedure shall be stated in the contract notice.

If such is not the case, it shall instruct short-listed candidates to submit a tender as per the conditions contained in paragraphs II and III of Article 7 herein.

Article 6

Amended by Law No. 2008-735 of 28 July 2008 - Art. 6

The period between the date the public contract notice is sent and the final date to receive tenders shall be at least forty (40) days. It shall appear in the contract notice.

The public body shall compile a short-list of firms and groups of firms having tendered and who are admitted to the dialogue procedure defined in paragraph I of Article 7 or the procedures stated in paragraphs II and III of the same article, as per the selection criteria stated in the contract notice. The number of candidates may not be less than three for the procedures set forth in paragraphs I and III of Article 7, or less than five for the procedure set forth in paragraph II of the same article, subject to a sufficient number of candidates who have not been excluded under Article 4 and who demonstrate the appropriate professional, technical and financial capacities. Upon request by the party concerned, the public body shall provide its grounds for rejecting a candidate.

Article 7

Amended by Law No. 2008-735 of 28 July 2008 - Art. 7

I. - On the basis of the specifications that it has prepared in order to determine its needs and objectives, the public body shall enter into a dialogue with each of the candidates. The purpose of such a dialogue is to define the technical means and the legal and financial arrangements best suited to satisfy its needs.

The public body may discuss all aspects of the contract with the candidates.

All candidates shall be interviewed on an equal basis. The public body may not provide certain candidates with information which may give them an advantage over others. It may not reveal to other candidates proposed solutions or confidential information communicated by a candidate participating in the dialogue without the latter's consent.

The public body shall continue the dialogue procedure with the candidates until it is able to identify the solution or solutions, if necessary after having compared them, which are most capable of meeting its needs.

It may provide for the discussions to take place in successive phases, at the conclusion of which only those proposals which best meet the criteria contained in the contract notice or the tender procedures shall be selected. The contract notice or tender procedures shall state that this option is to be used.

When the public body deems the dialogue concluded, it shall so inform the candidates who participated in all phases of the award procedure. It shall invite the candidates to submit their final tender on the basis of the solution or solutions presented and specified during the dialogue within a period of not less than one (1) month. It shall state the conditions for contract performance, including those contract provisions which provide for modification, during the term of the contract, of the rights and obligations of the co-contracting party and, where applicable, state the criteria for the contract award contained in the contract notice or the tender procedures. It shall endeavour to maintain true competition throughout this phase.

Such tenders shall include all the elements necessary for contract performance.

The public body may request clarifications, specifications, additional information or fine-tuning concerning the tenders submitted by candidates, as well as confirmation of certain commitments, including financial, contained therein. Such requests may not, however, serve to alter the basic features of the tender or essential terms of the contract, variations in which are likely to distort competition or produce a discriminatory effect.

A payment may be provided under the public contract notice or tender procedures to all candidates or only to those whose tenders are among the most competitive. When the requests of the public body require a significant investment from the candidates participating in the competitive dialogue, such payment shall be mandatory.

II. - Invitation to tender procedures are set by decree.

III. – When the amount of the contract to be performed is less than the threshold amount set by decree, the public body may elect to use a negotiated procedure with publication of a public

contract notice. This procedure shall be freely defined by the public body in the tender procedures, subject to compliance with the provisions of articles 3, 4, 6, 8, 9, 10 and 12.

Article 8

Amended by Law No. 2008-735 of 28 July 2008 - Art. 1

Amended by Law No. 2008-735 of 28 July 2008 - Art. 8

I. - The contract is awarded to the candidate submitting the most economically advantageous tender (“best and final offer” ,or BAFO), as per the set criteria, based on the results of the preliminary needs assessment referred to in Article 2 herein, contained in the contract notice or the tender procedures, and as applicable as set forth in the conditions mentioned in Article 7.

Award criteria shall be weighted. If the public body demonstrates that use of such weighting is objectively impossible, the criteria shall be prioritised.

The award criteria must include the overall cost of the tender, performance objectives defined according to the contract purpose, particularly as regards sustainable development, and the portion of the contract that the candidate undertakes to award in turn to small and medium-sized enterprises and self-employed contractors. Overall cost of the tender is intended to mean the sum, in current value, generated by the design, financing, construction or conversion, upkeep, maintenance, operation or management of works, equipment and intangible assets, and the provision of services specified for the term of the contract.

The definition of small and medium-sized enterprises is set by regulation. Other criteria, related to the purpose of the contract, may be selected, including the quality and innovative nature of the tender, turnaround time for the works, equipment or intangible assets and their architectural, aesthetic or functional qualities.

II. – On request by the public body, the candidate identified as having submitted the most advantageous tender (BAFO) may be requested to clarify aspects of its tender or to confirm commitments contained therein. Such requests may not, however, involve changes to the basic features of the tender or essential terms of the contract, variations in which are likely to distort competition or produce a discriminatory effect.

Article 9¹

Amended by Law No. 2008-735 of 28 July 2008 - Art. 9

As soon as the contract recipient has been selected, the public body shall inform the unsuccessful candidates that their tender was rejected. A standstill period of at least ten (10) days is required between the date of notification of the decision and the date of contract signature.

Should the public body abandon the award procedure, it shall so inform the candidates.

¹ The provisions of this Article shall apply to those contracts for which an award procedure has been launched by 30 November 2009.

In answer to a written request from an unsuccessful candidate, the public body shall respond in writing within fifteen (15) days, stating its grounds for rejecting the tender, the features and advantages of the selected tender and the identity of the contract recipient.

A partnership contract may only be signed by the State or a State-run entity with a public accountant upon approval of the administrative authority under the conditions set by decree, having taken into consideration the effect on public finances and availability of funds.

The contract recipient shall be notified of the contract award prior to commencing any contract performance.

Within thirty (30) days of such notification, the public body shall send a contract award notice for publication to the Official Journal of the European Union. This notice shall conform to the model format set forth in the ministerial order issued by the minister in charge of the economy.

Once signed, partnership contracts and their appendices shall be forwarded to the administrative authority pursuant to conditions set by decree. Use of the information and documents communicated shall be limited to purposes of statistics and economic analysis. Information contained in such contracts which is protected by confidentiality, in particular that of an industrial and trade nature, may not be disclosed.

Article 9²

Amended by Law No. 2009-515 of 7 May 2009 - Art. 22

As soon as the contract recipient has been selected, the public body shall inform the unsuccessful candidates that their tender was rejected. In the event of notification by post, a standstill period of at least sixteen (16) days shall be required between the date in which the award notification letter was sent to the candidates and the date of contract signature. In the event of electronic notification of all candidates, said standstill period shall be reduced to at least eleven (11) days.

Should the public body abandon the award procedure, it shall so inform the candidates.

In answer to a written request from an unsuccessful candidate, the public body shall respond in writing within fifteen (15) days, stating its grounds for rejecting the tender, the features and advantages of the selected tender and the identity of the contract recipient.

A partnership contract may only be signed by the State or a State-run entity with a public accountant upon approval of the administrative authority under the conditions set by decree, having taken into consideration the effect on public finances and availability of funds.

The contract recipient shall be notified of the contract award prior to commencing any contract performance.

Within thirty (30) days of such notification, the public body shall send a contract award notice for publication to the Official Journal of the European Union. This notice shall conform to the model format set forth in the ministerial order issued by the minister in charge of the economy.

Once signed, partnership contracts and their appendices shall be forwarded to the administrative authority pursuant to conditions set by decree. Use of the information and documents

² The provisions of this Article shall apply to those contracts for which an award procedure has been launched starting from 1 December 2009.

communicated shall be limited to purposes of statistics and economic analysis. Information contained in such contracts which is protected by confidentiality, in particular that of an industrial and trade nature, may not be disclosed.

Article 10

Amended by Law No. 2008-735 of 28 July 2008 - Art. 10

When a public body has received a project proposal by a firm or a group of firms in response to which it plans to enter into a partnership contract, it shall conduct an award procedure pursuant to the conditions set forth in Articles 2 to 9 herein.

Save if the firm(s) involved in proposing the project come(s) under one of the categories of exclusion contained in Article 4, and assuming the appropriate technical, professional and financial capacities, it/they shall be allowed to participate in the procedure contained in Article 7 herein.

Any communication to the public body of an innovative idea which results in the launch of a partnership contract procedure may give rise to a lump sum payment.

Article 11

Amended by Law No. 2008-735 of 28 July 2008 - Art. 1

Amended by Law No. 2008-735 of 28 July 2008 - Art. 11

A partnership contract shall contain the following clauses related to:

- a) Term of the contract;
- b) Conditions for sharing risks between the public body and co-contracting party;
- c) Performance objectives assigned to the co-contracting party, including the quality of services provided, quality of the works, equipment or intangible assets, conditions under which they are made available to the public body and, where applicable, the level of attendance;
- d) Payment of the co-contracting party, taking into account and distinguishing, for calculation purposes, investment costs -including the costs related to assessment and design, ancillary construction costs and interests during construction -, operating and financing costs and, where applicable, receipts that the co-contracting party has been authorised to obtain in managing the public domain, works, equipment or intangible assets, in activities which are unrelated to the public service missions carried out by the public body and which are not detrimental thereto, the grounds and terms under which payment may be modified throughout the contract term and method of payment, including those conditions under which, on an annual basis, the amounts owed by the public body to its co-contracting party and those which the latter owes in the form of penalties or sanctions, shall be compensated;
- d) (i) Conditions under which, pursuant to Article L. 313-29-1 of the Monetary and Financial Code, the public body shall certify that the investments have been made as per contract stipulations;
- e) Duties imposed on the co-contracting party to ensure the proper use of works, equipment and intangible assets for the public service for which the public body is responsible, and compliance with public service requirements;

f) Method by which the public body shall monitor contract performance, in particular compliance with performance objectives, including those involving sustainable development, and the conditions under which the co-contracting party may contract out to other firms in performing the contract, including the conditions requiring it to award a part of the contract to small and medium-sized enterprises and self-employed contractors.

The co-contracting party to the partnership contract shall furnish any provider acting as a subcontractor who so requests it a financial institution guarantee ensuring payment of sums due to the requesting provider. Such providers shall be paid no later than the deadline set by regulation;

g) Sanctions and penalties applicable to the co-contracting party's failure to perform its duties, including meeting performance objectives;

h) Conditions under which, either by contract amendment or, in the absence of agreement, by unilateral decision by the public body, modifications may be introduced to certain aspects of the contract or its termination initiated, particularly in light of the evolving needs of the public body, technological innovations or changes in the financing terms obtained by the co-contracting party;

i) The amount of control exercised by the public body over the partial or total assignment of the contract;

j) The conditions under which, in the event of default by the co-contracting party, continuing public service is assured, particularly if the contract is declared terminated;

k) Consequences of contract discharge, whether anticipatory or at term, in particular the ownership of works, equipment and intangible assets;

l) Conditions related to the prevention and settlement of disputes and those conditions under which disputes may be referred to arbitration, governed by French law.

Article 12

Amended by Law No. 2008-735 of 28 July 2008 - Art. 1

Amended by Law No. 2008-735 of 28 July 2008 - Art. 12

When all or a part of the design of works, equipment or intangible assets has been assigned to a co-contracting party, the following provisions shall apply:

a) The conditions of contract performance set by the contracting public body shall include the requirement to designate a project management team in charge of the design of the works, equipment and intangible assets and to monitor their completion;

b) For building projects, tenders must include construction documents;

c) Contract award criteria must include the overall quality of the works, equipment or intangible assets.

Should the public body only assign the co-contracting party a part of the design of the works, the former may itself, in derogation of the definition of the basic mission set forth in the fourth paragraph of Article 7 of the Law of 12 July 1985 relating to public works management and its

relationship to private project management, hire a project management team for the part of the design over which it retains responsibility.

Article 12-1

Added by Law No. 2008-735 of 28 July 2008 - Art. 13

The co-contracting party to the partnership contract shall submit an annual report to the public body for contract implementation monitoring purposes.

Article 13

Amended by Law No. 2008-735 of 28 July 2008 - Art. 14

I. - When a contract involves occupation of a public domain, it shall be deemed authorisation to occupy said domain throughout the term of the contract. Unless otherwise stipulated therein, the co-contracting party to the contract shall enjoy property rights over the works and equipment it provides. Such rights shall confer upon the holder the prerogatives and duties of an owner, in the conditions and subject to the limits defined by the contract provisions intended to guarantee the integrity and use of the public domain.

If the co-contracting party to the partnership contract has been authorised to generate value from a part of the domain of the public body through such a contract, the latter shall, where applicable, delimit the property belonging to the public domain. The public body may authorise the co-contracting party to grant leases under private law, including construction and long-term leases, on the property belonging to the private domain, and to establish thereupon all forms of property rights for limited periods. The consent of the public body must be expressly given in writing for each of the leases entered into by the co-contracting party to the partnership contract. With the public body's consent, these leases or rights may be granted for a term exceeding that of the partnership contract.

TITLE III: MISCELLANEOUS PROVISIONS.

Article 19

Amended by Law No. 2008-735 of 28 July 2008 - Art. 15

Title I and Articles 25-1, 26 and 27 herein shall apply to State-run health entities [*établissements publics de santé*] and cooperative health structures with public legal status [*structures de coopération sanitaire dotées de la personnalité morale publique*], as well as to those private or public institutions [*organismes de droit privé ou public*] set forth in Article 124-4 of the Social Security Code. The provisions of the fourth paragraph of Article 9, however, shall not apply.

Chapter III of Law No. 2008-735 of 28 July 2008 related to partnership contracts shall also apply.

Article 25

Amended by Law No. 2009-179 of 17 February 2009 - Art. 16

Title I and Articles 25-1, 26 and 27 herein shall apply to those contracting authorities referred to in Article 3, paragraph 1, subparagraphs 1 and 4 of Order No. 2005-649 of 6 June 2005 related to contracts awarded by certain public or private bodies which are not subject to the Public Procurement Code, to contracting entities mentioned in Article 4 of said Order as well as to public interest groups (*groupements d'intérêt public*). The provisions of the fourth paragraph of Article 9, however, shall not apply.

Chapter III of Law No. 2008-735 of 28 July 2008 relating to partnership contracts shall also apply.

For those contracts involving an amount equal to or in excess of a threshold set by decree, the contracting entities set out in Article 4 of the aforementioned Order 2005-649 of 6 June 2005 may also opt to use the negotiated competitive bidding procedure preceded by a contract notice under those conditions defined by the *Conseil d'Etat* decree referred to in Article 12 of said Order for the contracting entities.

In the event the contract amount involved is less than the threshold referred to in the previous paragraph, such contracting entities may opt to use the negotiated procedure specified in paragraph III of Article 7 of this Order.

Article 25-1

Added by Law No. 2009-179 of 17 February 2009 - Art. 17

In order to establish neutrality under the various options in public procurement, projects eligible for subsidies, royalties and other forms of financial investment, when carried out pursuant to Law No. 85-704 of 12 July 1985 relating to public works management and its relationship to private project management, shall be eligible for those same subsidies, royalties and other forms of financial investment if carried out hereunder.

The terms and schedule of payment of such subsidies, royalties and other forms of financial investment may be adapted to the term of the partnership contract.

Article 30

The Prime Minister, the *ministre d'Etat*, Minister of the Economy, Finance and Industry, the Minister of the Interior, Internal Security and Local Freedoms, the Keeper of the Seals, Minister of Justice, the Minister of Defence, the Minister for Health and Social Protection, the Minister for Infrastructure, Transport, Regional Planning, Tourism and the Sea, the Minister for the Civil Service and State Reform and the Minister for Culture and Communication are individually responsible in their respective areas for the implementation of this Order, which shall be published in the Official Journal of the French Republic.

By the President of the French Republic:

Jacques Chirac

Prime Minister,

Jean-Pierre Raffarin

Minister of the Economy, Finance and Industry,

Nicolas Sarkozy

Minister of the Interior,

Internal Security and Local Freedoms,

Dominique de Villepin

Keeper of the Seals, Minister of Justice,

Dominique Perben

Minister of Defence,

Michèle Alliot-Marie

Minister for Health and Social Protection,

Philippe Douste-Blazy

Minister for Infrastructure, Transport,

Regional Planning,

Tourism and the Sea,

Gilles de Robien

Minister for the Civil Service and State Reform,

Renaud Dutreil

Minister for Culture

and Communication,

Renaud Donnedieu de Vabres