

## **Law 2008-735 of 28 July 2008 on partnership contracts**

**The law extending partnership contracts was published in the OJ on 28 July 2008 following a decision by the Constitutional Council. This note summarises the main additions and improvements and thus serves to present the new text. It follows the numbering system of the 2004 Order consolidated with the new law, as validated by the Constitutional Council .**

### ***Analysis of the final law following decision by the Constitutional Council***

The law broadens access to partnership contracts, by creating a new criterion for recourse to the PC, the efficiency criterion, alongside the now well-known ones of urgency and complexity. It clarifies and makes secure a number of provisions and neutralises the main imbalances of competition with the other methods of public purchasing in tax and regulatory terms (e.g. insurance).

#### **Part 1 of the order: the State and its public institutions**

##### **A more flexible contract**

Article 1 makes the PC more effective by allowing more explicitly:

- the transfer of current contracts from the contracting authority to the PC holder (architect or upkeep and maintenance, for example),
- the possibility of receiving payments from the end user on behalf of the contracting authority,
- the link between remuneration and performance,
- the possibility for the State and/or several State contracting authorities to joint together to conduct a project together in their shared field of competence, with a single contract-holder manager.

##### **The new criterion of efficiency and stipulations on urgency and sustainable development**

Article 2 retains the prior evaluation by State expert bodies who will have to prepare a methodology for evaluation, each in their own field of competence, regarding total cost, sharing of risks, performance **and sustainable development**. The reasons allowing the conclusion of a partnership contract include:

- the project's complexity according to its unchanged definition (impossible to define the technical means to meet its needs, or the financing of the project),

- the urgency, it being specified that the situation of delay will be taken into consideration whatever the causes of this delay,

- the new efficiency criterion of the partnership contract in relation to the other tools of public purchasing. The criterion of deferred payment alone cannot constitute an advantage justifying recourse to the partnership contract.

### **Search for transparency in evaluation**

In adding transparency of procedures and effectiveness of public procurement to the principles of free access and equal treatment of applicants, Article 3 of the law should oblige contracting authorities to better assess the real and complete cost of public contracts.

### **Choice of procurement procedure**

In separating, in Article 5, the partnership contract procurement procedures (competitive dialogue, call for bids and negotiated procedure) from the eligibility criterion chosen to justify recourse to the PC (even in case of urgency the contracting authority is free to use competitive dialogue), the law meets the wish of local elected officials to be free to choose the most appropriate procedure. Such a measure was above all a response to the need for access to competitive dialogue in case of urgency in a given sector (4th access criterion, censured by the CC) but is still fully relevant, in the perspective of a simplification/standardisation of the CD procedure for limited-size operations.

Article 7:

- does not affect the competitive dialogue procedure which basically remains that of Directive 2004/18. The **optional allowance awarded to applicants** becomes mandatory in principle when the requests of the contracting authority imply a **significant investment for applicants** who have participated in the competitive dialogue.
- **The negotiated procedure will be defined by decree** and freely adapted, with some reservations, by the contracting authority.

### **Definition of total cost:**

The total cost is defined in Article 8 as follows: "total cost of the offer means the sum, in current value, generated by the design, financing, construction or conversion, upkeep, maintenance, operation or management of structures, facilities, or intangible assets, and the provision of services planned for the term of the contract".

The dimension of sustainable development becomes one of the award criteria, in terms of performance targets, while architectural quality is added to the list of criteria – aesthetic or functional – liable to be selected .

The definition of SMEs is given in a decree.

**Systematic transmission of contracts signed**

Partnership contracts and their appendices must be communicated (Art 9) to the administrative authority (in practice, the partnership contract support mission MAPPP – see draft decree) after their signature. This information will be used for purposes of statistics and economic analysis, while respecting those covered by trade secrecy.

**Reinforcement of companies' rights to their innovative ideas**

The private initiative procedure is reinforced: from now on, the communication of an innovative idea to the contracting authority which is followed by the launch of a partnership contract procedure may give rise to the payment of a lump-sum allowance.

**Stipulations in mandatory clauses, particularly an optional security**

Article 11 containing the mandatory clauses of the PC has been clarified:

- definition of investment costs broadened to include, in addition to the cost of the works, the cost of studies, the supplementary costs and the interim financial costs,
- definition of concept of supplementary revenue (activities unrelated to the public service mission and not affecting it)
- procedure for recognition of the investments made, a prior contractual condition for implementation of the transfer of receivables stipulated in Art 28,
- elimination of the concept of subcontracting which was unnecessary; from now on **the co-contractor will only have to deposit a security if requested by any service provider** enlisted for the performance of the contract. This security will guarantee payment of the sums due to the service provider who requests it.

Article 12 replaces the concept of structure by that of "structures, facilities or intangible assets".

An **annual report** by the holder sent to the contracting authority is now stipulated to allow monitoring of the contract performance.

**Extending supplementary revenue by generating value from public property**

Article 13 stipulates, as we wished:

- the partnership contractor's right to generate value from the property on which the structure or facility is built has been broadened: the contractor may generate value from a part of the contracting authority's property in the framework of the partnership contract. The partnership contractor may grant construction or long-term leases on the private property of the contracting authority; he may also set up all types of temporary property rights there.

The contracting authority's agreement must be explicitly formulated for each lease granted by (and not to as indicated) the holder of the partnership contract. The term of these leases may exceed that of the partnership contracts.

### **Extension of PC to hospitals and subsidized housing**

The law explicitly extends the provisions of the PC to private or public bodies governed by the Social Security Code (Art L 124-4) and to bodies governed by the order of 6 June 2005 (Art 3 of Order No. 2005-649)<sup>1</sup>.

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## **Part 2: Local authorities**

### **System identical to State one for the definition and evaluation of partnership contracts**

The law gives the same definitions and the same evaluation as those given for the State: complexity or urgency, or efficiency (Art 18 of the 2008 law and Art 14 of the order). The articles of the Local and Regional Authorities Code are therefore modified accordingly (Art L 1414-1 and 1414-2). Whereas the evaluation was conducted freely in the past, from now on the evaluation must be conducted according to a methodology defined by the Ministry of Economy (MAPPP).

The reference to the effectiveness of public purchasing and the proper use of public money is also retained. The deferred payment criterion alone cannot constitute an advantage justifying recourse to the partnership contract.

Local authorities may join together to appraise and award a PC although they may not delegate by convention the signing of the contract (passage censored by the Constitutional Council).

### **Freedom of procurement method**

Article L 1414-5 keeps the same idea that the local contracting authority can choose its method (competitive dialogue, call for bids or negotiated procedure). It indicates its choice in the preliminary notice. The allowance for significant investment with CD is also maintained.

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<sup>1</sup> These are Articles 16 and 17 of the law but concern Articles 25 and 25-1 of the former order.

**Analysis in total cost**

As stipulated in Article 7 of the draft law, the total cost is defined as follows: "total cost of the offer means the sum, in current value, generated by the design, financing, construction or conversion, upkeep, maintenance, operation or management of structures, facilities or intangible assets, and the provision of services planned for the term of the contract".

**Communication of contract**

As stipulated for the State, partnership contracts must be communicated to the administrative authority (MAPPP) after their signature (Art L 1414-10). This information will be used for the purposes of statistics and economic analysis.

**Innovative idea allowance**

As stipulated for the State, the communication of an innovative idea to the contracting authority which is followed by the launch of a partnership contract procedure may give rise to the payment of a lump-sum allowance.

**Identical stipulations in mandatory content of the contract**

Article L 1414-12 keeps the same elements of the mandatory content of the contract.

**Security**

As stipulated for the State, the co-contractor will only have to deposit a security if requested by any service provider enlisted for the performance of the contract. This security will guarantee payment of the sums due to the service provider who requests it.

Upon the presentation of the co-contractor's annual report, as stipulated in Article L 1414-14 of the Local and Regional Authorities Code, a discussion will be held on the performance of the partnership contract. The content of this annual report will be set by decree after notice of the Council of State.

**Generating value from public property**

As stipulated for the State, the partnership contractor's right to generate value from the property on which the structure or equipment is built has been broadened: the contractor may generate value from a part of the contracting authority's property in the framework of the partnership contract. In addition, the contracting authority's agreement must be explicitly formulated for each lease granted to the holder of the partnership contract. It is specified for local authorities that "The contract determines the conditions under which the revenue resulting from the value generated from the private property by the contractor reduces the amount of remuneration paid by the contracting authority."

A new appendix has been added to the list of appendices for the budget of towns of more than 3,500 inhabitants: an appendix tracing the debt related to the investment share of the partnership contracts.

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### **3-Miscellaneous provisions**

#### **Eligibility of administrative long-term leases for VAT compensation (FCTVA)**

This possibility is limited to leases in an amount **lower than a threshold set by decree** (Art 38 of the law of July 2008 and L 1615-13 of the Local and Regional Authorities Code) which should be fixed at 10M including VAT. As in the case of a PC, the property must form part of the public property; otherwise the VAT compensation must be reimbursed. This is the start of a separation of roles between PCs and administrative long-term leases (BEA) on building projects of limited size, with low or zero complexity and a small service component, which will now be handled mostly with BEAs.

**Extension to awarding entities which are managers of networks (e.g. French rail network, etc) not subject to the government procurement code (CMP) – Art 25** (the law will have to be reviewed in the autumn to reintroduce the provision – censored by the CC as unintelligible – on the thresholds allowing these entities recourse to a negotiated procedure).

**Neutrality in the area of subsidies** (Art 25-1): projects conducted as PCs will be eligible for the same subsidies as when they are conducted according to the law for government prime contracting ("MOP").

**Transfer of receivables (Art 28): from now on the regulations for transfer of receivables have been adjusted to take into account the difficulties observed in the implementation of the preceding Art 313-29-1.** This can apply to the full amount (and not 80% as the present reading could suggest) of the remuneration corresponding to the investment (including, in particular, the study and design costs, the supplementary construction costs and the interim financial costs) + financial costs (hitherto excluded); it can then give rise to acceptance by the contracting authority (making it into an irrevocable undertaking) (by Article 38 of the law of July 2008) **for a fraction of the said remuneration not exceeding 80% from the date of recognition of the investments in accordance with the contractual stipulations (see Art 11).**

#### **Tax provisions**

The law now stipulates the following exemptions, with the aim of neutralising the tax imbalances which could penalise PCs as regards, in particular, government prime contracting:

-payment for exceeding the legal density limit (VDPLD, Art L 112-2 of the Town Planning Code)

-fee for creation of offices in the Greater Paris Area (Art L 520-7 of the Town Planning Code)

-annual contribution on rental revenue (Art 234 nonies of the General Tax Code)

-property registration tax for transfers of receivables (Art 677 and 846 of the General Tax Code)

-preventive archaeology fee (RAP, Art L 524-7 of the Heritage Code)

as well as the alignment of the property registration tax regulations (Art 742 and 1048 ter of the General Tax Code) with the fixed fee of €125 for the State and local authorities, in the case of temporary occupation permits (AOT) granted (or withdrawn) in the framework of a PC (or BEA or leasing)

### **Building damage insurance**

Private corporate entities acting as project owners in the framework of a partnership contract will be exempt from taking out building damage insurance. This provision will only apply to partnership contracts entered into pursuant to Article 1 of the 2004 order. Partnership contracts entered into by local authorities or their public institutions are therefore excluded from this provision.

### **PC and BEA extended to subsidized housing**

Subsidized housing PLCs may enter into partnership contracts under the conditions of the 2004 order and long-term leases.

### **Submission of State temporary occupation permits (AOT) for prior evaluation**

As of 1 January 2009, any draft lease presented by the State or by a State public institution entered into in the framework of a temporary occupation permit constituting public property rights, the rent of which is higher than an amount set by decree in the Council of State (expected to be around 1M€), is subject to a prior evaluation carried out under the conditions defined in Article 2 of Order No. 2004-559 of 17 June 2004 on partnership contracts.

**Scope of the law extended to SOFERGIE (companies financing energy-saving schemes via leasing facilities):** these financing companies which specialise in energy-saving projects are now allowed to finance PCs addressing the same issues.

### **Effective date of the law**

The tax provisions of the text will apply to draft partnership contracts for which a government competitive tender notice was sent for publication prior to the date of publication of the law (28 July 2008). All the other provisions will apply to draft partnership contracts for which a government competitive tender notice is sent for publication after this date.

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