

**ASSOCIATION  
OF REGIONS OF  
FRANCE**

**ASSOCIATION OF  
MAYORS OF FRANCE**

**ASSOCIATION OF  
DEPARTMENTS OF  
FRANCE**

**THE FRENCH PPP INSTITUTE**

**THE FRENCH PPP TASK FORCE  
[MAPPP]**



# COMPETITIVE DIALOGUE CHARTER



**January 18<sup>th</sup> 2007**

**Charter Signature**

**Presided by Christian PONCELET, President of the Senate**

by M.M.:

- **Thierry BRETON**, Minister of Economy, Finances and Industry
- **J-F. COPÉ** Associate Budget and State Reform Minister, Government spokesman
- **B. HORTEFEUX** Associate Minister for Local Authorities
- **A. ROUSSET** President of the Association of the Regions of France
- **N. DE SAINT PULGENT** President of the French PPP Task Force [MAPPP]
- **C. MARTINAND** President of the French PPP Institute
- **M. ALLIOT-MARIE** Minister of Defense
- **J. PELISSARD** President of the Association of Mayors of France
- **C. LEBRETON** President of the Assembly of Departments of France
- **J. GRAND D'ESNON** Legal Affairs Director, Ministry of the Economy, Finance and Industry
- **E. JOSSA** General Manager of Local Authorities at the Ministry of the Interior and Regional Organisation

## CHARTER STAKES

**Competitive Dialogue**, imposed by the Community Directive 2004/18 dated March 31<sup>st</sup> 2004, is an original procedure intended to **optimise procurements** for **complex projects**. It completes and is distinguished from (existing) negotiated procedures and calls for tender variants.

The **essence of Competitive Dialogue** is the discussion stage between the selected economic operators and the public contractor concerning the choice of solutions enabling to best meet the latter's needs. Firstly, this requires a balance between the services and the definition of performance measures in response to needs and, secondly, the negotiating parties' capacity to **assess and compare** the different solutions. Competitive Dialogue is constructed with a concern for a win-win partnership throughout the commitments.

These new specific Competitive Dialogue characteristics require from both public and private partners a capacity of open-mindedness, **a realistic appreciation of internal and external resources** to be mobilised as well as **precision in both the preparation and implementation**, adapted to the fundamental characteristics and the dialogue form.

The **requirements' level** generated by Competitive Dialogue, notably during the preliminary period, is more important than in traditional procedures, this is all the more true when it applies to global contracts with financing, such as partnership and related contracts. Competitive Dialogue is a **transparent** and **non-discriminatory procedure**. Based on the functional description initially researched and specified by the public contractor, the dialogue purpose cannot be the programme's substantial modification. The same applies to performance objectives, assessment criteria or the general legal conditions stipulated in the consultation regulations. However, this operating programme may be clarified during the procedure, if this is deemed necessary.

Said **regulations' quality and contents** are also essential for the dialogue's success; **to reassure** all contracting parties of compliance with **confidentiality** and the guarantee of a **balanced** dialogue, to describe a simple process within the scope of a fixed duration which is proportional to the stakes; notably in the event of partnership and related contracts, this shall be adapted according to the project's complexity and size on which basis the appropriate **compensation** for tenderers involved in the process shall be foreseen and adjusted.

The smooth operating of such a procedure supposes **this Charter's explanation of legislative and regulatory provisions** (Directive 2004/18, Order dated June 17<sup>th</sup> 2004, Public Contracts Code, Public Health Code...) through rules and terms which comply with the spirit of this new procedure so that final choices are optimised. The first Competitive Dialogue examples demonstrate the quality of this procedure, insofar as it is **performed with the required means and diligence**.

Competitive Dialogue Charter signatories undertake to implement **this Charter's principles and recommendations** each time they implement a Competitive Dialogue procedure. They also indicate their desire to benefit from experience feedback concerning its implementation and to make it evolve, including concerning contract execution and performance.

The founding parties invite all proponents in Competitive Dialogue procedures to implement and promote this Charter in the manner they deem most adapted.

# COMPETITIVE DIALOGUE

## CHARTER

### PRINCIPLES

1. **Conduct** a traceable and transparent procedure respecting tenderers' equal treatment.
2. **Ensure** that steering and quick-decision capacities are well organised to enable responsible and fruitful dialogue without excessive delays.
3. **Specify** the rules for conducting Competitive Dialogue, thereby enabling tenderers to master the stakes of their dialogue participation with sufficient clarity.
4. **Specify, on the basis of operating specifications and/or project items** and via Competitive Dialogue, the principal issues on which the public contractor expects contributions from tenderers.
5. **Draw up**, during the Competitive Dialogue, the operational programme in terms of results to be achieved and requirements to be complied with, specifying the items which may or may not be modified.
6. **Monitor** a fair and optimised distribution of risks between the public contractor and private partner according to their respective capacities to cover said risks, and prior definition of contract modification terms.
7. **Comply with** the propositions and dialogue's confidentiality, including intellectual property and know-how in whatever forms, and financial and contractual innovations.
8. **Cease pointless and costly discussions** with tenderers as soon as their solutions no longer appear liable to be selected in the final stage.
9. **Provide compensation** for unsuccessful tenderers according to their contribution and the project's context.
10. **Call to remit final bids shall not constitute** either a new consultation or a new negotiation.

## **1. Conduct a traceable and transparent procedure respecting tenderers' equal treatment.**

- Explain, in the call for tender notice or consultation regulations, all information essential to the procedure's correct performance: definition, coefficient and hierarchy of choice criteria in the selection of the most advantageous bid, whether mandatory or not (such as technical, social, environmental, financial criteria, related to SME's role, etc ... as chosen by the public contractor), possible Competitive Dialogue phasing with the possibility of eliminating tenderers during the procedure.
- Anticipate possible conflicts of interest and monitor that competition conditions are not discriminatory.
- Perform previous research or feasibility studies prior to consultation to clarify competitors' risks (for example, real estate risk).
- Ensure traceability of initial propositions, public contractor requests and subsequent bids from tenderers.
- Be able to justify public contractor decisions.

## **2. Ensure that steering and quick-decision capacities are well organised to enable responsible and fruitful dialogue without excessive delays.**

- Appoint a responsible, and available, project manager able to make or have made decisions swiftly at the various stages, and coordinate the different specialised proponents assisting the public contractor.
- Identify the required internal or external skills or expertise, and obtain these at the appropriate time. External experts must be able to be efficiently coordinated and demonstrate sufficient reactivity.
- Identify the possible contribution of the competent support assignment, whether its role is mandatory or optional.
- Monitor that the dialogue is continuous and coherent throughout the process, notably by imposing mutual obligations to reply and decide within reasonable time limits.

### **3. Specify the rules for conducting Competitive Dialogue, thereby enabling tenderers to master the stakes of their dialogue participation with sufficient clarity.**

- Explain Competitive Dialogue rules from the beginning: considered stages, their possible duration, written information exchange terms between dialogue sessions, and bids' finalisation, compliance with intellectual property or significant innovation rights (including legal or financial) and information which shall not be disclosed to other tenderers without the concerned tenderer's permission, compensation rules.
- All of these rules shall be specified as precisely and fully as possible in the consultation regulations.
- The number of consulted tenderers shall be sufficient to generate competition but should remain reasonable, insofar as their elimination can be justified on objective grounds and in order to avoid excessive costs.

### **4. Specify, on the basis of operating specifications and/or project items and via Competitive Dialogue, the principal issues on which the public contractor expects contributions from tenderers.**

- The public contractor shall have previously defined its needs, with external assistance if required.
- Competitive Dialogue is not intended to assist in identifying its needs, but to seek the most financially advantageous bid.
- The operating programme must enable tenderers to explain quantifiable or assessable responses, specifying the project's scope.
- When the public contractor has performed a prior pilot study (architectural), the consultation regulations explain the specific terms of this Competitive Dialogue and participation of the selected design team.

**5. Draw up, during the Competitive Dialogue, the operational programme in terms of results to be achieved and requirements to be complied with, specifying the items which may or may not be modified.**

- An approach in terms of results should be favoured where possible.
- So that the procedure is clear, the programme's intangible elements (or the pilot study) and elements which might be subject to change or modification, must be explained as much as possible.
- The level of results to be achieved, or requirements to be complied with, shall be fixed at reasonable levels, based on their indicative cost, notably due to the Competitive Dialogue.

**6. Monitor a fair and optimised distribution of risks between the public contractor and private partner according to their respective capacities to cover said risks, and prior definition of contract modification terms.**

- Avoid any transfer of risks to the private partner if the latter has no possibility of controlling said risks (risk of significant regulations' modification, risk linked to obtaining certain administrative authorisations, save for private partner's proven default ...). Indeed, either it decides to overlook said risk or assesses its value, more costly than for the public contractor.
- Therefore, Competitive Dialogue must lead to a optimal appreciation of risks, avoiding inaccuracies, ambiguities or inadequate allocation.
- In particular concerning partnership contracts, the principle of adaptability must be provided for through clauses specifying regular meetings, without preventing specific meetings in the event of substantial disruptions in the contract's equilibrium.

**7. Comply with the bids and dialogue's confidentiality, including intellectual property and know-how in whatever forms, and financial and contractual innovations.**

- Any sharing of innovations, original ideas and, *a fortiori*, intellectual property, shall be prohibited ("tunnel"), save for the concerned tenderer's permission.
- The public contractor's replies of a general nature to tenderers' questions shall be communicated to other competitors.
- The public contractor must undertake a dialogue based on ethics, sufficiently open to obtain tenderers' contribution of original ideas.

## **8. Cease pointless and costly discussions with tenderers as soon as their solutions no longer appear liable to be selected in the final stage.**

- Bids are eliminated on the basis of specific selection criteria detailed in the call for tender.
- Avoid premature elimination of bids by simple comparison.

## **9. Provide compensation for unsuccessful tenderers according to their contribution and the project's context.**

- Tenderers' costs incurred in responding to the consultation and carrying out the procedure shall be assessed at their real value and remain reasonable, as they are always ultimately paid by the commissioning partners through the costs budgeted in contracts.
- Compensation rules shall be specified in advance in the consultation regulations and, when possible, shall be determined objectively by reference to the project's progress and/or size of the work for example.

## **10. Call to remit final bids shall not constitute either a new consultation or a new negotiation.**

- Request for a final bid shall not consist in a new consultation on the basis of the best, innovative ideas from the various tenderers.
- The finalising procedure of final bids shall not consist in negotiating said bids.
- Monitor the comparison between final bids in order to enable a clear choice of the most financially advantageous bid for the public contractor, in compliance with hierarchy or coefficient criteria in the initial consultation regulations.
- All group members shall be bound by the final bid, external financing shall be justified by the appropriate authorities' firm approval (credit committees) subject to financial documentation's finalisation and, if applicable, all checks being carried out before committing to a project (*due diligence*).

**WITH PATRONAGE FROM THE SENATE AND ASSISTANCE  
FROM THE FRENCH PPP INSTITUTE**

**Christian PONCELET**  
President of the Senate

**Claude MARTINAND**  
President of the French PPP Institute

**FOUNDING SIGNATORIES OF THE CHARTER:**

**Thierry BRETON**  
Minister of Economy,  
Defense  
Finances and Industry

**Michèle ALLIOT-MARIE**  
Minister of

**Jean-François COPÉ**  
Associate Minister of the  
Budget and State Reform,  
Government Spokesman

**Brice HORTEFEUX**  
Associate Minister  
for Local Authorities

**Claudy LEBRETON**  
President of the Assembly  
of Departments in France

**Jacques PELISSARD**  
President of the Association  
of Mayors in France

**Alain ROUSSET**  
President of the Association  
of Regions in France

**STATE DEPARTMENTS, PROMOTORS COMMITTED TO THE  
CHARTER:**

**Jérôme GRAND d'ESNON**  
Legal Affairs Manager,  
Ministry of the Economy,  
Finance and Industry

**Noël SAINT PULGENT**  
President of the French PPP  
Task Force [MAPPP]

**Edward JOSSA**  
General Manager of  
Local Authorities,  
Ministry of the Interior  
and Territorial Organisation