

1977

An Outline-Guide to Agreements for Development Projects in Algeria

Mohamed-Ali Haroun

Thomas O. Rose

Recommended Citation

Mohamed-Ali Haroun & Thomas O. Rose, *An Outline-Guide to Agreements for Development Projects in Algeria*, 11 INT'L L. 681 (1977)

<https://scholar.smu.edu/til/vol11/iss4/8>

This Short Articles, Comments and Casenotes is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

An Outline-Guide to Agreements for Development Projects in Algeria

In the framework of its industrial development plan, Algeria has sought foreign partners for and concluded in the past few years a substantial number of contracts with foreign enterprises for the delivery of engineering services and/or completed industrial or infrastructural units.¹ The frequency with which advertisements of bids for tender on development projects appear in the Algerian and foreign press bears witness to the importance of opportunities offered to foreign enterprises with needed know-how and to the development of new economic and commercial relations between Algeria and the industrialized countries.

This article will describe as concretely as possible the legal context in which contracts for development projects are negotiated and concluded in Algeria. Because this article is intended as a primer to development contracts in Algeria, it is restricted to an analysis of the practical questions which must be faced by a foreign enterprise rather than of considerations of legal or political doctrine which they embody.

I. In General

1. *The Parties*

The parties to a development contract are, in the common nomenclature of such agreements, the "Client," either the Algerian government itself, an Algerian public enterprise or a national company, and the "Contractor," usually a foreign enterprise. As a general rule, development contracts are prepared and executed in the French language.

The foreign enterprise will have to take pains to know the juridical status of

*Member of the Algerian Bar.

†Partner, Donovan Leisure Newton & Irvine, Paris.

¹The services performed under such contracts are collectively referred to herein as "development projects." These cover a wide spectrum of activities, from the supply of engineering plans and related technical assistance to the construction and operation of factories under turn key contracts, subject to precise output or performance requirements which the foreign contractor warrants.

the client, since the rules governing the contract it signs will be different, especially the financial aspects thereof, according to whether the client is a "person" organized under public or private (general corporate) law. Thus, if the client is a person organized under private (corporate law), the development contract will be governed by Finance Regulation No. 72 of February 1, 1973, which establishes the procedure and conditions governing the transfer of funds from development contracts concluded by such persons with foreign parties. On the other hand, if the client is a person organized under public law, an agency of local government or of a public service, Finance Regulation No. 77 of November 27, 1973 applies. The difference of treatment resulting from this qualification is considerable, as Algerian administrative law (including the Code des Marchés governing public contracts) applies when the client is organized under public law.

The qualification given the client can have practical consequence in the Contractor's legal system, too, as in the Federal Republic of Germany, where one type of insurance against the risks of nationalization is available from Hermes, the German public agency for promoting foreign investment, where the client is a private company and another type (less expensive) where the client is a public enterprise.

The question of what criteria are used for determining if a client is a public or private person has provoked doctrinal dispute. If the Algerian government is the sole shareholder of a company's stock, is not this fact sufficient for the company to be recognized as a person organized under public law? Despite the doubt expressed by certain authors, the fact that the government owns all the capital stock of a company does not prevent it from being a person subject to the rules of private law, like any other commercial company, and indeed, the decree establishing a national company commonly specifies that the company is to be governed by the rules of private corporation law. For example, Decree No. 63-491 of December 31, 1963³ provides: "The National Company for the Transfer and Distribution of Petroleum Products (SONATRACH) is organized by the Government to carry out the objectives stated in its by-laws . . . Its operations will be governed by the rules for (ordinary) commercial companies, unless a provision in the by-laws is contrary thereto."³

Another example is the National Company for Construction Materials (SNMC)⁴ whose implementing decree provides: "The company is deemed to be a merchant in all its relations with third parties. The accounts of the company are to be kept in the usual commercial manner."

³Official Journal of the Algerian Republic, dated January 10, 1964, as modified by decree No. 66-296 of September 22, 1966 (J.O.R.A. of September 30, 1966).

⁴The hierarchy established between company law rules and the provisions of the by-laws is unusual.

⁵Organized by ordinance No. 67-58 dated March 27, 1967 (J.O.R.A. of March 31, 1967).

2. *The Language of the Contract*

The official language of Algeria is Arabic. However, it is customary for public enterprises, which are most often the Algerian party to development contracts, to require that the contract be prepared in French. It is thus indispensable, even where the Algerian party accepts that the final official version be in another language, for the foreign party to be able to work in, or have available to him persons capable of working effectively in French.

II. **The Determination of the Price**

The price clause of contracts concluded by Algeria usually is drafted as follows: the client promises to pay the contractor as compensation for the services and materials he will supply in conjunction with the performance of his contractual duties, a fixed, lump sum price of X . . . (to be paid in transferable currency) e.g., in dollars and Y . . . (non-transferable Algerian dinars).

Finance Regulation No. 72,⁹ referred to above, defines the contract price as follows: "The contract must include a lump sum price for the services rendered and must be accompanied by a schedule of prices or a detailed estimate of the cost of all services and materials. This price will include an evaluation of the goods, services, or materials, which the Algerian party promises to deliver or provide in Algeria."

The contractor must thus accurately calculate his contract price, taking into account all direct and indirect costs and expenses, while remaining competitive. Once established, the contractor must live with his contract price, for the Algerian government is hostile to escalator or price adjustment clauses in its contracts. Even if price revision is provided for, it may not take place until the expiration of a six-month period following the effective date of the contract. Moreover, in practice it can be difficult to obtain the benefit of a price revision clause due to the fact that the official Algerian price indexes, which control price increases for local labor and supplies, are not always published on a regular basis.

Of course, the total contract price will commonly include costs incurred outside Algeria as well as those described below, incurred within Algeria. Any allowable price revisions as to such costs are determined in accordance with a formula set forth in the contract.

The contractor must be aware from the beginning that the legend "tax-free" which usually appears in the "price" clause or the provision which states that "all taxes and duties required in Algeria shall be borne by the Client" does not

⁹Regulation No. 77, which applies to contracts concluded by enterprises organized under public law, is almost identical to the text of Regulation No. 72.

mean that the contractor will not pay taxes in Algeria. On the contrary, the client is liable for some taxes (e.g. the 8 percent standard tax) withheld at the source, and for others which he must pay as liability accrues.

Of specific interest are the following:

1. The Standard Tax ("Taxe Forfaitaire");
2. The TUGP, the TUGPS, and customs duties;
3. Income tax on wages;
4. Social security payments.

1. *The Standard Tax*

Prior to December 31, 1969, foreign companies operating in Algeria were taxed pursuant to the rules of common law and thus subject to the same taxes as Algerian companies. However, under a specific exception, they were allowed to opt for payment of a standard tax, which, at the time, was paid at a 15 percent rate on the value of the project.

Since January 1, 1970, the Standard Tax is imposed on the price of all development contracts (Art. 82 of the Ordinance of December 31, 1969 incorporating the Finance Law of 1970).

Thus foreign companies carrying on only temporary activities in Algeria in connection with the performance of construction contracts are liable to pay the Standard Tax. This tax is based on the *total contract price*. It is levied at a rate of 8 percent and is collected by a withholding at the source, i.e., on each installment payment which the Algerian client pays. The latter remits directly to the Algerian tax administration, and then delivers to the contractor a special receipt provided by the tax administration.

2. *The T.U.G.P.—The T.U.G.P.S. and Customs Duties*

To avoid dispute, the contract must specify which party shall bear:

- the "Taxe Unique Globale à la Production" (TUGP): This is a transfer tax on the materials to be incorporated in the project; its rate varies according to the product. With the approval of the Minister of Finance and the Minister of Industry, the contractor may buy or import its materials on a tax-free basis.

- The "Taxe Unique Globale sur les Prestations de Services (T.U.G.P.S.)": A transfer tax on gross amounts received for services rendered. The rate is 6 percent.

These taxes basically work like the European value-added tax. The contractor may deduct from the amount invoiced to his customer the T.U.G.P. and T.U.G.P.S. which he has paid his supplier.

- Customs duties, handling duties, etc. imposed in Algeria and relating to temporary or final importation of all property, machines, equipment and material to be used on the job.

It should be noted that, in addition to the choice of the party liable for import duties, another factor relating to customs formalities may be of great importance. The contract must specify which party shall be responsible for clearing the material through customs. The absence of such specification can lead to practical difficulties and considerable administrative delay because of portuary congestion and insufficient lifting machinery, which may destroy the profitability of a contract through the imposition of performance penalties.

3. *Salary Tax and Social Security*

Taxes which are levied on the payment of salaries in Algeria are as follows:

A. SALARY TAX

This is a progressive tax which makes allowance for the number of dependents of the employee. A table of rates for calculation thereof is available from the Algerian tax administration. This tax is laid on the employee but his employer is responsible for withholding the correct amount and is liable therefor in case of a shortfall.

B. PAYROLL TAX

This is a tax levied on the employer and imposed today at a rate of 6 percent on the total amount of salary paid.

C. SOCIAL SECURITY

Social security payments are required to be made to the various interested government "funds" by an employer engaged in performing a contract in Algeria. Even foreign nationals must be included among the beneficiaries of social security, unless a tax convention exempts them from such coverage. The employer bears the greater part of these contributions, although the employee also has a share deducted from his salary. Social security contributions are as follows:

1. *Family Allowance*: levied at a rate of 24.25 percent of salary, but not in excess of a ceiling today of DA 2,000;
2. *Workman's Compensation*: levied at a rate of from two to ten percent of salary, but not in excess of DA 2,000;
3. *Vacation Pay*: levied specially in the construction and public works field at a rate of 10.93 percent of salary.

III. **Determination of the Transferable Quotient and Methods of Transfer**

Finance Regulations No. 72 and 77 specifically prescribe the documents to be filed with the appropriate Algerian agency to justify transfer of part of the contract price in foreign currency, as well as the conditions of transfer.

The Documents

A. The following must be supplied for *all types of contracts*:

- a draft of the contract. A final draft of each contract must be submitted to the Finex⁶ before it is executed, to allow for corrections made necessary by exchange control. The control will not be effective before the approval of the appropriate Algerian banking agency is obtained. This approval follows as a matter of course, once the Finex has approved the allocation of the contract price between transferable and non-transferable portions.

- an estimate of the total cost of the contract (Algerian dinars and foreign currency), not including tax costs thereof.

- a breakdown of required foreign currency amounts and Algerian dinars amounts.

- a schedule showing the constituent parts of each item to be purchased by foreign currency or by dinars. This analysis must include the details of unitary prices, tariff rated and multiplier (in number, duration or quantity . . .), which will permit calculation of the total price of the contract.

- the composition of foreign currency amounts and Algerian dinars amounts. This analysis is intended to ensure that:

1. amounts for which exchange control transfer is ordered will not exceed the price owed to foreign suppliers;

2. expenses payable in Algeria in dinars are foreseen.

The schedules describing foreign currency and dinar payables are drafted by the Algerian party to a contract, which is then responsible for the apportionment between hard and Algerian currency.

B. When dealing with a contract incorporating several kinds of services it is wise to supply the specific documentation for each, i.e., for construction and for surveys, and for specific services, and for technical assistance.

These documents could include:

A. CONSTRUCTION OR PUBLIC WORKS PROJECTS

- Exhibits showing the number, quality, salary and duration of sojourn of foreign technicians employed by the Contractor in Algeria.

- where transfers of foreign exchange are required for leasing of equipment to be imported into Algeria for temporary admission, a description and supporting documents will be required, specifying the date of leasing the property, its real value on the date of entry into the national territory, and the duration of its use on the job called for by the contract. All computations showing how to arrive at the amount of rent may also be required.

⁶Ministere des Finances, Direction des Finances Exterieures.

- an exhibit showing the cost of transportation of equipment and material from the seller's warehouse abroad to the Algerian port of destination.
- a projected profit and loss statement for the job, indicating expected results of the transaction.

B. AGREEMENTS FOR STUDIES, SERVICES AND TECHNICAL ASSISTANCE

- an exhibit showing the number, quality, salary and duration of sojourn of the foreign technicians employed by contractor.
- when required, the preliminary approval of the Planning Secretariat, provided for by Decree No. 71-133 of May 13, 1971.
- an exhibit setting forth the various elements of the contract price and the situs of the services to be rendered (Algeria or abroad) and showing the amounts payable in dinars and in foreign currency, as well as the applicable transfer rates.

Conditions of Transfer

A. DRAFTING THE FINANCIAL CLAUSES

Aside from contracts in the nature of clearing agreements, currency of payment and of billing must be that of the party producing the imported goods or services. However, with the permission of Algerian national banks, other currencies may be stipulated for billing or payment.

Payment obligations may never be the object of a gold clause, which guarantees the payee against conversion rate fluctuations.

Each transaction must designate a national bank which shall be depositary of all financial documents relating to the project. This bank must be the one used by the Algerian client.

A foreign company which has contracted with an Algerian firm subject to Finance Regulation No. 72 and 77 must solicit approval from its depositary bank for, and open an interior non-resident account relating to the public project ("Compte I.N.R. marche public").

Such an account must be opened for each such project and will only be debited to the extent necessary for the settlement in Algeria of those project-related disbursements for which the account was opened.

The exchange control permission for the account expires six months after the terms of the payment provisions in the contract in question.

Transfers of foreign exchange provided by the contract for the account of the foreign firm must be made by the debit of the Algerian client's account and on its order.

B: METHOD OF CALCULATING THE TRANSFERABLE PORTION

1. CONSTRUCTION AND PUBLIC WORKS AGREEMENTS

A. Salaries

Salaries of non-Algerian employees are transferable by the contractor subject to a deduction equal to a minimum of 70 (seventy) dinars per day per foreign technician.

This deduction represents the government's estimate of the per diem costs of maintaining a foreign technician in Algeria.

B. Supplies Which Are Not Available in Algeria

These costs typically will include machinery and equipment.

C. Transportation:

Transportation costs for property granted temporary admission status are transferable, but only to the extent of the cost from its place of purchase or storage abroad to the port of destination in Algeria.

D. Head Office Expenses

These costs include all head office expenses relating to the contract. This item, although entirely transferable, may not exceed 15 percent of total salaries paid to foreign personnel located in Algeria for the purposes of the contract.

E. Leasing of Property:

This item includes the cost of leasing property granted temporary admission status in Algeria for the purposes of the job. The full amount of such leases is set forth in an exhibit to the price schedule. It is fixed by reference to the usual amortization rates for the particular equipment and to its use on the site.

The full amount to be transferred may not exceed the value of the property at the time of entry into Algeria.

F. Social Security Payments:

Such payments are transferable upon presentation of appropriate invoices or other supporting documents, but may not exceed 40 percent of total salaries paid foreign personnel located in Algeria.

**2. AGREEMENTS WITH RESPECT TO STUDIES, SERVICES AND
TECHNICAL ASSISTANCE**

The same rules set out above govern with respect to the transfer of salaries, travel, head office expenses and social security payments in connection with this kind of agreement.

IV. Responsibilities of the Contractor: Insurance

Under general principles, the contractor is liable both to third party and to the client for all damages caused by itself, its employees or equipment in its control in the execution of the contract. In connection with construction contracts, the contractor is also subject by law⁷ to a special ten-year guarantee, "even if such is not provided in the contract."

This guarantee also binds the contractor in turn key or "product in hand" contracts.

A question may arise as to whether the contractor is insured in his own country for contractual and architectural risks. Will an additional insurance policy for the Algerian job be required, thus adding another element of cost to the price?

The Algerian policy on the subject, set forth in Finance Regulation No. 72 and 77, states that when goods or services are available on the Algerian market, the contractor must avail himself of them. Adequate insurance coverage is available on the national market, and consequently development projects generally require that the contractor be insured by one of the two major national insurance companies: *Compagnie Algérienne d'Assurances et de Réassurances* and *Société Algérienne d'Assurances*, both 100 percent government-owned.

Technical Control of the Construction

Ordinance No. 71-85A of December 29, 1971 establishes the C.T.C., which is responsible for supervising the construction of all types of buildings, engineering and infrastructural works defined by decree of the Minister of Public Works and Construction. The appendix to the decree includes a detailed list of buildings and works subject to supervision by the C.T.C. This list includes bridges, dikes and factory buildings.

Qualified insurance companies will not cover the risks of the ten-year guarantee unless the plans for a project have been certified and the finished work has been made subject to the permanent control of the C.T.C. Fees charged by the C.T.C. are computed according to the size of the job and its distance from C.T.C. headquarters.

V. Late Performance Penalties

Provision for damages for late performance is made in all contracts between an Algerian party and its foreign counterpart. Specific liquidated damages clauses are tailored for each contract and range from a daily penalty to an

⁷Article 554 of the Algerian Civil Code.

amount arrived at by complex formulae taking into account the nature of the job.

Of course, delay may result from circumstances beyond the control of both the contractor and the client. In addition, delay in delivery and performances must be examined in light of practical difficulties created by temporary dislocations or by monopoly power held by certain Algerian public enterprises whose services are required for the job. We already have alluded to delays caused by congestion of the ports and overburdened customs service.

Delay may also result from the time required for forwarding necessary materials, equipment and machinery from the port of landing to the site. Usually, an explicit provision in the contract, pursuant to Public Notice 72 and 77, assigns the transportation of goods for the job to the Société Nationale des Transports Routiers (S.N.T.R.). In such case any delay is the sole responsibility of S.N.T.R., which has a *de facto* monopoly over carriage of goods by road. The same is true for construction materials available in Algeria. These must be purchased from the Société Nationale des Matériaux de Construction (S.N.M.C.), sole accredited supplier in Algeria.

What happens if one of these national companies were unable to supply services or materials within normal delivery periods, thus causing the contractor to fall behind in its performance schedule? It would be possible after formal demand for performance and notice of the delay to the client, to raise the defense of Act of God or force majeure. These doctrines, however, give rise to dispute and divergent interpretations. In connection with national enterprises having *de facto* monopolies, it will be best to solve the problem by including a clause as follows:

Where under the present contract or the applicable laws and rules, an Algerian national enterprise establishes that it is not in a position to furnish the materials, supplies or services, or substitutes thereof, in the time required to permit performance in conformity herewith, the contractor will notify the client thereof and present supporting documents establishing the failure of supply etc.; it will then have the option of applying to another Algerian or foreign firm for substitute performance and the client promises to obtain all certificates and authorizations necessary for temporary or final importation to Algeria of materials, supplies and services required to perform the contract in the time allocated therein.

This clause will of course have no effect upon the supplies and services delivered by national companies having a legal monopoly: for example, Société Nationale de l'Électricité et du Gaz (SONELGAZ) or Société Nationale de Distribution d'Eau Potable et Industrielle (SONADE). Ordinance No. 69-59, dated July 28, 1969, which established SONELGAZ, states in Article 4: "A monopoly over the production, transportation, distribution, import and export of electricity is conferred on SONELGAZ." Article 2 of Ordinance No. 70-82, dated November 23, 1970, grants a similar monopoly to SONADE over the distribution of water to the population and to industry and tourism.

In view of such precise draftsmanship of the monopolies awarded to certain enterprises, it is not possible, as a matter of public policy, to provide in a contract for alternate performance by a foreign company. A default by one of these enterprises can only be considered an act of God or force majeure excusing the contractor for strict performance. But it would be wise to specify so in the contract.

The foregoing sections have reviewed specific aspects of development contracts concluded by foreign firms in Algeria. The problems reviewed were real, not hypothetical, having arisen in the context of contract negotiations over the past ten years.

It should be noted in conclusion that the law governing the contract is always Algerian law, and the courts always Algerian, when the Algerian contracting party is national government, a local government agency, or the public administration. In such cases, an arbitration clause for dispute resolution may not be used. However, in the case of an Algerian national company, such a clause would not be forbidden by law, even if the arbitration took place in a third country, provided that Algerian substantive law is applied.

The foregoing outline obviously does not claim to address all the difficulties encountered by contractors in Algeria. It is rather a review of certain problem areas, the purpose of which is to illustrate the need for a foreign enterprise to be advised by experienced counsel when it ventures into Algeria.

