NEWS LEXTTER

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PUBLIC-PRIVATE PARTNERSHIPS IN ANGOLA

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On 14 March Law No. 2/2011 on public-private partnerships ("PPP Law") came into force in Angola. It is intended that this law, which was published on 14 January 2011, will boost the State's ability to take advantage of the private sector's management capacity, improve the quality and quantity of public services and generate savings in the use of public resources (through a more efficient allocation of the available resources). In the same way, the new legislation should allow a strengthening of the relationship between the State and the private sector in the process of Angolan economic growth and development.

Accordingly, the objective of this law is to define general rules applicable to the intervention of the State in the determination, conception, preparation, tender process, adjudication, alteration, supervision and overall operation of public-private partnerships.

This general framework still needs to be complemented with the necessary regulations. Provision was made for this to happen within 60 days of the publication of the PPP Law and this would have allowed all aspects to be more precisely defined by the time the PPP Law came into force. However, as far as we are aware, those regulations have not yet been published.

THE CONCEPT OF PUBLIC-PRIVATE PARTNERSHIP

For the purposes of the PPP Law, a public-private partnership is considered to be "the contract or union of contracts by which private entities, known as private partners, give a lasting undertaking to a public partner to ensure the operation of an activity aimed at meeting a public need, in which the financing and the responsibility for the investment and for carrying out the activity falls, in whole or in part, on the private partner."

This means that a public-private partnership has the following distinctive elements:

(i) The association of private entities with the meeting of public needs as defined by the public sector.

(ii) The establishment of a long-lasting relationship (sometimes for decades).

(iii) The fact that there is an obligation for certain results to be achieved, meaning that the private partner takes on a results-based obligation rather than one simply to provide the means.

(iv) The fact that the financing and responsibility for the investment lies, at least in part, with the private partner.

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(v) The fact that the risk of carrying out the activity is assumed, at least in part, by the private partner.

The instruments for legal regulation of the cooperation relationship between the public and private entities under this PPP Law are, by way of example: (i) public works concession contracts, (ii) public service concession contracts, (iii) continuing supply contracts, (iv) contracts for the provision of services, (v) management contracts, and (vi) cooperation contracts (when it relates to the use of an establishment or infrastructure that already exists).

It is also important to mention that for the purposes of this law public partners are not only the State and local government but also independent funds ands services and public companies and, before entering into a partnership contract, the private partner must set up a specific purpose vehicle in order to carry out the project in question.

REQUIREMENTS FOR THE LAUNCH OF PPPs

The following are the requirements to launch and set up a PPP:

(i) that the PPP is included in the General Plan of PPPs (although, if there is a sound reason to do so and exceptionally, PPPs not covered by the said plan may be approved);

(ii) that there is provision in the budget for the said PPP (in other words, that its launch and execution are done in accordance with the regulations on financial programming that appear in the State General Budget Law) ;

(iii) that the objectives and the results that are intended to be achieved with the launch and operation of the PPP are defined clearly in advance;

(iv) that the choice of the model for the partnership in question brings an advantage to the public partner when compared to the alternative means of achieving the same result (including by means of traditional public tendering). However, it must also bring the private partner the expectation of remuneration that is adequate in light of the cost of the investment, the level of risk assumed and the time foreseen for completion of the project (when applicable);

(v) that the reports and authorisations necessary to implement the project have been obtained (including, in particular, those relating to environmental and planning issues), so as to allow a proper and full allocation of the risks inherent to carrying out the PPP;

(vi) that the conception of the models for the partnership that are finally adopted avoid, whenever possible and except where there are sufficient grounds, the probability of unilateral modifications to the contracts and economic and financial rebalancing, thus aiming to ensure the foreseeability of contractual performance and balance between the risks assumed and the costs incurred with the partnership.

PREPARATION AND LAUNCH OF PPPs

As regards the structure of the preparation, launch and operation of PPPs, the law provides that a commission will be set up: the Ministerial Commission for the Evaluation of Public-Private Partnerships.

This commission is made up of the Ministers of Economy, Finance, and Planning and may also include the minister responsible for the sector and the provincial governor of the place where the PPP in question will be located. The role of the commission is to serve as a link between the private partner and the public partner and it should approve various procedures in the context of the partnership including the General Plan for PPPs, the proposals for PPPs (after obtaining the report from the ministry responsible for the sector), as well as providing guidance for the contracting process (after its approval by the holder of executive power) and supervising the execution of the various PPPs.

It also falls to this commission to decide on the launch of a specific PPP and the respective conditions. After this, it is for the minister responsible for the sector to carry out the procedures for selection and negotiation of the terms of the partnership with the private partner, launching the PPP after approval of the Court of Auditors and in accordance with the legislation applicable to public procurement. In this respect it is important to point out that the title of article 12 of the PPP Law seems to be misleading in that it refers expressly and solely to the "launch of the public tender process for the partnership", being that the "public tender process" is not the only pre-contractual process that may be adopted to launch a partnership. There are other legal mechanisms that may be used for this purpose as long as the rules for public procurement are followed and as long as the approval of the Court of Auditors is obtained.

After choosing the private partner and the approval of the whole process by the Court of Auditors, the file on the partnership together with the draft contract must be sent to the holder of executive power. This provision accords with the rules that are currently in force in Angola as, at the moment, the Council of Ministers only has a consultative role.

PPP RISK MANAGEMENT

The concept behind PPPs is based on the allocation of risk to each of the partners in accordance with their capacity to manage these same risks at the lowest possible cost. This same idea is transposed to the PPP Law which, under article 5, establishes that it falls to the public partner to deal with the operation and supervision of the subject of the partnership (thus guaranteeing that the public interest objectives underlying the launch of the PPP are met). At the same time, the financing, exercise and management of the activity contracted fall, preferentially, to the private partner. This idea also appears in article 7 of the PPP Law when it establishes that the allocation of risks must be identified clearly in the contractual structure in accordance with the principle that provides for the risk to be allocated to the partner best able to manage it a lower cost.

It should also be noted that the transfer of risk is a particularly important aspect of PPPs. Many risks can be transferred in a more or less efficient way: construction and project risk, time or financial slippage risk, integration risk, demand risk, exploitation risk and financial risk. However, the transfer of risk in a PPP is not always clearly made and this means that basic care must be taken in designing the PPP and in clearly establishing the exact terms under which the transfer must take place in the tender process documentation and in the contract.

OPERATION AND SUPERVISION OF THE PPP

Despite the fact that PPPs may not involve initial costs for the public sector or that, at the outset, these costs may be relatively insignificant, it cannot be denied that there is financial involvement on the part of the State as, in different ways, it may be drawn into this type of association with the private sector.

As is to be expected, the PPP Law makes provision for the financial rebalancing of the PPP when there is a significant change in the financial conditions under which the partnership is being carried out. This includes cases in which such a change arises out of a unilateral imposition by the public partner in respect of the content of the contractual obligations of the private partner or the essential conditions of the partnership.

We cannot fail to mention that the PPP Law demonstrates concerns about the cost of PPPs for the public partner. It should be emphasised that the risks the State assumes with PPP contracts generally arise out of contractual clauses dealing with the restoration of the financial balance. These clauses mention the situations that may give rise to compensation by the State, for example, unilateral changes imposed by the public partner that imply a greater financial effort by the private partner or legislative changes of a specific character that lead to an increase in the costs of the project for the private partner and, in both cases, this must affect the ratios appearing in the financial model. It is on the basis of this proviso that concessionaires make their claims in respect of the need to restore the financial balance of the relevant contracts.

The financial balance is based on micro and macroeconomic previsions appearing in the financial model that forms an integral part of the respective contracts and it is with reference to this financial model that concessionaires calculate the amounts to be claimed as "financial balance". In this way, and in accordance with the provisions of article 18, it is important that the situations that give rise to this rebalancing are clearly defined in the tender process documents and in the contract in order to avoid "surprises" later on.

Additionally, and also on the basis of concern about the costs that may be incurred by the State, the PPP Law establishes that, without prejudice to compliance with the legal regulations applicable to public spending, the carrying out, alteration or reduction of unforeseen works, or any other decision which, in the context of the execution of the PPP contract or its operation is capable of causing an increase in costs for the public partner or for the State that exceeds KZ 200 000000 (on an annual accumulated basis) must be approved by an advance order from the Minister of Economy, the Minister of Finance and the Minister responsible for the sector. However, it is also important to note that the law provides for the tacit approval of such alterations if said order is not issued within 60 days (unlike the similar Portuguese provision, which sets a period of only 30 days for this purpose).

The PPP Law also establishes the equitable sharing of financial benefits arising from operating the partnership, including in the case of refinancing. This rule seems to seek to avoid some of the problems that have occurred in PPPs carried out in Portugal even before the worldwide financial crisis. These cases involved concessionaires that sought to renegotiate the financing conditions through the refinancing of the PPPs on the capital markets but these transactions never reached financial closing because the partners could not agree on how to share the benefits. Do note that the Portuguese legislator also approved a similar rule in 2003 under which any later benefits should be shared between the two partners.

The sharing of benefits or the mechanisms for rebalancing may take on various forms, namely: (i) alteration of the term, (ii) increase or reduction in the obligations of a financial nature, (iii) the award of direct compensation (usually more relevant in the initial phase of the project in which no income is yet received), (iv) any combination of the above models or any other means agreed between the parties.

PPP GUARANTEE FUND

Finally, it should be noted that, like the Brazilian example, provision is made for the Executive (through the Ministry of Finance) to set up a special public fund called the Public-Private Partnerships Guarantee Fund, with the aim of making provision for any possible financial liability on the part of the State, that for extraordinary economic reasons, cannot be met with recourse to the funds specifically allocated to the PPP by the State.

The existence of such a fund requires additional regulation and its real usefulness should only be evaluated when it is set up, by looking at how much is put into it, which is its investment policy and the situations in which the funds will, in fact, be used.

PREFERENCIAL SECTORES FOR THE IMPLEMENTATION OF PPPs

Despite the fact that the PPP Law does not expressly refer to any sectors there PPPs are to be implemented, if we consider the current situation in Angola, it seems that this legislation and the later regulations will be especially relevant in the following sectors:

(i) Road Infrastructure: Over the last few years more than 3000 km of roads have been rehabilitated across the country and there are currently plans to rehabilitate a further 8000 km. Through the Ministry of Planning and Construction, the Angolan

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(ii) Sanitation Equipment and Networks: The rehabilitation and construction of equipment and networks for the supply of water and for sanitation in the large Angolan cities should also be priority areas for the establishment of public-private partnerships bearing in mind the current needs of the population.

(iii) Energy: Angola's energy potential is not currently being fully exploited. Investment in the expansion of the electricity grid and in the construction of dams, power stations and other infrastructures should be on the State's list of priorities for the launch of PPPs.

(iv) Other Infrastructures and Services: The Angolan government strong focus on rehabilitation and construction of a range of basic infrastructures is shown by the announcement of a large number of projects including the construction of new ports, airports and logistical centres across the country. PPPs for the modernisation and management of a range of public services are also expected.

This newsletter was prepared by a multidisciplinary team made up of Angolan lawyers from GLA – Gabinete Legal Angola and Portuguese lawyers from PLMJ. This team was brought together under an agreement for international cooperation and membership of PLMJ International Legal Network, in strict compliance with applicable rules of professional ethics.