NEWS LEXTTER

PLMJ SOCIEDADE DE ADVOGADOS, RL
A.M PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE E ASSOCIADOS

DACHENG LAW OFFICES
大成律师事务所

PLMJ INTERNATIONAL LEGAL NETWORK
MEMBER OFFICES
ANGOLA • BRAZIL • CAPE VERDE • CHINA
MACAO • MOZAMBIQUE • PORTUGAL

May 2011
2011 五月

China
中国

莫桑比克政府采购法

一，法律框架

莫桑比克政府采购制度主要由2010年5月24日第15/2010号法令[1]“关于国家公共建设合同、物资和服务供应规章”（以下简称“规章”或“法令”）进行规范。
即使只是对该法令进行简要解读，也可以看出它在莫桑比克政府采购制度中举足轻重的地位。
同时，通过本文的简要介绍，可以让读者知
道该政府采购法统一规定了政府采购程序中的几个主要方面的问题，包括最为重要的行政合同。总之，解读该法令对理解莫桑比克的政府采购制度非常重要。

二、政府采购的适用范围和主要原则

1.该规章适用于所有国家机关和事业单位，以及地方政府和国有公司[2]。

2.该规章遵循传统的行政法原则，包括合法性原则，确定性原则，合理性原则，比例原则，行政公开原则，公平公开原则。

同时，该规章除了明确上述传统行政法原则外，对裁决问题还适用特别原则，比如特别适用的稳定性原则，保持竞争和良好经济管理原则。
另外，该规章第四条[3]中出现的“其他行政法原则”，需要结合2001年10月15日第30/2001号法令中第四条至第十四条的内容（公共行政服务原则）来理解。

3. 政府公开招标作为一般原则适用于政府公共工程合同与物资和服务供应（见第七条）。
除一般原则（即公开招标）外，我们还有特别机制。特别机制的规则不同于一般机制，主要由国际公约或其他形式的国际协定来决定其特殊的程序规则。此外，我们还有例外程序，当基于对公共利益的考虑，采购方可采取以下合同前程序确定采购合作对象：预选招标；限制性投标；两段式招标；命令招标(tender by bidding)；小型招标 和私人协定[5]。

[1] 该法令取代了2005年12月13日第54/2005号法令。
[2] 该规章中的国有公司指的是所有由国家100%控股的公司。
[3] 除非另有说明，本文出现的法条指引都是来自上述第15/2010号法令。
[4] 规章确立的小型招标制度是一大创新，它将第54/2005号法令中的零散规定进行整合并加以完善。同时它还吸收了很多适用于此类招标的特别规定，使得莫桑比克采购法更为便捷和有效。仅限个人、微型和小型公司企业（具体标准由规章规定）具备参与该类招标制度的资格。
[5] 规章第113条明确规定了该类招标制度适用的情况，例如订立中出现紧急情况，先前的公开招投标被废止，涉及军事机密的合同或交易，租赁合同等等。规章还详细规定了该类招标的决标程序

4.莫桑比克国内外的个人或公司，只需要满足规章第20条至第30条关于投标人法律资格、经济和技术资质以及良好的纳税纪录等方面的要求，就是合格的投标主体。
关于资质要求，需要投标人出示工商营业执照和公证文书（或其他等效文件），并书面声明自己不存在规章第21条所述的任何障碍，出示合法的定期收入声明、年度审计报表和缴税信息，资产状况，上年度审计报告，一份无人申请投标人破产（投标人与债权人之间也无任何协议或安排）的声明，具备从事招标工程项目资质的注册证书和有关机关颁发的许可证或其他等效文件，是集团公司的要出示必要的（财团投资项目）说明或组成财团投资项目的协议。
对外国投标人而言，要求其递交的各种文件与本国投标人相同。

具体而言，包括递交法律资格，经济/财务和科技资质，在其本国的纳税情况等文件。
但这些外国投标人必须在莫桑比克境内有代理人，且具备接受传唤，法律文书通知，承担行政和司法责任的能力（相应的代理委托书或正式任命文件应当在公开招标程序或其他合同前程序中与投标书一同递交）。
另需特别注意的是某种程度上限制外国投标人参与投标的情况：合同价值低于一千零五十万梅蒂尔卡的公共建设合同，合同价值低于525万梅蒂尔卡的物资和服务供给合同（见第26条和第90条[6/7]）。
该类限制需获得相关部委的提前批准（且该批准有理有据），方能适用。

5.评标和定标——即定标标准——采用"[8]最低竞价" 标准为基本原则。
即最低报价的投标人就是最后的中标人。如果出现相同最低报价，则通过"抽签"的方式确定最终中标人。
规章同时规定，在合理的情况下[9]，标标准可采取"综合标准"，即综合考虑各投标书的技术评估和价格。
出现平局时，选用技术最好的投标书。如果投标方案各方面依然不相上下，则通过公开"抽签"决定[10]。

三、公共建设合同

1.公共建设合同的法律性质属于行政合同（见第40条（1）所述）[11]。
由此可得知：从实体法角度，该类合同属于行政法范畴[12]，而从程序法角度，行政法院有管辖权。而后者，规章允许合同中由双方当事人约定争议解决条款，可选择在莫桑比克境内用葡语进行仲裁。

2.履约保证书是公共建设合同的先决条件[13]。
在此点上，规章与第54/2005号法令不同，无需再要求政府采购方在招标书中对投标人的提供履约保证书予以明确。

3.总体而言，该规章中规定公共建设合同的内容比较少，也缺少一些他国立法中常见的规则，比如对工程委托的形式规定，工程评定规则，停工原因的规定，意外事件或不可抗力，特别是困难情形，财政平衡和情势变更——作为第54/2005号法令的替代者，规章在这些不足上没有相关改善。

在此认识基础上，这些问题应当遵照现行的工程监督规则，临时和最终工程验收规则，合同中政府方享有的特权，限制修改合同条款，终止合同的理由及其各种结果，按民法原则予以处理。
工程保证期为5年，从工程完工时起算[14]。

[6] 仅限国内投标人的招标项目的限制标准较第54/2005号法令有了较大改变，为更多的外国投标人提供参与到政府采购招标项目的机会。
[7] 从性质上而言，这是一种可选择的限制，即在合同价值满足文中标准的情况下，可以选择适用，也可以不适用。但当政府招标方决定不限制外国投标人参与竞标时，即允许外国投标人竞标，政府招标方有义务为国内投标人提供"竞价优惠"——无论是公共建设合同还是物资和服务供应的招投标。在物资和服务采购中，国内投标人需证明其物资具备国内性，即至少其价值的20%来源于国内（见第26条3、4、5款）。
[8] 需要注意的是，与其他国家的一般立法规则不同，对于投标人异常低价的情况，规章不要求评标小组一定要投标人就低价进行说明。
[9] 作为规章的众多创新之一就是定标的综合标准，即综合考虑技术评估和价格，以及使用"莫桑比克制造"或"莫桑比克骄傲"标语的证书。规章对该类标语的使用进行了规定，并鼓励国内投标人使用（见第37条第4款和第39条第1款）。
[10] 涉及公共建设项目和服务的特许证的决议过程可能还要参考其他标准，比如考虑申请许可证的最高报价，对公共服务使用人而言的最低价格，提供的公共物资和产品的最好质量以及公众满意度。这些标准可以单独作为考量标准也可以综合考量。而在能源领域，特别是电力和石油产业，对特许证有特别规定。
[11] 本文主要内容是围绕公共建设合同，但其中很多内容也同样适用于物资和服务采购合同，特别是这两者的法律性质，都属于行政合同，在对政府招标方的权力方面，有许多共通之处。
[12] 如规章所述，一般原则是适用行政合同的原则，其次才是由私法原则予以补充（见第40条第2款）。
[13] 在小型招标合同中无需履约担保书，无论是公共建设合同还是物资和服务采购合同。聘用个人顾问时，依法也不需要履约担保书。
[14] 规章第50条规定，工程保证期也可以少于5年，但不得低于1年。

根据规章第二条，各公共建设项目都由财政部、工业与贸易部、公共建设住房部和教育卫生部以联合文书的形式分别发布政府招标书。也就是说，许多规章中没有规定的事项，可由招标书加以具体规定，所以不同的招标书在某些方面可能有截然相反的规定。

4.另外不得不提规章中关于“招投标登记注册”的规定（见第58条）。
简言之，规章允许在公共建设合同，物资和服务供给中存在“单一投标人登记注册”的情况。

这里的“登记注册”没有时间限制，而且对已登记注册的投标人而言，拥有很大的便利——无需再向招标方出示上文所列的各种资质证明文件[15]。

5.最后值得注意的是，依据规章可以对政府招标方对招标项目的分类提出异议。而依据之前的第54/2005号法令，仅可对定标决议申请异议。
如果向上级主管机关提出的异议被驳回，那么申请人可以提起行政诉讼[16]。

但申请人提出异议或向上级主管机关申请异议的时间期限只有三个工作日，这个时间显得非常紧迫。

最后，我们想说，这是一部值得每一位有意与莫桑比克政府订立采购合同的个人或公司去了解的法令。

[15] 规章规定，公共工程承包商的正式登记注册取决于许可证（由土木建设承包商许可证委员会颁发）有利害关系的人的陈述（见第60条第2款）。
[16] 此处的向上级主管机关申请异议是提起行政诉讼的前提。

12/15F, Guohua Plaza, No.3 Dongzhimennan Avenue, Dongcheng District, Beijing 100007, PRPRC (headquarters)
T. (+86) 10 5813 7799 . F. (+86) 10 5813 7788 (12/F) . www.dachenglaw.com

Public Procurement in Mozambique

I. Framework

The legal framework for public procurement in Mozambique is currently laid down in Decree 15/2010, of 24 de May[1] , which approved the new "Regulations for Public Works Contracting, Supply of Goods and Provision of Services to the State" (the "Regulations").

Even from a brief analysis of this piece of legislation, its importance in the context of contracts with the State in the broad sense is clear to see.

Also by way of an introduction, it is important to emphasise that we are dealing with legislation that takes what we can say is a successful unitary approach to the issues most relevant to the area of public procurement, including the system for the most important administrative contracts. In a word, it can be said that the Regulations under analysis are a very useful codification of this (always) complex theme.

II. Subjective scope of application, core principles and rules of public procurement

1. The Regulations under analysis apply to all State bodies and institutions, including local government and State companies[2] .

2. The Regulations enshrine traditional guiding principles for the activities of public authorities from among which we would highlight the principles of legality, proportionality, transparency, equality and good faith.

However, it should also be pointed out that, alongside these fundamental principles which should guide the conduct of the State in the sense already referred to, express provision is also made for other specific principles on issues of adjudication, such as, inter alia, the principles of stability, competition and sound financial management.

We must also stress that, under article 4 of the Regulations[3] , there is an express reference to the "other principles of public law", which means we should not lose sight, in the application of the said Regulations, of the provisions of articles 4 to 14 of Decree 30/2001 of 15 October, which establish the "Rules for Operation of Public Administration Services".

3. The usual rules that shape public works contracting and the acquisition of goods and services are those of public tender procedure (see article 7).

By contrast with the "general system" (of public tender), we have what is called the "special system". This system requires the application of rules different to those set out in the Regulations for specific public procurement cases in which a treaty or other type of international agreement determines the adoption of distinct procedural rules. We also have what is called the "exceptional system". Where the proper "public interest" grounds exist, this system allows the contracting public entity to choose one of the following pre-contractual procedures: tender with prior qualification, limited tender, two-stage tender, tender by bidding, small-scale tender [4] and private treaty [5]).

4. Individuals and companies, both Mozambican and foreign, that meet the legal, financial/economic and technical requirements and have their tax situation in order in accordance with the Regulations (see articles 20 to 30) are considered to be "eligible" for tenders for public works and the supply of goods and services.

In the context of this "qualification", we highlight the need for the proposals to be accompanied by the commercial registration and the public deed or other equivalent document, a declaration signed by the bidders that they do not have any of the various applicable "impediments" (see article 21), the consortium project or agreement for establishment of a consortium (in cases of groups of companies), the periodic declaration of income and annual declaration of accounting and tax information, asset situation and accounting information for the latest financial year presented in accordance with the law, a declaration that there are no applications for insolvency against the entity (and that it has not requested any arrangement with its creditors), a certificate proving registration or enrolment in a professional activity compatible with the subject matter of the contract in question, a licence or equivalent document issued by the appropriate body in the case of activities subject to such requirements.

In this respect it is important to point out that "foreign bidders" have the option of presenting documents "equivalent" to the ones required from "domestic bidders".
On the same point, the Regulations provide that "foreign bidders" should be able to demonstrate their legal, economic/financial and technical qualifications as well as their tax situation in their respective country of origin is in order.

However, they must have a "proxy" resident and domiciled in Mozambique with special powers to accept service of summonses and subpoenas, and answer administratively and legally for their acts. (The relevant power of attorney or other official appointment document must be filed with the proposal to be submitted in the public tender or other type of pre-contractual procedure).

[1] This Decree repealed Decree 54/2005, of 13 December.
[2] For the purposes of the Regulations, all companies in which the State holds 100% of the respective share capital are considered to be "State" companies.
[3] Where there is no express indication or other legislative source, all legal provisions should be understood to be provisions of the Regulations approved by Decree 15/2010, to which we have been referring.
[4] The enshrinement of the small-scale tender process represents one of the innovations introduced by the Regulations which have grouped together and established a system for a set of scattered references that the old Decree 54/2005 contained in relation to small-scale tender processes. It also established a collection of rules that are specifically applicable to this type of tender and through these provisions it seeks to make the legal framework for public procurement in Mozambique faster and more efficient. It should be noted that only individuals, micro and small companies (as defined by the Regulations) may take part in these small-scale tender procedures.
[5] Turning our attention to the relevance of the private treaty procedure (see article 113), we would like to make it clear that this "mechanism" may be used, for example in cases of "emergency", *rectius*, urgency in contracting, in cases in which a prior public tender was abandoned, in cases that involve "secret" military contracting or acquisitions, in case of rental contracts. It should be noted that all the said adjudication procedures are sufficiently regulated in the Decree we have referred to.

An this point, something that is worthy of particular attention is the fact that contracting public entities may restrict the participation of "foreign bidders" in significant adjudication processes, that is processes of a value of less that ten million five hundred thousand meticals in the case of public works contracts and five million two hundred and fifty thousand meticals in the case of acquisition of goods and (see articles 26 and90[6/7]).

In any case, this type of limitation is dependent on the prior and well-grounded authorisation of the relevant Minister.

5. In relation to the evaluation and decision criteria – that is, the adjudication criteria – it is important to mention that the overriding criterion is the "lowest price"[8] .
Consequently, in general, the proposal with the lowest price is the proposal chosen for the purposes of adjudication. In the event of a tie, the final classification of the bids is established by a "draw" (seearticle38).

Exceptionally under the Regulations, the adjudication criterion may be a "combined criterion", which means a criterion that takes into consideration the technical evaluation of the proposal and the respective price. Naturally, there must be sufficient grounds to take this approach[9] .

In situations where there is a tie in the evaluation of proposals, the best technical proposal will prevail. If the tie in the classification of proposals persists, there will be a "draw" in the context of the public session[10] .

III. PUBLIC WORKS CONTRACTS

1. Public works contracts are considered to be administrative contracts by legal definition (see article 40 (1))[11] .
Two corollaries immediately result from this: on the substantive level, these contracts are subject to the system of administrative law[12] ; on the procedural level, these contracts are subject to the jurisdiction of the administrative courts. On this latter issue, it is important to point out that the Regulations allow for the existence of dispute resolution clauses in these contracts. However, the arbitration must take place in Mozambique and in Portuguese.

2. A performance bond must be provided as a condition precedent to the making of a public works contract[13] .
Contrary to what happened when the old Decree54/2005 was in force, this obligation does not have to be expressly included in the tender documents.

3. In general, we can say that these Regulations are sparse in their regulation of public works contracts and surprising in the absence of rules (which are very common in other comparable legislation) on the formalities for the consignment of works, the rules for evaluating works, the reasons for suspension of works, cases of accidents or force majeure, particularly difficult circumstances, financial equilibrium and changes in circumstances – the substitution of Decree 54/2005 by the new Decree not having remedied the fragilities mentioned above.

Having made this observation, the problems of which may as quickly as they were announced be resolved by recourse to the civil law, we must, however, underline the existence of rules on the supervision of the works, the provisional and definitive acceptance of the works, the prerogatives of authority of the contracting public entity (the developer), the limited cases for alteration of the contractual provisions, the grounds for termination of the contract and the respective consequences.

The maximum guarantee period for the works is five years form the date those works are concluded[14] .

On this point it should also be noted that under article 2 of Decree 15/2010, it falls to the ministers of finance, industry and trade, public works and housing, and health and education to approver, under joint legislative instruments, the specific tender documents for each State tender process. This means that there is nothing to prevent, and quite the contrary, some of the issues not covered in the Regulations under consideration being regulated in the said tender documents (for each specific case).

---

[6] The value of the limits applicable to these adjudication processes that can be restricted to "domestic bidders" was increased considerably by the new Decree, making this option even more significant.
[7] Naturally, this is a case of a legal option and, as a consequence, it may or may not be adopted. However, it should be noted that if the contracting public entities do not opt to apply this significant restriction, they are obliged to observe "margins of preference to Mozambicans" capable of benefitting domestic bidders – whether in the case of public works or that of the acquisition of goods and services. In the latter case, proof must be offered of the incorporation of domestic factors in the goods to be acquired, the value of which must correspond to at least twenty per cent (see article 26 nos. 3, 4 and 5).
[8] We would like to point out that, contrary to usual practice in other legislation of the same type, there is no legal rule that determines that an abnormally low priced proposal should be the subject of clarification to be requested from the bidder by the tender jury.
[9] One of the innovative measures introduced by the new Regulations consists of the inclusion among the factors to be included in the technical evaluation, which together with the price, makes up the combined criterion that may govern the adjudication, of the possession of a valid certificate with seal of the right to use the slogan "Orgulho Moçambicano"* – *Made in Mozambique"* [*Mozambican Pride]. The right to use this slogan arises from various provisions in the Regulations and seeks to encourage domestic bidders to adopt it (see articles 37 (4) and 39(1)). 10
[10] We stress that the adjudication of concessions for public works or services is done with recourse to the other types of adjudication criteria, that is, the greatest offer of price for the attribution of the concession, the lowest rate or price to be applied to the users of the public service, the best quality of services or goods to be made available to the public and the best handling and satisfaction of demand. These criteria may be considered independently or jointly. It is clear that there is legislation specific to the attribution of concessions in the energy sector, specifically in the areas of electricity and oil.
[11] We now limit ourselves to this brief note on public works contracts as they are the most relevant, although the considerations set out here are, generically, applicable to contracts for the supply of goods and acquisition of services, specifically as to the legal nature of all these contracts as administrative contracts and, in the same way, in respect of the powers of compliance on the part of the contracting public entity.
[12] As the Regulations state, this contractual type is also subject to the "general theory of contracts and, only on a secondary level, to the provisions of private law (see article 40 (2)).
[13] The provision of a definitive guarantee may be dispensed with in the case of small-scale contacts for works, the supply of goods and the provision of services. This may also happene in the event of the selection of individuals for the provision of consultancy services, an issue also regulated by this legislation.
[14] Article 50 of the Regulations allows for the term of the guarantee for the works to be shorter than five years but never shorter than one year.

4. A final word is needed to draw attention to the provisions of the Regulations in relation to what is called the "register" (see article 58).

For the sake of brevity, it is important not to disregard the existence of a "single register" of contractors for public works, and supplies of goods and services, that are eligible to take part in adjudication proceedings.
The said register is permanently open to entities that want to register and offers the advantage – which we must emphasis is extremely significant – of removing the need for duly registered entities to present the items described above that are required for them to qualify [15].

5. The final point that merits attention is that complaints may be made to the contracting public entity about that the acts of classification and de-classification provided for in the Regulations. The possibility of appeal to the appropriate authorities also exists. Under the previous system only the act of adjudication was subject to such measures.

There will always be the possibility of appeal to the courts against a rejection decision made in the context of an appeal to a higher authority[16].

On this issue, it should be noted that, at only three business days, the time limits to make a complaint or to lodge and appeal to a higher authority are clearly very short.

In conclusion, it can be said that we are facing a piece of legislation which is essential reading for anyone who might be interested in entering

[15] It should be noted that the new Regulations now makes the official registration of public works contractors depend on the presentation by the interested party of the licence issued by the Civil Construction Contractors Licensing Commission (see article 60 (2)).
[16] For us the, an appeal to a higher authority means a necessary appeal to a higher authority. In other words, to appeal to a court, it is a pre-requisite that there has already been an appeal to a higher authority.