

SMALL-SCALE PUBLIC-PRIVATE PARTNERSHIPS AND BUSINESS CONCESSIONS

PROJECTS WORTH NO MORE THAN MZN 5,000,000

Following the entry into force of Law No. 15/2011, of 10 August – a Law that approves the guidelines for the process of contracting, implementing and monitoring public-private partnership projects, large-scale projects and business concessions (PPP, LSP and BC Law) – as well as Decree No. 16/2012, of 4 July – Regulation of the PPP, LSP and BC Law – there was a need for compliance with the provisions of Article 3, nº 4 of the Regulation of PPP, LSP and BC.

The said law established that “for the purposes of Article 40¹ of Law No. 15/2011, of 10 August, the procedures applicable to contracting small-scale PPP and BC projects, with investment of less than the minimum defined by law for the purpose of mandatory prior assessment by the appropriate authorities for this purpose, are laid down in specific regulations”.

¹ According to this article, the Council of Ministers is responsible for the general and specific regulation of Law of PPPs, LSP and BC.

Under this legal provision, approval was given to Decree No. 69/2013, of 20 December which approves the Regulation of Small-Scale Public-Private Partnerships and Business Concessions (Regulation of SS PPP and BC) which entered into force 30 days from the date of its publication in the Official Gazette (*Boletim da República*)².

This Regulation sets out the guidelines and procedures applicable to the process of contracting, implementation and monitoring projects with an investment value of no more than MZN 5,000,000 (five million meticals), carried out in the country on the initiative or decision and control of governmental entities at a central, provincial and district level, by local authorities, as well as through private sector initiative³.

² Official Gazette (Boletim da República) No. 102, I Series, 20 December 2013.

³ SS PPP and BC projects of an altruistic, social, humanitarian, cultural, sporting or other similar non-profit nature are excluded from the scope of application of the Regulation.

SS PPP AND BC PROJECT CONTRACTING PROCESS

The contracting of SS PPP and BC projects is by **open tender**. It can exceptionally be by **direct award**, applicable in those cases in which there were no responses to the previous call for tenders launched by the contracting authority or all the bidders were disqualified⁴.

⁴ In addition to the above, the PPP, LSP and BC Law and its Regulation envisage other forms of contracting PPP, LSP and BC projects, notably, tender with prior qualification (adopted when competitiveness by means of an open tender may be restricted given the complexity of the qualification requirements or the cost of drawing up bids to participate in the tender), and two-stage tender (used in projects in which the underlying technical complexity or the need for better justification or technical clarification of the initiative of the project prevent the public entity from accurately defining in advance technical specifications that are the more satisfactory and in the public interest or the best way to serve the public interest).

The open tender involves the following stages: (i) **launch and publication of the tender** (includes the dissemination, publication and promotion of the project proposal); (ii) **submission of bids** (which must include a financial guarantee of good faith and responsibility in their participation in the tender); analysis and assessment of the bids; (iii) **award of contract**; (iv) **conclusion of the contract** (signed at the private notary's office of the Ministry that supervises Finance, after assessment and authorisation of the project's foreign investment).

Legislation on the contracting of public works, and the supply of goods and services to the State will also be applicable to the tender procedure, in the alternative⁵.

It should also be noted that there is the possibility of public bidding when a project proposal is presented through private initiative not set out in a public plan and it is accepted by the public entity.

The bidding is intended to gauge and adapt the terms of the project's technical and financial proposal, its quality, price and other conditions proposed for the contracting, the proposer of the project initiative enjoying a preferential margin of 15% on the assessment of bids from competitors for the award of contract, as a result of that bidding.

FORMS OF CONTRACT PROVIDED FOR IN THE REGULATION

The instruments of legal regulation of partnerships between public⁶ and private partners under the aforementioned Regulation are: the **concession agreement**⁷ (used for granting development or rehabilitation rights and the corresponding operation and maintenance of a new or existing project); **operating lease** (used for granting development or rehabilitation rights, as well as the operation and maintenance of an existing project); and **management agreement** (used for granting management rights for an existing and operating project).

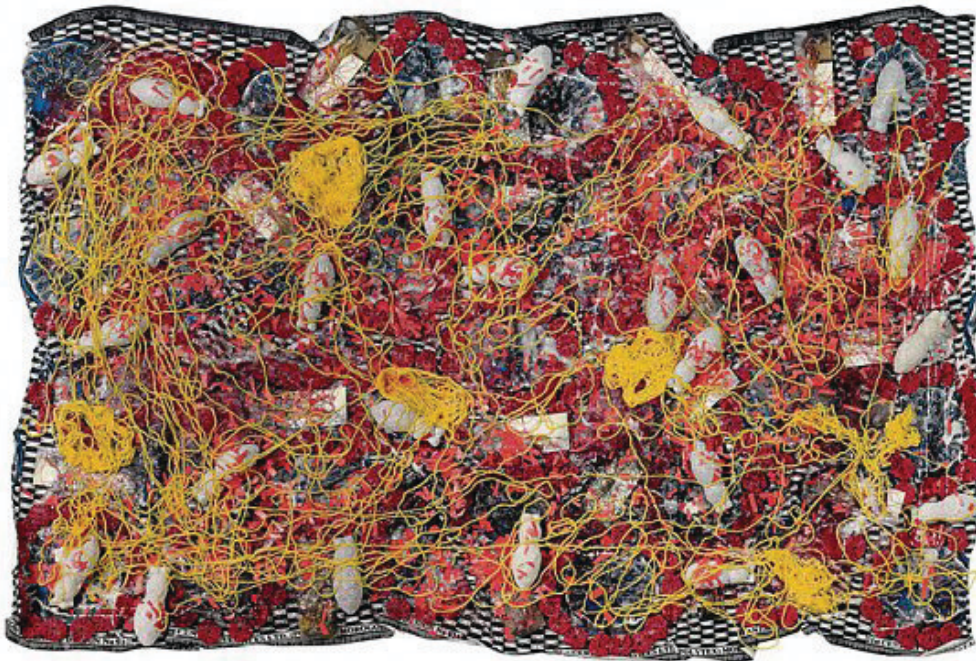
It must be noted that the concession agreement has a maximum duration of 15 years, the operating lease has a maximum duration of 10 years and the management agreement has a maximum duration of 6 years. It must also be noted that the time limits of agreements are determined based on the following: (i) Investment to be made and time necessary for its recovery; (ii) Nature and complexity of the service to be provided; (iii) Object of the concession; and (iv) Underlying public interest.

It is to be noted that, with regard to the contracting of PPP, LSP and BC projects under the PPP, LSP and BC Law and its Regulation, the time limits for the duration of the PPP project agreements are longer, namely, the maximum concession agreement is 30 years, the maximum duration of an lease agreement is 20 years and the management agreement has a maximum duration of 10 years. The length of LSP and BC projects is determined according to legislation specific to the project sector or, failing this, to the term provided for in the agreement.

⁵ Regulation No. 15/2010, of 24 May (Regulation of the Contracting of Public Works Contracts and the Supply of Goods Services to the State).

⁶ Public partners are the State or other public entities or local authorities that are parties to a contract.

⁷ A concession agreement can take one of the following forms: (i) BOT - Build, Operate and Transfer; (ii) DBOT - Design, Build, Operate and Transfer; (iii) BOOT - Build, Own, Operate and Transfer; (iv) DBOOT - Design, Build, Own, Operate and Transfer; (v) ROT - Rehabilitate, Operate and Transfer; or (vi) ROOT - Rehabilitate, Own, Operate and Transfer.



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FINANCIAL GUARANTEES OF PERFORMANCE

The entity contracted must provide a guarantee of performance and full compliance with its contractual obligations. This guarantee must be furnished in the form of a bank guarantee, cash, insurance policy or another reliable fiduciary instrument, on conclusion of the agreement, for an amount equivalent to 2% of the volume of investment.

It is to be noted that, with regard to the contracting of PPP, LSP and BC projects under the PPP, LSP and BC Law and its Regulation, the guarantee to be furnished by the entity contracted must be for an amount equivalent to 10% of the volume of investment and remain valid until the start of operation of the activity, at which time it is returned to the contracted entity, which must furnish other contract guarantees, including a start-up guarantee to be returned at the term of the agreement.

CONCESSION FEE

SS PPP and BC projects are subject to a monthly fee, as a rent, for the pursuit of the activity which is the subject of the agreement, of an amount not less than 3% of the net revenue from indirect taxes or a fixed monthly fee of an amount no less than 2% of the value of the asset (in the case of lease of an asset to the project).

ALTERNATIVE REGIME

In the event of an omission in the Regulation of SS PPP and BC, the provisions of the PPP, LSP and BC Law and its Regulation will apply.

Amina Abdala

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