

July 27, 2012

mozambique@vda.pt

New Regulation of the Law on PPP, LSP and BC

The past 4 July saw the publication of the Regulation of the Law about Public-Private Partnerships (PPP), Large-Scale Projects (LSP) and Business Concessions (BC) which, in compliance with article 40 of Law no. 15/2011, of 10 August (Law on PPP, LSP and BC), establishes the procedures applicable to the contracting, implementation and monitoring of PPP, LSP and BC.

The act under discussion regulates, with some detail, the rules laid out in the aforementioned Law, covering the matters regarding (i) the powers of the Sectorial and Financial Supervisor (*Tutela Sectorial e Financeira*), the Regulatory Authority (*Autoridade Reguladora*) and the Implementing Entity (*Entidade Implementadora*); (ii) the pre-contractual stages of the the Projects; (iii) the types of public contracting procedures; (iv) the financial guarantees and incentives to investment; (v) the contracts and respective revisions or amendments; (vi) the execution of contracts, redemption, causes of termination, amongst others; (vii) the prevention and mitigation of risks in PPP; and (viii) the sharing of benefits.

1. Public contracting

The types of procedure of public contracting set out are the public tender, the tender with prior qualification (similar, in general terms, to the public tender and the limited tender with prior qualification found in the Portuguese Public Contracts Code), the two-stage tender and the direct award of contracts. The two-stage tender is used for projects where the underlying technical complexity or the need for better reasoning or technical clarification of the project does not allow the public entity to previously and precisely define the technical specifications most adequate to the public interest. The direct award of contracts, on the other hand, is a last-resort procedure which can only be used "in situations that are noteworthy and duly justified by the public entity" or in a case where a prior tender has been deserted or the successful contestant has pulled out.

It should be noted that the contracting process may be invalidated or canceled whenever the results of the analysis of the proposals and negotiations do not correspond to the public interest goals that underlie the setting-up of the PPP in question, in accordance with the tender documents and applicable law. The possibility of invalidation or cancellation is equally based on vague concepts leaving the public entity a significant degree of discretion.

The assessment of the proposals is carried out in two stages – the first stage involves the evaluation of technical proposals with a view to qualifying the contestants that are eligible to present financial proposals. As for the assessment criteria, the Regulation is not very clear. On the one hand, it refers to the determination of the ranking of the qualified contestants based on the following criteria: (i) scale of the investment to be made; (ii) levels of production or provision of services envisioned; (iii) level and impact of the financial benefits; (iv) level and impact of the socio-economic benefits. On the other hand, the Regulation also mentions the evaluation of the economic and financial viability and the equitable sharing of the benefits, as well as the incurrance of risks, which is to be carried out in accordance with the economic and financial model approved by the supervisor.

2. Security and Incentives

It is also important to emphasise Security and Incentives matters. The Regulation establishes the rules that are applicable to the form and terms of the granting of financial security by the contracted entity, to the granting of financial aid by the public entity, to the security and incentives to investment and also to the access to security against non-commercial risks.

In what particularly concerns the granting of financial aid, the Regulation provides that the Council of Ministers, taking into account the strategic national or socio-economic interest in question, may authorize and enable the setting up of a PPP that is economically viable but not feasible financially, through one of the following ways: (i) participation of the State or another public entity in its financing, by way of a subsidy or a participation in the share capital or through the granting of a financial guarantee; (ii) facilitation of access to financing requested from multilateral or governmental institutions; (iii) attribution of a subsidy or compensation for the difference between the real cost and the price or tariff set by the Government.

3. Contracts

The Regulation also establishes the essential core of the contracts, expressly setting forth a significant array of clauses that must be included in the contracts related to those projects, as well as a series of formalities to be complied with such as the need to prior supervision and publication of the main terms of the Contract in the official gazette (Boletim da República).

In regards to the implementation of contracts, the act regulates contractual revisions or amendments, which shall only take place by means of a mutual agreement or for the purpose of correcting or adjusting situations arising from events or factors that are beyond the control of the professional or management capacity of the parties, as well as for mitigating the effects of events of force majeure that substantially affect the compliance with or the scope of (i) deadlines for the implementation of the project; (ii) levels and types of investment, (iii) levels of production and of satisfaction of agreed needs, (iv) contractually agreed indicators or ratios, (v) others.

Additionally, in what concerns the PPP's regime, it is stressed that these may take on the following types (i) concession agreement, (ii) management and operation agreement and (iii) management agreement, with maximum terms of 30, 20 and 10 years respectively.

4. Sharing of risks and benefits

As far as the principle of risk and benefit sharing provided in the Law on PPP, LSP and BC is concerned, the Regulation rules, on one hand, the allocation and the forms of prevention and mitigation of risk in PPP and, on the other hand, the forms of benefit sharing in PPP, LSP and BC projects.

The sharing of financial benefits is reflected in measures such as (i) the duty to ensure the inclusion of a participation of 5% to 10% in the share capital of the private promoter, reserved for preferential purchase by Mozambican individuals; (ii) the opportunity for Mozambican corporate entities to participate in the project; (iii) the contribution of the project to the creation of a positive exchange effect for the Balance of Payments; (iv) the establishment in the contract of extraordinary benefit sharing, by way of the constitution of a reserve for the economic stabilization of the project, sharing of the value of the extraordinary annual benefit, execution of investment projects or social responsibility programs, or other, (v) the payment to the state of adjudication tax, bonus or signing fee, concession tax, etc.

In addition to socio-economic benefits referred to in the Law on PPP, LSP and BC, the Regulation also provides for the inclusion of contractual clauses directed at the conservation of the environment, as well as social responsibility, development and sustainability programs, to be agreed with the relevant populations.

5. Renegotiation of agreements in force

In line with the Law on PPP, LSP and BC, the Regulation rules the treatment given to the renegotiation of contractual clauses already applying at the date of the respective entry into force, in order to ensure that the assessment of the effects of the renegotiation for each contracting party is complemented with a verification of the adequacy of the measures that ensure the prevention and mitigation of risks and the equitable sharing of expected benefits inherent to the project.

The result of the above assessment is reflected in the demonstration of the material effect of each clause, with a clause whose overall result represents a loss or decrease in revenue for the State of an amount equal to or above 25,000,000 meticaís a year being considered to have a material effect that justifies its renegotiation.

The Regulation entered into force on the date of its publication.

For more information please contact:

Vanda Cascão | VdA, Partner: vc@vda.pt

Nuno Castelão | VdA, Head of International Relations: nc@vda.pt

Isabel Garcia | Silva Garcia, Partner: Isabel.garcia@silvagarcia.co.mz

Ana Rita Almeida Campos | VdA, Head of Business & Practice Mozambique: arc@vda.pt

Catarina Pinto Correia | VdA, Managing Associate: cpc@vda.pt

Ana Luís de Sousa | VdA, Managing Associate: als@vda.pt

LISBON

Av. Duarte Pacheco, 26
1070-110 Lisboa Portugal
lisboa@vda.pt

OPORTO

Av. da Boavista, 3433 - 8º
4100-138 Porto Portugal
porto@vda.pt

MADEIRA

Calçada de S. Lourenço, 3 - 2º C
9000-061 Funchal Portugal
madeira@vda.pt

BRAZIL

Pinheiro Neto Advogados
brazil@vda.pt

ANGOLA

Paulo Antunes Advogados
angola@vda.pt

MOZAMBIQUE

Silva Garcia Advogados e Consultores
mozambique@vda.pt

This is a limited distribution and should not be considered to constitute any kind of advertising. The reproduction or circulation thereof is prohibited. All information contained herein and all opinions expressed are of a general nature and are not intended to substitute recourse to expert legal advice for the resolution of real cases.