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INVESTING IN ANGOLA: THE NEW RULES ON PUBLIC PROCUREMENT



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The current system of public procurement is governed by Law No. 20/10 of 7 September - the Public Procurement Law («PPL»). The PPL repealed the earlier legislation, in particular, Law No. 7/96 of 16 February and Decree No. 40/05 of 8 June, which established the rules in relation, respectively, to the system for public expenditure, the provision of services, the leasing and acquisition of goods, and to the system for public works contracts. The PPL, therefore, consolidated both earlier systems into a single piece of legislation that has been in force since the 6 December 2010.

In preparing the PPL, the legislature was aware of the needs for human, technical and financial capacity on the part of contracting public authorities. As such, it has also focused on simplifying the procedures for purchasing goods and services and for public works projects by increasing the use of new technologies in public procurement.

The importance of these matters has greatly increased recently with the recent entry into force of Law no.º 2/2011 on Public-Private Partnerships in Angola (the «PPP Law») and the Public Probity Law. The publication of the PPP Law, coupled with the fact that Angola continues to be a country of significant growth where the state is still the main customer of many companies, not only Angolan but also foreign, confirms the usefulness of this Newsletter. The Public Probity Law,

Law No. 3/10 of 29 March, reflects the need and the concern on the part of the State to change and to demonstrate to Angolans that the performance of duties in the administration of the State, in the various forms of public administration and other public powers, must be duly respected.

With this in mind, the law enshrines and brings together in the same text the duties of loyalty, impartiality, probity and others of a professional and public nature. Despite the publication of this law on probity, the legislature also made a point of transposing the ideals of probity into the PPL itself. The PPL has a chapter entitled *Ethics in the Procurement Process* which applies above all to the employees and agents of the contracting public body, members of the evaluation committee and the jury itself. The procedural evaluation committee is, moreover, in itself, one of the innovations of the PPL.

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TYPES OF PROCEDURES

Always guided by ideals of impartiality and fair and equitable treatment of all bidders, the following state agencies are subject to the new rules on public procurement: (i) organs of central and local state administration, (ii) the national assembly, (iii) the courts and the public prosecutors office, (iv) local authorities (v) public institutions, (vi) public funds, (vii) public associations, and (viii) public companies wholly financed by the general state budget (to be subject to specific regulations).

The types of procurement procedures have been reduced to just four by eliminating the very common private treaty method. This means that, in entering into agreements under this legislation, the contracting public authorities referred to above must choose one of the following procedures:

- a) Public tender
- b) Tender restricted by pre-qualification of candidates,
- c) Limited tender without presentation of candidates, or
- d) By negotiation, with or without prior advertisement.

The PPL also provides for the following special procedures:

- a) Design contests,
- b) Electronic dynamic acquisition systems, and
- c) Consultancy services procurement method.

In cases of leasing, acquisition of goods or procurement of services, there may still be a place for what is known as an electronic auction, provided that certain conditions are met.

The rule as to the choice of procedures set out above was that their adoption depends on the estimated value. To that end, a schedule to the legislation contains a sliding scale of contract values. The scale begins at 5 000 000.00 Kwanzas (level 1) and goes up to the maximum value of 1 100 000 000.00 Kwanzas. The choice of procedure to be adopted may, in some cases and

regardless of the estimated value, be determined according to material criteria.

PUBLIC PROCUREMENT OFFICE AND PUBLIC PROCUREMENT PORTAL

On an organic level, the PPL has introduced new models that differ from the previous system. These include the creation of a Public Procurement Office (the "Office") and a Public Procurement Portal (the "Portal").

The Office, recently created by Presidential Decree No. 298/10 of 3 December, acts as a support body for the Executive on matters of definition and implementation of policies and practices relating to procurement and it is hoped it will have representation offices in all provinces. The Portal, for its part, aims to equip the bodies subject to the law with a range of information related to public procurement. The Portal will feature electronic platforms and the rules for their setting up, operation and management will be established by a special law.

PURCHASING CENTRES

The PPL provides that purchasing centres may be created by the contracting public authorities in order to centralise the procurement of (i) public works contractors, (ii) leasing and (iii) procurement of goods and services. In fact, purchasing centres can set up exclusively for a particular sector.

For example, purchasing centres may handle the award of tenders for the execution of public works, procurement of goods, or the making of framework agreements, designated as supply contracts, which are aimed at securing the subsequent conclusion of public works contracts.

As purchasing centres carry out their activity as true contracting public authorities, they are, therefore, subject to the provisions of the PPL.

PROMOTION OF ANGOLAN ENTREPRENEURSHIP

Seeking to recognise the importance of public procurement to the survival of companies, the legislature felt the need to devote a provision to the *Development of Angolan Entrepreneurship*, thus

enhancing not only the content of the *Law on the Promotion of Angolan Private Enterprise*, Law No. 14/03 of 18 July itself, but also the already distant impositions introduced by Resolution No. 23/03 of 10 June.

The rule establishes that in procurement procedures, preference should be given to the admission, qualification and selection of domestic companies in order to give priority to domestic production. Indeed, in the procurement process, a margin of preference may be established for domestic candidates or bidders at the time of the adjudication.

This means that the participation of foreigners, whether individuals or companies, is limited to proposals with values higher than 500 000 000.00 Kwanzas for public works contracts and 73 000 000.00 Kwanzas for the acquisition of goods and services.

As an exception to this restriction, foreigners can apply for procedures to enter into contracts where the estimated value is lower than those set out above, or in which the procedure does not depend on value. This exception is conditional upon there being no individuals or companies in the Angolan Market that meet the conditions of eligibility necessary for the contract in question or when, for reasons of convenience, the contracting authority decides to do so.

Whatever their area of activity, candidates wishing to submit proposals may join forces with others. This important right will, for example, allow domestic and foreign competitors to

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The following rules merit special attention: (i) the prohibition on establishing down payments that exceed 15% of the total value of the contract, except when authorised by the Ministry of Finance on objective grounds, in which case such payments could go up to 30%, (ii) the prohibition on making addenda to contracts, being performed or already completed, the value of which exceeds 15% of the initial value, and (iii) payments arising from contracts must be made in Kwanzas although there are some exceptions.

associate with each other in some situations in order to enhance their proposals. If they present the winning bid, these associates must, however, agree on the appropriate legal vehicle to be adopted for their association before concluding the contract.

Interested parties, whether domestic or foreign, associates or not, will always have to prove, at every stage of the procedure, that they possess the legal qualifications and professional, technical and financial capacity required to implement the contract that is the subject matter of the procedure.

Throughout the PPL there are several provisions that make it clear this law takes a fairly protectionist approach. For example, in their operations purchasing centres must give preference to purchasing goods that contribute to the protection of domestic industry, at the same time as promoting competition. There are also rules that state that *«If price and quality are equivalent, the contractor, except where there is express provision to the contrary, must give priority in implementing the work, to materials produced by domestic industries.»* This demonstrates the care taken by the legislature to give priority to domestic companies and in this case, to domestic production itself.

PUBLIC EXPENDITURE

It should not be forgotten that, when it comes to public procurement, it is essential to bear in mind the implications on public expenditure and the application of State money. As such, it is important to remember the legislation concerning management and budget managers, public debt and any organic and functional legislation such as that of the Court of Auditors itself.

An example of this is Presidential Decree No. 24/10 of 24 March on the implementation of the General State Budget for 2010. This legislation has set new rules on procurement of goods and services for the State and other public authorities.

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This law came into force on 24 March 2010, taking immediate effect in respect of existing contracts that were signed after 1 January 2010. Contracts made after 1 January 2010 and which do not have a clause on the existence of budget coverage, the project or activity, the economic nature of expenditure and the number of the budgetary approval notice, should be amended accordingly.

It is also important to bear in mind in relation to these matters that certain acts and contracts are subject to preventive and even ongoing supervision by the Court of Auditors - Law No. 13/10 of 9 July. The preventive supervision itself is exercised through the Court of Auditor's official order. The order will be a refusal or a declaration of conformity with the applicable legislation and confirmation of the respective budgetary approval of the costs resulting from those acts and contracts.

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.
