

Public-private partnerships in Angola

Introduction

On 14 January 2011, the Angolan parliament adopted the Law on public-private partnerships (*Lei no. 2/11 de 14 de Janeiro: Lei Sobre as Parcerias Público-Privadas; "PPP Law"*). This memorandum provides an overview of some of the matters addressed in the PPP Law.

The introduction to the PPP Law explains that the Angolan Executive (being the President) has embarked on a programme for the renovation and construction of infrastructure for, amongst others, roads, railways, airports, distribution of water and electricity, sanitation of cities, applying the State's own financial resources or through borrowings. Many of the tasks can also be undertaken in close cooperation with the private sector. The private sector could finance the initiation, development and the execution of the projects and recover the investments thereafter through the exploitation of the infrastructure on the basis of a concession.

The purpose of the PPP Law is to define the general terms applicable to the involvement of the State in the various stages of a public-private partnership. The PPP Law provides the general legal basis for public-private partnerships in Angola, which should enable the State to take advantage of the management capabilities of the private sector to improve the quality of services delivered by the State and to save money. It also intends to ensure a balanced and careful allocation of risks and the creation of incentives to promote financially sound and well managed partnerships. The PPP Law is to a large extent based on the Portuguese public-private partnership law (*Decreto-Lei no 86/2003 de 26 de Abril*).

Definition of Public-Private Partnerships

The PPP Law provides an extensive description of what it considers to be public-private partnerships by reference to the legal arrangements and the parties involved in such legal arrangements.

Legal arrangements

The PPP Law defines public-private partnerships as a contract or a set of contractual arrangements pursuant to which private entities, designated by the private partners, are obliged towards the public partner, on a long term basis, to ensure the development of an activity that satisfies a collective need, and in respect of which the financing and the responsibility for investment and exploitation rests, in whole or in part, with the private partner.

Public-private partnership contracts also include, for example, concession agreements in connection with public works or public services, long term supply contracts, service agreements, management agreements and joint venture agreements in respect of the use of already existing infrastructure.

Parties

As public partners for the purpose of the PPP Law are considered the Angolan State as well as local governments, autonomous funds and services providers, and publicly owned companies. The PPP Law also applies to partnerships where the private partner is a cooperative or a not-for-profit entity.

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Exemptions

Exempt from the application of the PPP Law are:

- Public works contracts.
- Public procurement contracts.
- Public-private partnerships with a value of less than 500,000,000 Kwanzas (approx. USD 5,000,000 (exchange rate 7 March 2011)).
- All other supply contracts (goods and services) with a term of 3 years or less (without automatic renewal).

Status of PPP Law

The PPP Law prevails over any other law relating to public-private partnerships. It is, however, foreseen that the law may provide special legal regime for particular sectors. The regime will deal with economic, financial and technical principles and rules, specific procedures and the designation of a specific entity for the particular sector that will be responsible for the various steps in the partnership process.

Establishment of a public-private partnership

The PPP Law provides that in order to establish a public-private partnership the following conditions must be observed:

- The public-private partnership must be consistent with the General Plan for Public-Private Partnerships (*Plano Geral das Parcerias Público-Privadas*; "PGPPP"), a long term and multi-sector plan prepared by all ministerial departments concerned and approved by the Executive. In special cases, exceptions are possible.
- Compliance with the State's financing programme pursuant to the State's General Budget Law (*Lei do Orçamento Geral do Estado*).
- Clear expression of the objectives of the partnership.
- A partnership model that provides advantages to the public partner in comparison with other options with the same objectives and which, at the same time, provides for the private partner an adequate potential for financial return, taking into account the amounts invested, the degree of risk involved and the estimated time to execute the works.
- Compatibility with laws and regulations (e.g., environmental) and authorisation requirements.
- A partnership model that avoids or reduces, to the extent possible and unless there is an adequate basis for this, the probability of unilateral changes to the contract by the public partner or any other facts or circumstances that could result in a repositioning of the financial equilibrium.
- A competitive (economically or socially) negotiation result.
- The identification of the public entity that is responsible for the payments that are to be made under the public-private partnership and the identification of the origin of the financial resources to make such payments.

The division of risks in a project must be clearly defined in the contract and should be based on the principle that a risk is borne by the party who is best capable of managing this risk at the lowest costs.

CMAPP

Before a public-private partnership is submitted to the Executive, it is first evaluated by the Ministerial Commission for the Evaluation of Public-Private Partnerships (*Comissão Ministerial de Avaliação das Parcerias Público-Privadas*: "CMAPP"). The CMAPP is composed of the Minister of Economy, the Minister of Finance and the Minister of Planning. If a project relates to a particular sector, then the Minister responsible for that sector can also participate.

The CMAPP is, amongst other things, responsible for the preparation of a procedural manual for public-private partnership projects, the PGPPP, the approval of projects and guidance in respect of the contracting process (to be approved by the Executive).

Process

The PPP Law describes the process for the preparation of the project and the studies and documentation that should support the project. The package will be prepared by the responsible Minister for the project. The CMAPP will then evaluate the project based on the information and documentation received.

The CMAPP determines when a project can be launched for tender, in which case the responsible Minister can start with the selection of the private partner(s) and the negotiation of the terms of the partnership. The CMAPP can, upon proposal of the responsible Minister, decide to suspend or cancel the process if the results of the negotiations are not in line with the public interests that the partnership is intended to serve. The process will also stop if only one candidate partner is available, unless the CMAPP expressly decides otherwise.

Special purpose company

Before the partnership contract can be entered into, a special purpose entity will need to be established. The purpose of the entity, which can in principle be any of the commercial legal entities that are available under applicable Angolan law, will be entrusted with the implementation and management of the project. If the income of the special purpose entity exceeds an amount established by the CMAPP, it must be established in the form of a public limited company (*sociedade anónima*). This company may then also issue (listed) securities in the national and international capital markets. If the company's income exceeds another thresholds determined by the CMAPP, it will be obliged to report under IFRS.

The transfer of control in the special purpose entity requires the approval of the public authority as further set out in the partnership contract. If this approval is not obtained, then the partnership contract will terminate. In addition, it is not allowed for the public authorities to hold the majority of the capital in the special purpose entity, unless the shares in the entity are acquired by a state-owned financial institution following a default under the financing contracts relating to the public-private partnership.

Contract execution

Once the successful bidder is selected and the process in connection with the contract negotiations approved by the Audit Court (*Tribunal das Contas*), the CMAPP will submit the project file to the Executive for approval. After this approval has been obtained, the contract can be signed on behalf of the State by the Minister of Economy, the Minister of Finance and the Minister responsible for the sector to which the project relates.

Monitoring

The CMAPP and the responsible ministry will monitor the project in order to assess the costs and risks of the project and to improve the process for the establishment of new projects. The PPP Law grants a range of powers to CMAPP in connection with the evaluation of projects.

Changes

If a change to the contract or the obligations of the parties is proposed, the public entity involved in the partnership must submit a file to the responsible ministry which will forward this file together with its report for assessment to the CMAPP.

Financial equilibrium

The PPP Law includes a number of provisions that apply to the situation that the financial equilibrium in the partnership is affected. This financial equilibrium can be repositioned if there is a substantial change in the financial condition of the project, particularly as a result of a change imposed by the public partner in the scope of the private partner's obligations or in the conditions that are essential for the development of the partnership. The public partner and the private partner must share equally in financial benefits that the project may experience, such as improved financial conditions.

Any repositioning must take account of the original economic model that was developed as base-case for the partnership. The repositioning of the financial equilibrium can be effected through:

- A change in the term of the partnership;
- An increase or reduction in the monetary obligations;
- Direct compensation
- Any combination of the above or any other form agreed between the parties.

An adjustment in the financial equilibrium of the partnership will be treated as a change of the terms of the partnership contract and is therefore subject to assessment by the CMAPP.

Any increases in the costs of the project in excess of 200,000,000 Kwanza per year require approval of the Minister of Economy, the Minister of Finance and the Minister responsible for the relevant sector. The PPP Law describes how this approval can be obtained.

Arbitration

The PPP Law provides that disputes in connection with public-private partnerships can be submitted to arbitration in accordance with the Voluntary Arbitration Law (*Lei Sobre a Arbitragem Voluntária*). It further describes that, if an arbitration tribunal needs to be established in connection with a partnership, the public authority representing the public partner is obliged to inform the Ministry of Economy and the ministry responsible for the relevant sector. They can require the establishment of a negotiation commission.

Guarantee Fund

The PPP Law provides for the establishment of a Public-Private Partnership Guarantee Fund (*Fundo de Garantia para as Parcerias Públicos-Privadas*). This fund is intended to provide cover for extraordinary costs incurred by the State in connection with public-private partnerships that cannot be covered by the funds specifically allocated by the State for the implementation of the public-private partnership project.

External adviser

Special rules apply to external advisers of the public partners in a public-private partnership. A decision to hire an external adviser is subject to a number of requirements set out in the PPP Law. Furthermore, it is prohibited for external advisers to advise the private partner or any other party involved in the tender process. If this prohibition is not observed, this can lead to the exclusion of the party concerned in the tender process or an early termination of the partnership (based on a default by the private partner) and require the private partner to indemnify the public partner in accordance with the contract or the law. ■

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