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An Independent Law Firm based in Cameroon

NEW DECREE  
APPLICABLE  
**TO THE PUBLIC  
COMPANIES  
MARKETS**

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July 4, 2018

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On September 24, 2004, the President of the Republic of Cameroon took decree 2004/275 establishing the public procurement Code. This Code was replaced by a new public procurement Code on June 20, 2018 by decree 2018/366 of the President of the Republic of Cameroon. Nevertheless, in the case of this article all our references are based on the decree of 2004.

The public procurement Code of 2004 sets out the rules applicable to the awarding, execution and control of public contracts financed or co-financed, by the State budget, but also by the budget of a public or parapublic company. Thus, until the law of July 12, 2017 on the general status of public company, the public procurement Code applied to public company because all their markets constituted the public order. Indeed, the law of July 12, 2017 and its article 119 established that public companies were no longer subject to the public procurement Code and it was up to the Board of Directors (the “**Board**”) to ensure compliance with the rules of competition, equal treatment of candidates, transparency and fair price. Beyond the prerogatives conferred to the Board, the legal void established by this law of July 12, 2017 is to be noted in that, no more text framed the markets of public companies in Cameroon. It is to fill the void that the President of the Republic of Cameroon took, on June 12, 2018, Decree No. 2018/355 laying down the common rules applicable to the public companies markets (the “**Decree**”), to be found on our website.

The decree defines the public company as any “*economic unit endowed with legal and financial autonomy, exercising an industrial and/or commercial activity, and whose capital is wholly or mainly held by the State or a legal person*”<sup>1</sup> (the “**Public Company**”). Thus, these Public Companies are subject to the provisions of the Decree when the public market is financed or co-financed by their budget, bilateral or multilateral external assistance and/or a loan endorsed by the State. On the other hand, the Decree cannot apply to purchase orders, acquisition or rental of built or unbuilt buildings and to the acquisition of petroleum products intended solely for the use of vehicles of the Public Company<sup>2</sup>.

In addition, the Decree establishes, as from its entry into force, a transitional period of six (6) months ending on December 12, 2018 in order to enable the Board to set up the internal awarding market commissions and to designate its members<sup>3</sup>. During this transitional period, the markets launched by Public Companies will be governed by the public procurement Code.

We will further analyze the new rules for the award and execution of the Public Companies markets (1) before examining the monitoring of the execution and the penalties for infringements of the provisions of the Decree (2).

## 1. AWARDING AND EXECUTION OF THE PUBLIC COMPANIES MARKETS

### 1.1. Awarding of the Public Companies markets

The Decree innovates by defining new managing entities (1.1.1) and also by recognizing new procedures and types of markets (1.1.2).

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<sup>1</sup> Article 2 of the Decree. <sup>2</sup> Article 4 of the Decree. <sup>3</sup> Article 116 (2) of the Decree.

### 1.1.1.

#### The markets managing entities

Previously, the initiative and the conduct of the award of a market were the responsibility of the contracting authority or the delegated contracting authority.

As from now on, the management of the markets rests with the Board, with the contracting authority, the internal awarding markets commissions and the internal administrative management structures of the markets.

The Board has the most extensive powers to act in all circumstances on behalf of the Public Company. It is within this framework that the Board approves the procurement plan proposed by the general managing of the Public Company.

The Board shall also fix the thresholds for awarding the markets, purchase orders and letters of order, the rate of markets passed in accordance with the over-the-counter procedure. The Board shall lay down the arrangements for the organization and operation of the internal awarding market commission (the "**Commission**") for the appointment of its President and members. In addition, the Board creates within the Public Company the arbitration and recourse review committee. This committee is responsible for dealing with disputes brought by bidders to the award phase. In the end, the Board arbitrates the cases of disagreement between the contracting authority and the Commission.

The contracting authority shall implement and conduct in a concrete manner the awarding and execution operations. As a result, the contracting authority develops and updates the procurement plan, launches the tenders, assigns the markets, publishes the results, signs and notifies the markets. It follows the physico-financial performance of the market and in this sense terminates the contracts when necessary. Within the meaning of the Decree, the contracting authority shall be understood to mean the Chief Executive Officer of the Public Company who, after deliberation of the Board, may delegate his functions as contracting authority to one manager or more of his company.

### 1.1.2.

#### Procedures and types of markets

For the interests of competitiveness, the deadlines for the usual procedures have been reduced and adapted procedures have been introduced (i). With regard to the types of markets, their implementation was not only clarified, but new types of markets were mainly introduced (ii).

##### i. Reduction of deadlines for usual procedures and adoption of adapted procedures

Regarding usual procedures, we have the tender and the over-the-counter procedure as they are found in the public procurement Code. However, the Decree stipulates that the deadlines granted to tenderers for the surrender of their offer must now be at least fifteen (15) days for the open tender and between thirty (30) and sixty (60) days for an international tender.

Regarding, the content of the offer, it remains the same with however the advantage that the period of validity of the bid bonds has been abolished<sup>4</sup>. To open tenders, the minimum time limit for evaluating bids by the Commission has been abolished<sup>5</sup>, however it is specified that any award of a market shall be materialized

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<sup>4</sup> Article 23 (2) of the public procurement Code established that the time limit for the validity of the bid bonds was to exceed thirty days of the bids. Now, the terms of the tender deposit are specified in the tender files. In other words, the Board freely fixes the terms of the bid bond.

<sup>5</sup> It is now up to the Board to set these deadlines.

by a decision of the contracting authority within ten (10) days after its publication aware of that the award proposal shall be published<sup>6</sup> within a period of three (3) days from the date of transmission by the Commission<sup>7</sup>.

Concerning the restricted tender, the period between the publication of the results of the pre-qualification and the opening of the invitation to tender may not exceed two (2) months. Interested candidates have ten (10) days for national tenders and fifteen (15) days for international tenders to file their offers<sup>8</sup>. It should be noted that these deadlines were not clearly specified in the public procurement Code.

Finally, the over-the-counter procedure<sup>9</sup> has been shortened to the maximum. There is no more obligation to advertise. The contracting authority after a resolution of the Board can proceed to the direct consultation of three (3) enterprises. The Commission has a period of seven (7) days to formulate its proposal for award. In any case, the contracting authority shall have a maximum period of thirty (30) days to sign and notify the contract.

It should be noted that the main innovation in the awarding process is the clarification of simplified procurement procedures. At the forefront of these procedures are the request for quotation and the recruitment of an individual consultant<sup>10</sup>.

The quotation request is now admitted for light or floating rolling stock, but also for all other services defined by the Board. This application is only eligible for benefits of a maximum amount of fifty (50) million CFA francs. After receipt of the offers, the Commission shall propose the tenderer whose tender is the most compliant. The contracting authority shall decide on the award within forty-eight (48) hours and publish the results.

The individual consultant is now recruited by the contracting authority for the realization of intellectual benefits but also for the provision of non-quantifiable services which do not necessarily require the use of a firm. The amount of the consultant's benefits may not exceed fifty (50) million CFA francs. If the realization of the service involves a large number of experts, the contracting authority will have to use a consultancy office. The contracting authority will also have to ensure that no expert is banned or disbarred in the field of public procurement, but also that no expert is in a position of conflict of interest.

## ii. Introduction of new types of markets

The public procurement Code referred only to the different types of tender, the Decree came to establish a typology with the opening to new types of markets. In practice, the Decree takes over the classical markets (works, supplies, services) with the benefit of specify and contextualize them to the Public Companies. As from now, supply contracts can be concluded with suppliers for purchase or leasing, which was not previously accepted. More, the Decree now admits new markets such as the framework agreement, the reserved markets, and the adapted markets.

The framework agreement shall be accepted when the contracting authority cannot determine in advance the volume and pace of orders for supplies or services necessary for its needs. The framework agreement

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<sup>6</sup> The publication is made in the markets journal held by the organization in charge of regulating the markets or in any newspaper authorized to receive legal announcements.

<sup>7</sup> Article 50 (2) of the Decree.

<sup>8</sup> Article 57 (5) of the Decree.

<sup>9</sup> It should be recalled that the over-the-counter procedure is admitted among others for work whose choice of the enterprise is required by its particular aptitudes, for the replacement of a failing contractor, for the needs which can only be satisfied by a single provider or supplier in so far as the latter has exclusive rights to a license or has a unique know-how.

<sup>10</sup> It should be noted that the demand for quotation was simply referred to in the public procurement Code, while the recruitment of a consultant was only mentioned in the context of the contracts for intellectual benefits always without high precision.

shall be concluded by one or more contracting authorities with one or more providers and shall not exceed three (3) years. However, the framework agreements are concerned only with the current supplies or services and the maintenance and renovation works<sup>11</sup>.

In order to promote small and medium-sized enterprises, reserved markets have been set up. Some markets of Public Companies can be reserved for artisans, vulnerable people, and civil society organizations. The nature and thresholds for the award of such markets are fixed by a Board resolution.

Finally, the introduction of the adapted markets is intended to be a solution to the problem of extension of deadlines, since it is now possible to proceed with the direct purchase of supplies. This purchase must be made on the basis of a contract, at the fair price from providers who have demonstrated special aptitudes or those in monopoly situations or even exclusive distributors. To do so, the Chief Executive Officer of the Public Company, after consultation with at least three (3) providers, directs the order to the candidate presenting the lowest bid for the works and supplies, and the best-known for the services and intellectual benefits<sup>12</sup>.

## **1.2. Execution of the Public Companies markets**

Previously, the market had to be concluded before any beginning of execution.

From now on, it is sufficient that the market be published, notified and the start-up service order served to the contractor for the commencement of execution. This general reform is particularly affecting enforcement mechanisms (1.2.1) and guarantees related to the enforcement of the market (1.2.2).

### 1.2.1.

#### The enforcement mechanisms of the Public Companies markets

The main enforcement mechanisms remain the same, namely, subcontracting, subcommissioning, co-contracting and the endorsement for the changes being implemented. However, thresholds have been defined for subcontracting and endorsement<sup>13</sup>.

In the case of subcontracting, the cumulative amount of the benefits concerned may not exceed 50% of the amount of the market. In other words, the market owner cannot outsource more than 50% of the market value. This threshold, which did not exist before, is understood in the sense that the contracting authority does not designate a successful tenderer for the market to have it finally carried out by another provider often unknown by the contracting authority.

As regards the endorsement, it remains constant that it is the only means by which the stipulations of a contract can be amended. However, the thresholds have been revised upwards. Where the excess of the market amount is not more than 20% of the initial amount of the market, the amendments may be made in order of service and adjusted by endorsement. It should be noted that before the threshold was set at 10%. Where the excess of the market amount is more than 20% of the initial amount of the market, the amendments may be made only after the endorsement has been signed. Previously, the threshold was also set at 10%. In any event, the overall amount of the amendments remains capped at 30% of the initial market amount. The Decree stipulates that the contract will be terminated and a new contract shall be made when the overall amount of the amendments exceeds 30% of the original market amount<sup>14</sup>.

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<sup>11</sup> Article 27 and 28 of the Decree.

<sup>12</sup> An offer is called lowest when it is least expensive by withholding only the price as an evaluation criterion, while an offer is said to be better-known when it is most economically advantageous in terms of quality and price.

<sup>13</sup> Article 86 of the Decree. The public procurement Code did not establish a threshold, it only defined the nature of each mechanism.

<sup>14</sup> Article 85 of the Decree.

### 1.2.2.

#### Guarantees related to the enforcement of the market

The main guarantees remain and their thresholds have not been fluctuating, namely the definitive guarantee<sup>15</sup> of between 2 and 5% of the original market amount and the withholding guarantee<sup>16</sup> which cannot exceed 10% of the original market amount. However, improvements have been made. The Decree accepts that the holder of the market may replace the withholding guarantee with a good performance bond. This bond is the same amount as the withholding guarantee, and it must be provided before the payment of each deposit. In addition, the validity of the withholding guarantee must now cover the period of maintenance until the final reception.

The other development concerns small and medium-sized enterprises with national leaders and capital, as well as civil society organizations. These categories of providers can now produce in place of the bond, either a certified check or a bank check<sup>17</sup>.

Holders of a letter of order in the context of direct purchases may be exempted by a Board resolution from submitting a bond.

Furthermore, the provisions relating to the pledge remain the same, however, any mention to the insurance policy has been abolished. The public procurement Code forbade it, the Decree is silent on this point<sup>18</sup>.

## **2. 2. THE MONITORING OF THE EXECUTION AND THE PENALTIES FOR INFRINGEMENTS OF THE PROVISIONS OF THE DECREE**

### **2.1. The monitoring of the execution of markets**

It is specifically a question of examining the entities in charge of the monitoring because, before, the monitoring was mainly vested by the contracting authority and, where necessary, the supervisor<sup>19</sup>. Now, the entities in charge of the monitoring are easily identifiable and their competences clearly specified. They are the contracting authority (2.1.1), the ministry in charge of public contracts (the “**Ministry**”) (2.1.2) and the entity responsible for regulating public market (the “**Regulator**”) <sup>20</sup>.

#### 2.1.1.

##### Internal monitoring

The contracting authority shall ensure the internal monitoring of the execution of the markets passed by the Public Company. It ensures this mission through the department head or the market engineer<sup>21</sup>. In practice, monitoring will consist of the preparation of annual reports on the general situation of the markets passed

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<sup>15</sup>It guarantees the full performance of the services.

<sup>16</sup>This is a bond guaranteeing the good performance of the market.

<sup>17</sup>Previously this measure only concerned small and medium-sized enterprises. The Decree added the civil society organizations and the possibility of replacing the bond with a check.

<sup>18</sup>Article 73 of the public procurement Code prohibits any holder of Cameroonian or foreign nationality from a market from subscribing to direct insurance or reinsurance. The Decree abolished this passage and one wonders whether it is now possible for the holder of a contract to subscribe to an insurance policy. Attention should be paid to the administrative doctrine on this subject.

<sup>19</sup>Article 81 of the public procurement code.

<sup>20</sup>It is the Agency for the Regulation of Public Procurement (ARPP) whose Decree No. 2001/048 of 23 February 2001 establishes the organization and operation.

<sup>21</sup>This is the manager who will have previously been designated as the contracting authority and for this purpose he will have to control the execution of the market.

by the Public Company. These reports should include an account of the state of delivery of the contracts and the advances already received by the successful tenderer. The report shall be sent to the Board with a copy to the Ministry and the Regulator.

### 2.1.2.

#### External monitoring

The external monitoring is exercised by the Ministry. The Ministry mainly conducts periodic and unannounced controls in the running markets. The Ministry may carry out *a posteriori* controls to analyze the good behavior of a work or a guarantee supply. Within the framework of its control, it receives the actors concerned by the performance of the market, in particular, the successful tenderers, the contracting authority and the subcontractors. The Ministry receives copies of the documents related to the execution of the market in this case, the contracts and endorsements signed and notified, the minutes of receipt and the technical recipe but also the reports of the contracting authorities.

### 2.1.3.

#### Regulation

The regulator shall ensure the implementation of the regulation of the Public Company markets and publish in the journal of markets the acts relating to the awarding and control of the performance of the markets. All documents generated in the course of the execution of the markets of the Public Company shall be forwarded to the Regulator for storage and archiving within seventy-two (72) hours of their signature.

In addition, the regulator can carry out audits of the markets passed by Public Companies. In practice these audits are carried out by independent auditors which the Regulator will have previously recruited by means of tender.

## **2.2. The penalties for infringements of the provisions of the Decree**

The principle remains the same, violations of the provisions of the Decree are regarded as constituting offences against the public fortune and are sanctioned in accordance with the laws in force, but henceforth the management entities (2.2.1) and the entities in charge of the monitoring (2.2.2) may impose sanctions.

### 2.2.1.

#### Sanctions imposed by management entities

Without prejudice to the penalties laid down in the laws and regulations in force, the Board may annul, resume and/or suspend the award procedure, where it is established a breach of the rules of competition, transparency, fair price and equal treatment of the candidates. Against the actors of these violations, the Board is hereby authorized to take the following penalties<sup>22</sup>:

- Suspension of the contracting authority's power to pass markets for a period not exceeding twenty-four (24) months<sup>23</sup>;
- Forfeiture of the duties of President, members and secretaries of the Commission;
- Prohibiting companies from bidding on Public Company markets for a period not exceeding twenty-four (24) months.

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<sup>22</sup>Article 101 of the Decree.

<sup>23</sup>In practical terms, this is to say that any insensitive contracting authority, including a Chief Executive Officer of a Public Company, may be suspended by the Board.

In addition, if a staff of the Public Company responsible for monitoring the performance of the markets is convicted of misconduct or failure in the exercise of that control, the contracting authority may pronounce against him a prohibition of monitoring the performance of all markets within the Public Company for a period of three (3) years.

### 2.2.2.

#### Sanctions imposed by entities in charge of the monitoring

The main monitoring entity capable of imposing sanctions on offenders is the Ministry in its capacity as authority in charge of public markets. The Ministry declares against any external person to the services of the contracting authority convicted of misconduct or failure, a prohibition to monitoring the performance of all markets for a period of three (3) years. Similarly, the Ministry can now pronounce against any contractor convicted of fraudulent manoeuvres during the period of the award or execution of the market, an exclusion from the public order not exceeding two (2) years.

In addition, the responsibility of the Board and those of its members may be incurred in the following cases <sup>24</sup>:

- Omission, abstention, negligence or any failure having, in the performance of their task of supervising the management of the markets, caused damaging consequences for the Public Company;
- Actions that have had the effect of violating the principles of free access to public order, equal treatment of candidates, transparency of procedures, fair prices and governance in the procurement, awarding and enforcement of the Public Company.

However, it should be said that the Decree remains silent with regard to the sanctions which may be taken against the members of the Board.

Although the Decree takes up the main principles of public order, it innovates with the concern to increase the competitiveness of the markets passed by Public Companies and this is visible through:

- The drastic reduction of deadlines, particularly in the area of open tendering;
- The opening of new types of markets such as direct purchase;
- Clarification of the simplified procedures in this case the quotation request;
- The pre-eminence given to the Board in that it can now sanction internally deemed irregular procedures.

It will be appropriate in the next few days to be attentive to the behavior of the actors in the implementation of the markets in Public Companies because their role is decisive in achieving the objectives of the Decree.

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<sup>24</sup> Article 106 of the Decree.



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