Public Procurement World - Venezuela

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# 1. The Laws

## a. What is the applicable legislation?

In general, the applicable laws and regulations to all public procurement procedures at a national level (the "Public Procurement Regime") are the following:

The Public Procurement Law published in the Special Official Gazette of the Bolivarian Republic of Venezuela No. 6,154, dated November 19, 2014

The Public Procurement Law Regulations published in the Official Gazette of the Bolivarian Republic of Venezuela No. 39,181, dated May 10, 2009

The different instructions issued by the National Contracting Service (NCS)

In principle, the Public Procurement Regime is applicable to the central or decentralized agencies and entities of national, state and municipal public powers. Notwithstanding this, municipalities may establish, through ordinances, their own public procurement procedures in accordance with the framework established in the Public Procurement Law.

On the other hand, each agreement is also regulated by the particular technical specifications and the clauses of the final contract.

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

No.

## c. What are the basic underlying principles of the legal framework?

According to the Public Procurement Law, the principles applicable to agreements with the state and public tenders are the following: (i) economy; (ii) planning; (iii) transparency; (iv) honesty; (v) efficiency; (vi) equality; (vii) competition; (viii) publicity; and (ix) simplification of procedures. Additionally, popular participation through any production association form must be promoted.

## d. Is aerospace and defense procurement treated differently from other types of procurement?

No.

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

The Public Procurement Law is applicable to all public agencies, with special emphasis on:

Central or decentralized agencies and entities of the national, state and municipal public powers

Public universities

The Central Bank of Venezuela

Civil associations and corporations in which the Bolivarian Republic of Venezuela or the legal entities referred to in the previous numerals have a participation of 50% or more of the capital stock

Civil associations and corporations in which the civil associations and the corporations referred to in the previous numeral have a participation of 50% or more of the capital stock

Foundations incorporated by any of the persons referred to in the previous numerals, or where they have a majority stake in the administration of the foundations

Communes, communal councils and the base organizations of the Popular Power when they handle public funds

Socio-productive associations and any other popular organization form when they handle public funds

## b. Which private entities are covered by the laws?

The Public Procurement Law is applicable to private entities owned or controlled by the state (eg, civil associations, corporations and foundations). No other private entities are subject to the Public Procurement Regime.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

Yes, co-operations between public bodies for the provision of goods, the rendering of services or the execution of works are exempted from the contractor's selection modalities. However, the contracting principles provided in the Public Procurement Law would apply.

## d. Which types of contracts are covered?

As a general rule in Venezuela, the Public Procurement Regime is applicable to state agreements whose objectives concern the acquisition of goods, the rendering of services, and the execution of works.

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

When the amendments to an existing contract are substantial, the same requirements and procedures that the contracting body or entity required to formalize the original contract must be fulfilled.

## f. What is the applicable regime for framework agreements?

The contracting entity must apply the corresponding selection procedure, with a maximum overall estimate of price and quantities. In these cases, the adjudication will establish the unit prices of the item or items that make up the contract, with a maximum total amount of the contract, which will be executed by purchase, service and execution orders. These orders will then establish the conditions and terms of the amounts to be executed, there being no obligation on the part of the contractor to execute a certain amount or to pay the contractor the maximum amount established.

## g. What is the applicable regime for public-private partnerships (PPPs)?

The strategic and commercial alliances between public and private entities for the acquisition of goods, provision of services and execution of works are exempted from the contractor's selection modalities and from the rating by the National Contractors Registry (NCR). These agreements are regulated by the Decree No. \_\_\_\_\_, with the rank and force of law that promotes and regulates the new joint associative forms between the state, the community and private initiative for the development of the national economy (published in Official Gazette No. \_\_\_\_\_ dated \_\_\_\_\_\_\_).

## h. How are concessions dealt with?

Concession agreements for the execution of public works and the exploitation of public services are governed by the Organic Law on Promotion of Private Investment under the Concession Regime published in the Special Official Gazette of the Bolivarian Republic of Venezuela No. 5,394, dated October 25, 1999.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

The Public Procurement Law establishes a series of infractions for breach of its provisions.

Individuals' conduct that qualify as infractions in the Public Procurement Regime are the following:

Terminating a contract by breach or by any other reason attributable to the contractor

Breaching any other obligation of the law or any other obligation that they compromised in favor of the contracting entity, for reasons attributable to the contractor, even when it does not result in the termination of the agreement

Supplying or filing of false information or documentation before the contracting entities or the NCS

Withdrawing offers before their validity expires

Failing to subscribe the agreement in the established term (when awarded the agreement)

Incurring, in bad faith, practices or employing fraudulent practices in the procedures governed by the Public Procurement Regime

The Public Procurement Law establishes fines, suspension from the National Contractors Registry (NCR), and payment of compensation to the contracting entity. Additionally, in the particular case of works agreements, the contracting agency or entity may issue and execute, as a preventive measure, the immobilization of the goods, equipment, facilities, machines and materials affected to the execution of the work.

In case of suspension from the NCR, disqualification to enter into agreements with the state is extended to individuals who participate as partners, members or managers in the structure and organization of the disqualified company.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

The Public Procurement Law requires the mandatory execution of the Open Bid or International Open Bid when the amount of the agreements exceed certain amounts (ie, as established in Tax Units). In this case, the contracting entities do not have the discretion to choose another type of tender modality.

If the tender does not exceed the amounts set forth for the Open Bid, the contracting entity may proceed with Closed Bids. Closed Bids can also be used regardless of the value of the agreement when the maximum authority of the contracting entity justifies it through a reasoned administrative order in the following cases:

Acquisition of highly specialized goods destined to experimentation, investigation and education

For state security, qualified as such according to the rules that govern the subject

When based on the information verified by the National Contracts Registry, it is determined that the goods to acquire, the services to render and the works to execute, are to be produced and commercialized, rendered or executed by five or fewer bidders.

Additionally, the Public Procurement Law establishes the causes in which the contracting entity may proceed through the modalities of Price Consultation or Direct Awarding.

## b. What status do electronic means/procedures have?

The contracting bodies and entities must establish in the call or invitation and in the specifications, the possibility of participating by electronic means, according to their availability and technological preparation.

## c. Where are contract notices, i.e. calls for bid, published?

The contracting entities must publish on their official website the call to participate in open competitions (call for tender), until one day before the receipt of envelopes; it must also send to the NCS the call to participate in the open bids, to be published on the website of that body during the same period.

Likewise, contracting entities in exceptional cases, and with the approval of the Maximum Authority of the Central Planning Commission, may publish calls for open competitions in national or regional media, especially in the locality where the good is to be supplied, the service is to be rendered or the work is to be executed. In addition, they may release the call through other means of dissemination.

In case of closed bids, at least five participants must be selected by invitation, and these must be accompanied by the specifications, indicating the place, day and time of public acts of reception and opening of the envelopes containing the bids.

## c. Can certain prospective bidders be excluded from the competition?

Companies suspended from the NCR for breach of the provisions of the Public Procurement Regime are disqualified from participating in public bids. This disqualification extends to individuals who participate as partners, members or managers in the structure and organization of the disqualified company. Also, the prospective bidders could be disqualified if:

The participant has not adequately supplied the requested information, so it cannot be evaluated or appreciated.

During the qualification process, the offeror declares or is declared in dissolution, liquidation, delay or bankruptcy.

During the qualification process, any of the companies in a consortium or alliance withdrew from the process.

The offeror does not comply with any of the qualification criteria established in the specifications.

The contracting party determines that the offeror has submitted false information in its qualification documents.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

Yes. In accordance with the Public Procurement Law, the specifications must contain the selection criteria, for example:

Qualification criteria, their weighting and the way in which these criteria will be quantified

Evaluation matrix to determine the supply score, its weighting and the way in which the price will be quantified and the other factors defined as evaluation criteria

Criteria that allow the preference in qualification and additional score in the evaluation of local bidders

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

No.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

No. However, companies suspended from the NCR are disqualified from participating in public bids.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

No.

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

Yes. See question 4 (h) below.

## g. Can members of a bidder consortium be changed during a procurement procedure?

No. If during the qualification process, any of the members of a consortium or alliance withdraws from the process, they will be disqualified.

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

Yes, the offers could be rejected if they are submitted by different persons and the participation of any of them or their partners, managers or managers in the integration or direction of another bidder in the contracting process is verified.

## i. Is there a special regulation or a special requirement for a foreign company to participate in a procurement procedure?

Foreign companies must be registered in the NCR to enter into agreements with the state, regardless of whether they will act individually or as a part of a consortium. It is not necessary that a foreign company incorporate a corporation in the country to participate in a public bid.

In this sense, the Public Procurement Law establishes that in cases of Internationally Open Bids, legal entities incorporated and domiciled in Venezuela or abroad may participate. In the tender modalities of Closed Bids or Price Consultation, foreign companies that do not have subsidiaries or branches in Venezuela may participate, as long as the impossibility to obtain the goods or services in the national territory is recorded in the minutes of the start of the procedure. Likewise, in the tender modality of Direct Awarding, the contracting entity may directly award the contract to a foreign company, as long as the requisites of such tender modality are fulfilled.

Regarding the concession regime, any foreign company may participate in the bidding process. However, if the agreement is awarded to it, the foreign company must incorporate a Venezuelan company in the established term, with whom the agreement shall be understood as subscribed. If this obligation is not executed in the established term, the awarding decision will be without effects.

A company may participate in a public tender through their legal representative, who must be appointed through a meeting minutes that is duly registered. This document must be legalized in the foreign company's country of origin and translated into Spanish by a public interpreter in case it is in a different language. The inscription of the company in the NCR requires the company to appoint a legal representative in Venezuela. For this reason, certain documentation must be filed.

# 5. Specifications

## a. Are there any rules on the specifications?

Yes, the specifications will change depending on the contracting modality. In this sense, in the Open Bid, the specifications must be available to interested parties from the date indicated in the call to participate, until the business day prior to the date set for the act of opening the envelopes containing the expressions of will and offers. The contracting entity must keep a register of purchasers of the specifications, in which the minimum data will be entered to make the notifications that are necessary in the procedure. The fact that a person does not acquire the specifications for this modality will not prevent the presentation of the manifestation of will and offer. The contracting entity may set a price for the purchase of the specifications.

In the Closed Bid and the Price Consultation, the specifications will be sent to the participants together with the invitation.

In the Direct Contracting modality, the contracting entity must prepare the specifications, which will form part of the contract that is formalized and will be incorporated into the file.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

No.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

Yes, the president of the Bolivarian Republic of Venezuela in the Council of Ministers may issue temporary measures to ensure that the contracting of the contractors compensate for adverse or unfavorable conditions affecting small and medium-sized enterprises, cooperatives and any other form of community association.

Such measures include, among others: (i) the establishment of preferential amounts or categories of contracts; (ii) the use of contracting schemes involving the incorporation of goods with national added value; (iii) transfer of technology; (iv) incorporation of human resources; and (v) scheduling of deliveries, which will serve as an instrument of promotion and development for small and medium-sized industries, as well as the encouragement and inclusion of people and any other community associative form for work.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

As a general rule, the bid will be awarded to the contractor whose offer: (i) qualifies as the first option when applying the evaluation criteria; and (ii) complies with the requisites established in the technical specifications that guarantee fair prices and the required quality.

Likewise, it must be taken into account that in case of offers with prices that do not surpass 5% of that which resulted as the highest evaluated, is the one that complies with the following, as defined by the technical specifications, should be preferred:

In the acquisition of goods, the offer that has a higher national added value

In case of works and services agreements, the offer that is: (i) presented by a provider whose main domicile is in Venezuela; and (ii) has the highest incorporation of national parts and highest national human resources participation, even at a management level (Once the previous criterion has been applied and the evaluation results in two or more offers with the same scores, the bidder with the higher national participation in its stock will be preferred.)

## b. Are there any limitations regarding the offered bid price?

Yes, the fractionation of bids is prohibited. Bidders cannot divide into several contracts the execution of the same work, the provision of a service, or the acquisition of goods, in order to reduce the amount thereof, and avoid or omit rules, principles, modalities of selection or requirements established in the Public Procurement Regime.

## c. Are there any rules on alternative bids?

As general rule, conditional or alternative bids will be rejected by the contracting entity, unless this has been allowed in the specifications or in the contracting conditions.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

The Direct Award is permissible regardless of the amount of the contracting, provided that the maximum authority of the contractor, through a reasoned act, adequately justifies its origin, in the following cases:

In supplying goods, providing services, or executing works required for the continuity of the production process, and could be seriously affected by the delay in opening a procurement procedure

Where the technical conditions of a particular good, service or work so require or exclude any possibility of competition, or if having purchased goods, equipment, technology, services or works from a particular supplier or contractor, the contractor decides to purchase more supplier or contractor for reasons of standardization or the need to ensure compatibility with the goods, equipment, technology or services already in use, and also take into account the effectiveness with which the original contract has Contractor**'**s needs, the relatively low volume of the proposed contract compared to that of the original contract, the reasonableness of the price and the absence of another appropriate source of supply

In contracts for the acquisition of goods and the rendering of services, in which it is not possible to apply the other contracting modalities, under the special conditions under which the bidders agree to supply such goods, or provide the services or special conditions of the request of the contractor, and where the application of a contractor selection modality other than that provided herein does not allow obtaining the goods or services under the required conditions (The reasons for which the opening of a new procurement procedure could cause damage to the contractor must be indicated by a motivated act.)

In case of a proven emergency

In the execution of works, acquisition of goods, or provision of services regulated by contracts terminated in advance, where the opening of a procedure for selection of contractors could be harmful to the body or contracting entity

Contracting goods, services or works for marketing, donation or any other form of alienation to third parties, provided that the goods or services are associated with the contractor**'**s own activity and do not permanently enter its heritage

In contracts for the acquisition of goods, provision of services, or execution of works on which a method of selection of contractors could compromise the contractor**'**s trade secrets or strategies, the knowledge of which would offer an advantage to its competitors

In the acquisition of goods produced by companies with which the contractor subscribes commercial agreements of manufacture, assembly or supply, provided that such agreements have been signed to develop the national industry on said goods, in compliance with plans dictated by the National Executive

When contracting works, goods or services required for the immediate restoration or continuation of public services or activities of general interest that have been subject to interruption or failure, regardless of their recurrence

In activities required for works that are in direct execution by the contracting bodies and entities and which, according to their capacity for execution, is necessary for strategic reasons of construction, which are partially carried out by a third party, provided this assignment does not exceed 50% of the original contract

In the acquisition of goods and contracting services to small and medium-sized economic actors that are indispensable to ensure the development of the food chain

In supplying goods, providing services, or executing works for which the price consultation modality has been applied and has been declared deserted

In recruiting for socio-productive organizations created within the framework of the Law governing the communal economic system or organized communities by awarding projects to promote their development

When contracting with joint ventures or conglomerates created under the law that promotes and regulates the new joint associative forms between the state and the private community initiative, as long as the advantages of contracting are established, based on the principles that regulate the rules for the creation of these joint associative forms

## b. What are the consequences for violation of the competitive bidding requirement?

When the granting of the award or any other act issued in execution of the Public Procurement Regime has been based on false information or documentation, fraud, or in violation of legal provisions, the contracting entity shall declare the act null and void.

In addition, individuals could be sanctioned with a fine of 300 Tax Units and the prohibition to enter into contracts with the state for up to four years.

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

The Public Procurement Law and its Regulations contain specific regulations regarding the remedies and enforcement of the agreement.

In this sense, any administrative act issued by the contracting entity, by the NCS and the NCR, could be appealed in accordance with the Organic Law on the Administrative Procedures.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

Yes, the contracting entity could claim damages for noncompliance with the contract before the Civil Courts.

## c. Is there a specific forum before which procurement disputes are heard?

There is no specific forum, regulatory agency or jurisdiction in charge of hearing and solving disputes relating to state agreements. On these matters, the general rules set forth in the Organic Law on Administrative Procedures and the Organic Law on the Administrative Litigation Jurisdiction apply, depending on the forum before which the controversy is filed.

## d. Are there any timing requirements for the review?

Yes. The timing will vary depending on the type of dispute.

## e. What are the main preconditions for review?

As a general rule, the procedures established in the Organic Law on the Administrative Procedures will apply. In this sense, the written request must state:

The body to which it is directed

The identity of the person concerned and, where applicable, the person acting as their representative with the expression of names, domicile, nationality, marital status, profession and identity card or passport number

The address of the place where the relevant notifications will be made

The facts, reasons and petitions, expressing with clarity the subject matter of the request

Reference to accompanying annexes, if this is the case

Any other circumstances that require legal or regulatory rules

The signature of the interested parties

## f. What are admissible grounds for starting a review proceeding?

When it is sufficiently proved that the adjudication was granted with noncompliance with the provisions of the Public Procurement Law, or of any other applicable rule

Where, without proper motivation under the rules governing the modification of the contracts, these deviate or differ from the conditions set out in the respective specifications or from the wining offer

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

The general rule is that the commencement of a review proceeding shall not affect an ongoing tender procedure or an awarded contract.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

The tender procedure or the contract shall be declared null and void, and the individuals could be sanctioned with a fine of 300 Tax Units and prohibited from entering into contracts with the state for up to four years.

## i. How long does a judicial proceeding for review take?

It may take between 3 to 5 years.

## j. Must unsuccessful bidders be notified before the award? If so, when?

Unsuccessful bidders must be notified after the decision as to the awarding of the contract has been made.

## k. Are review proceedings common?

No.

## l. Are damage claims in relation with procurement procedures common?

No.

## m. What are the leading court decisions involving procurement disputes?

There are no leading court decisions involving procurement disputes.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

Yes, the NCS.

## b. Does a specific contract law apply for public contracts?

Yes, the Public Contracting Law and its Regulations contain specific provisions regarding the performance of the contract, obligations and rights, contractual bonds or guarantees, penalties for default, etc.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

No.

## b. Are there any specific laws or practices that apply in the defense sector?

No.

## c. Are there any specific laws or practices that apply in the health care sector?

No.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

No.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

No.

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