Public Procurement World - Chile

4. Bidder Selection

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

According to the PPL, the requirements for participating in a tender for contracting with the Administration are:

To be a natural or legal person (whether Chilean or foreign);

To demonstrate a financial situation and technical expertise as provided in the Regulation;

To comply with other requirements stipulated in the Regulation and General Rules of Chilean Law (e.g., to have legal capacity to conclude the corresponding contract);

Not have been convicted for anti-union practices or violation of constitutional rights of workers, or bankruptcy offenses under the Criminal Code (e.g., concealment of goods, acts or contracts that reduce assets or increase their liabilities without economic justification, providing false backgrounds to the trustee or insolvency liquidator; see paragraph 7 of Title IX of Book II of the Criminal Code) within two years prior to the bid submission, the submission of the proposal or the subscription of the convention, depending on the awarding procedure of the case (public, private or direct contracting procurement); and,

Not being executive officer of the contracting public body or enterprise, nor a person (natural or legal) related to the said official (see paragraphs sixth and final of Art. 4, PPL).

If the winner of the tender subcontracts a third party for providing the services or supplying the goods to the Administration, the subcontractor must meet the same requirements.

After the tender award, and prior to signing the contract, the contracting public agency may require from the contractor its registration in the Registry of contractors and suppliers, in charge of the National Directorate of Public Procurement. All natural or legal Chilean or foreign persons who wish to contract with the Chilean Administration, which are not subject to a ground of inability to contract with state agencies (PPL, Art. 16), are allowed to be registered. In addition to those mentioned in the first paragraph of this response, the PPL Regulation (Art. 92) adds the following grounds for disqualification from the Suppliers Registry: (1) conviction for bribery; (2) tax liabilities higher than 500 UTM (USD 33,500, approx.) for more than one year, or over 200 UTM (USD 13,400 approx.) for more than two years, without existing any payment agreement; (3) pension or health record debts of more than 12 months; (4) submission of documents before the Suppliers Registry, declared false by judicial award; (5) to be declared in bankruptcy by enforceable judicial decision; or (6) have been removed or suspended from the Suppliers Registry by founded resolution of the Public Procurement Directorate (PPL Regulation, art. 92). This register is public. Registration in it is not automatic: it must be approved by the Directorate of Public Procurement.

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

A prequalification phase is not mandatory. Nevertheless, the PPL Regulation enabled the contracting entities to establish said prequalification phase in the tender terms (PPL Regulation, Art. 34).

Additionally, if set forth in the tender terms, the public entity may divide the tender procedure in two stages: a technical qualification phase followed by an economic qualification of the bids (PPL Regulation, Art. 34).

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

Yes. Legal inabilities to contract with the State Administration are (1) being convicted for anti-union practices or violation of constitutional rights of workers, or (2) bankruptcy offences under the Criminal Code (e.g., concealment of goods), both within two years prior to the bid submission, the submission of the proposal or the subscription of the convention (PPL, Art. 4). Once the said inabilities end, the affected could request its incorporation in the Suppliers Registry, before the Directorate of Public Procurement.

Additionally, the Directorate of Public Procurement keeps a record regarding the contractual performance of the bidders in public procurement procedures (PPL Regulation, Art. 96 bis).

# 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?

The PPL Regulation established that the contracting agency may perform "market consultations" when drafting the tender terms; that is, formal procedures of consulting with suppliers, through open and public calls, in order to retrieve information about the characteristics of the services required, time of preparation of the bids and any other information needed for drafting the terms (PPL Regulation, Art. 13 bis).

As a general rule, companies that have aided the contracting agency in the elaboration of the contractual and technical terms of the contract are allowed to participate in the corresponding public tender. Nevertheless, special attention must be paid to the rules concerning bid-rigging (see answer 2.i).

Besides, the participation of privates in the elaboration of the tender terms must be subject to the Chilean Lobby Law (No. 20,730), according to which all efforts or negotiations conducted to influence policies, plans or programs in discussion or execution, must be annotated in a public register, with the sole exception of those covered by national security or national interest reasons.

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

Bidder consortia are allowed by the PPL under the name of 'temporary union of suppliers'[[1]](https://resourcehub.bakermckenzie.com/en#_ftn2). This consists on an union of natural and/or legal persons, for the submission of an offer -in the case of tenders-, or for signing a contract -in the case of direct contracting- (PPL Regulation, Art. 2, No. 37).

When formalizing the consortium agreement, the PPL Regulation compels all bidders to declare that they are all jointly and severally liable; and to appoint a joint representative. Despite the consortium can determine which background documents they will submit to be considered in the respective bid evaluation, this cannot be intended to hide relevant information that may affect a member of the consortium (PPL Regulation, Art. 67 bis).

A legal inability over one of the members of the consortium does not affect the other members. In case a member is disqualified under a legal provision, is up to the rest of the members of the Consortium to decide whether to continue or to withdraw from the tender procedure (PPL Regulation, Art. 67 bis).

In the case of contracts in the amount of 1,000 UTM (USD 67,000 approx.) or higher, the agreement stating the consortium should be materialized by deed.

The time scope of a consortium may not be inferior to that of the contract awarded (PPL Regulation, Art. 67 bis).

Special attention must be paid to the rules concerning bid-rigging (see answer 2.i).

[[1]](https://resourcehub.bakermckenzie.com/en#_ftnref2) In Spanish, known as 'Unión Temporal de Proveedores'.

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

Neither the PPL nor its Regulation rule this issue. Nevertheless, the Directorate of Public Procurement has issued a special guidance[[1]](https://resourcehub.bakermckenzie.com/en#_ftn3) regarding this topic. In this guidance, the Directorate has laid down that despite the tender conditions cannot impede a member from withdrawing from its consortium, it is improper for the consortium to replace such member with another, even if it has equal or better characteristics than the old member. Hence, the consortium shall continue with its remaining members.

The Directorate also stated that if during the execution of a contract the consortium is left with less than two members, the contract will be terminated in advance.

[[1]](https://resourcehub.bakermckenzie.com/en#_ftnref3) Directive on Temporary Union of Suppliers (December 1, 2015). Available in: <http://www.chilecompra.cl/wp-content/uploads/2016/11/directiva-n22.pdf>

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

Neither the PPL nor its Regulation rule this issue. According to general applicable rules, there should not be limitations.

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

There are few regulations in the PPL and its Regulation concerning foreign companies. As a general rule, the State can contract both with foreign and local companies (PPL, Art. 4). However, some rules must be adequately taken into consideration when entering into a procurement procedure with a foreign company. Among others, the following:

The PPL Regulation authorises foreign companies to submit bids written on paper, when it appears as essential to carry out the procedure by tangible means, in light of special idiomatic, economic, cultural or legal differences (PPL Regulation, Art. 62, No. 2).

The tendering agency may establish as a requisite for awarding a contract, the obligation to constitute a company of Chilean nationality or an agency of the foreign company.

Both local and foreign companies who want to be incorporated in the Suppliers Registry must render documents demonstrating their "legal existence" (PPL Regulation, Art. 91), and the validity of the powers of the legal entity (PPL Regulation, Art. 94).

The PPL does not establish a special way of demonstrating the legal existence nor the validity of the powers of foreign companies. Therefore, this accreditation must comply with the general rules of Corporate Law and Private International Law. Foreign legal persons can prove their legal existence by certificates of validity of the company or by an authorized copy of the Articles of Association or Articles of Incorporation, issued under the law of the place where they are domiciled and authenticated by the competent authority of the country of origin as well as by Chilean authorities. They can act through their legal representatives designated in its statutes, treaties or regulations, as long as said document is legalized in Chile. Please note that from 2016, the Apostille Convention of The Hague is into full effect.

Regarding the language of the documents, the contracting-public-agency may require, within the tender terms, a free or official translation.

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