Public Procurement World - Colombia

1. The Laws

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# a. What is the applicable legislation?

Colombia has a public procurement and contracting statute comprised mainly by Law 80/1993 and Law 1150/2007 (the "Procurement Statute"). This Procurement Statute is further developed by several decrees issued by the Colombian government.

The Procurement Statute sets forth the general rules regarding (i) government-owned entities which must observe the statute (the "Government-owned Entities"), (ii) principles of the contractual activity applicable to Government-owned Entities when dealing both with private and public parties, such as transparency, economy, accountability, contractual balance, among others, (iii) rights and obligations of Government-owned Entities and their contractors, and, (iv) mechanisms to participate in public procurement (i.e., public tenders, direct contracting etc.), among others (Law 80/1993, Articles 23 to 29).

The Procurement Statute deals mainly with the procedures by which public procurement is carried out. The Procurement Statute does not, as a general rule, set forth the minimum contents of the agreements entered into by Government-owned Entities, which are generally subject to private rules found in the applicable civil or commercial legislation (Law 80/1993 Article 13).

# 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”)?

Yes, The Colombian Procurement Statute interacts with commercial and trade agreements signed and properly ratified by the National Government with other countries.

Article 20 of the Public Procurement Statute, clearly provides a Reciprocity Principle, under which, foreign companies and entities will be granted the same treatment as Colombian companies in accordance to applicable trade agreements.

Therefore, the Government, when entering into agreements or treaties with other countries, must establish all the necessary mechanisms to enforce equal treatment in Colombia and to obtain equal treatment in the signatory countries.

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

Public Entities, when contracting, must always seek to fulfil the overall state purposes, the continuous and efficient provision of public services and to effectively represent the rights and interests of the administration.

Individuals contracting with the public entities must collaborate with public entities to achieve the overall objective and accomplish the social function implied in the contract.

Additionally, the Procurement Statute establishes the principles that govern public procurement. The key principles set forth by the Procurement Statute are:

Transparency - this principle for both the need of clear rules regarding the tender procedure and the rights of the parties to know the procedure and decisions of the Government-owned Entity, as well to challenge such decisions. As a general rule, all information submitted with a bid may be furnished to any interested party.

Economy - this principle stresses the need to perform the contractual process and perform contracts in an expeditious and efficient manner. In principle, before a public procurement procedure is issued, the Government-owned Entity must have the relevant budget provisions and have conducted design, risks and feasibility studies. Once the request for proposals is issued, the Government-owned Entity must clearly follow the procedure set forth in the requests for proposals and respect the terms and time schedule included therein.

Efficiency and Liability of the Public Officer - public officers in charge of procurement procedures of the Government-owned Entities must undertake their duties bearing in mind the fact that they are managing public resources. Public officers in charge of the procurement procedures must try to allocate the resources as efficiently and effectively as possible and they will have both fiscal and disciplinary liability for discharging their duties with negligence or wilful misconduct.

Contractual equilibrium - this principle states that a party that has entered into a contract with a Government-owned Entity has a right for maintaining the financial condition of the original proposal, which will be protected against any supervening facts that could alter such balance. This right leads to the possibility of filing a lawsuit to review the terms and conditions of the public contract whenever extraordinary unforeseeable circumstances have materially altered the initial financial equation of the public contract affecting the private contractor.

Regarding the principle of equal treatment, public procurement laws require Government-owned Entities subject to the Procurement Statute to award higher points to offers that include local goods or services. Foreign goods or services will receive the same treatment (and thus the same amount of points) whenever the country of origin of such goods or services grants the same treatment to Colombian bidders (Law 816/2002, Articles 1 and 2).

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

As a general rule, procurement of goods and services related to national defence and security is carried out through an abbreviated selection procedure which is a short-form competitive selection procedure (Law 1150/2007, Article 2(2)(i)). However, and according to Article 2(4)(d) of law 1150/2007, the procurement of goods and services considered to be classified due to their nature, can be handled through a direct contracting scheme.

Contracts signed by Satena (a Government owned airline), Indumil (Government owned military weapons manufacturer), Tequendama Hotel, the Science and Technology Corporation for the Development of the Naval, Maritime and Fluvial Industry (Cotecmar) and the Colombian Aeronautical Industry Corporation (CIAC) are not subject to the provisions of the Public Procurement Statute and shall be governed by the legal and regulatory provisions applicable to its activity.

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