Public Procurement World - Peru

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# 1. The Laws

## a. What is the applicable legislation?

The legislation that regulates public procurement in Peru is composed of the Law No. 30225 (hereinafter "LCE") and its corresponding Regulation which was approved by Supreme Decree No. 350-2015-EF (hereinafter "RLCE". The LCE and the RLCE entered into force on January 9th 2016. It should be mentioned that in 2017, some articles of LCE and the RLCE were modified, specifically the LCE was modified by Legislative Decree No. 1341, which was published on 7 January 2017, and the RLCE was modified by Supreme Decree No. 056-2017-EF, which entered into force on 3 April 2017.

## 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, the applicable Peruvian legislation is not affected by international procurement agreements or standards. However, the Peruvian public procurement process follows the same basic principles as these international agreements.

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

The underlying principles of the public procurement framework are as follows:

Free competition

Equal treatment

Transparency

Advertising

Competition

Effectiveness and Efficiency

Technological Validity

Environmental and Social Sustainability

Equity

Integrity.

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

As a general rule, all contracts with the State are covered by the public procurement framework, which regulates the bid selection process. However, there are two exceptions: (i) in the event of an emergency arising from catastrophic events, situations affecting national security or defense, or a health emergency declared by the body governing the national health system, in these instances the procuring entity can contract outside the typical selection process, through direct contracting; and (ii) some institutions can contract through state companies, as a FAME (Fábrica de Armas y Municiones del Ejército S.A.C.), without a selection process if and only if there is a specific law which expressly permits this. Article 36 of the Constitution permits this exception because these contracts are of particular public interest.

# 2. Application of the Statutory Procurement Laws

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

Within the scope of the LCE are the national government and its departments and offices, the regional governments and their departments and offices, the local governments and their departments and offices. Additionally, the Legislative Branch, the Judicial Branch, the Autonomous Constitutional Bodies, public universities, the Armed Forces, the Peruvian National Police, government companies, as well as other public organizations, funds, agencies and all institutions that are subject to the Public Debt Law and the cooperation agreements signed between Peruvian entities or different governments are covered by the laws of public procurement.

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

The laws of public procurement generally refers to public entities. However, the procurement framework also covers funds wholly or partly constituted by private funds.

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

As an exception, public procurement law is not applicable in the following cases:

Banking and financial contracts resulting from a financial service, including all services incidental or auxiliary to a service of a financial nature, except for insurance contracts and leasing.

Procurements made by bodies of the Foreign Service of the Republic, exclusively for their operations and management, outside of Peru.

Procurements made by the Ministry of Foreign Affairs aimed to perform the broadcast of the induction into office, international summits, and related side events held in Peru, which have previously been declared to be of national importance, involving the participation of Chiefs of State, government leaders as well as high-level officers and commissioners, provided that such procurements are within the standards set forth by international treaties or other international commitments.

The procurement of public notaries to perform duties provided in the public procurement framework.

Services provided by conciliators, arbitrators, conciliation centers, arbitral institutions, members or contracting authorities of the Dispute Resolution Board, other services arising from the conciliatory or arbitral function and other means of dispute settlement provided for within the public procurement framework for the contract execution stage.

Procurements made in accordance with the requirements and specific procedures of an international organization, States or cooperating entities, provided that they come from transactions of foreign debt and/or donations related to these transactions.

Service agreements signed with the chairs of boards of directors, who perform full-time roles in the State-owned Enterprises or Entities.

Purchases of goods performed by Entities through public tender, in accordance with the pertinent rules.

Entities comprised of public and private funds (Legislative Decree N.° 1224 and Legislative Decree N.° 674)

Also, as an exception, it is possible to exempt certain government entities from the scope of application of the LCE if and only if said exemption is stated by law. Currently, the LCE exempts the following public entities from its scope of application: the Private Investment Promotion Agency (*Proinversión*), the government oil company (*Petróleos del Perú S.A.*), the government company of shipbuilding and metalworking industry (*SISA Peru*), and the *Cajas de Ahorro y Crédito*.

## d. Which types of contracts are covered?

The LCE applies to procurement contracts which are used to obtain goods, services and works, assuming payment of the price or of the corresponding remunerations with public funds and other obligations derived from the contracting party.

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

The LCE regulates the cases in which extension of the contract term or modification of the contract proceeds:

Extension of the contract period: the term of the contract can be extended (i) when an addition is approved or (ii) because of delays of the execution of the contract not attributable to the contractor.

Modification of the contractual position: the contractor can transfer its rights on the contract due to a transfer of ownership of the assets that are leased to the entities; when mergers or splits occur; or when a law expressly permits.

Contract Addendum: the parties may agree on contractual addendum that are not related to the extension of time or additional works, provided that the following conditions are met: (i) the modification is necessary in order to achieve the purpose of the contract in a timely and efficient manner; (ii) provided that the material elements of the contract are not changed.; and (iii) the modification is necessary in order to achieve the purpose of the contract, which has been frustrated by supervening events.

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

Any party can terminate the agreement in these cases:

force majeure or an incidental event that frustrates the purpose of the contract.

the other party fails to fulfill their obligations.

supervening events.

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

There is a specific legal framework applicable to public-private partnerships contracts, which is composed of Legislative Decree No. 1224 and its Regulation, approved by Supreme Decree No. 410-2015-EF. It is important to mention that in 2017 some articles of this framework were modified by the Legislative Decree No. 1251, which was published on 30 of November 2016, and the Supreme Decree No. 068-2017-EF, which was published on 28 of March 2017. As a result, the public-private partnerships is not regulated by the public procurement framework, because this type of contract has its own unique framework.

## h. How are concessions dealt with?

Concessions are regulated in a separate regime; therefore, the public procurement provisions are not applicable. In general, the concessions, such public-private partnerships, are regulated by Legislative Decree No. 1224 and its Regulation, approved by Supreme Decree No. 410-2015-EF (some articles of this framework were modified b the Legislative Decree No. 1251 and the Supreme Decree No. 068-2017-EF). Additionally, different types of concession have different laws which apply, for example in an electronic concessions the Law Decree No. 25844 will also be applicable

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

There are some alternatives, which motivate the fulfilment of the articles of the LCE and the RLCE. For example, penalty fees, resolution of contracts, inability, anti corruption clauses, etc.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

There are different kind of procurement procedures applicable for the procurement of goods, services and works depending on the amount of the contract, as summarized in the following table:

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| **GENERAL RULES FOR PROCUREMENT OF WORKS, GOOD AND SERVICES (IN PEN)** |
| **TYPES OF BIDDING PROCESSES** | **WORKS** | **GOODS** | **SERVICES** |
| **General Services** | **General and Works consultant** |
| **Public tender** | = > 1'800,000.00 | = > 400,000.00 | -- | -- |
| **Public contest** | -- | -- | = > a 400,000.00 |
| **Simplified award** | < 1'800,000.00 | < 400,000.00 | < de 400,000.00 |
|  **Selection of Individual Consultants** | -- | -- | < 40 0000,00 |
| **Price comparison** |   |   |   |   |
| **Electronic Reverse Auction** |   |   |   |   |

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

Electronic means are used in public procurement. The Electronic Government Procurement System (SEACE) is the e-system used to exchange information and disseminate government procurement, as well as to carry out e-transactions. In this system are all the documents related to the procedure, addendums, awards, conciliation, etc.

Also, there is a specific electronic procedure, which is the electronic reverse auction, this procedure is used for procurement of common goods and services, which have technical specifications and are included in the List of Common Goods and Services. Finally, there are special contracting methods, which permit entities to contract to provide goods and services in the "E-Catalogues" outside of the typical selection process.

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

In the Electronic Government Procurement System (SEACE) all documents related to the procedure, the calls for tender, the integrated bases, the contract, the addendums, awards, and other important information related to a public procurement are registered. This is the website: <http://portal.osce.gob.pe/osce/node/14336>

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

The following are not allowed to act as bidders, contractors and/or subcontractors:

During the entire public procurement process, up to twelve (12) months after leaving their office, the President and Vice President of the Republic, Members of the Congress of the Republic, Members of the Supreme Court of the Republic, and Heads and Members of an accredited body related to Constitutional Independent Agencies.

Governors, Deputy Governors and Councilors of Regional Governments, in their regions, during their term and up to twelve (12) months after leaving their office.

Ministers and Deputy Ministers of State, within their sector, during their term and up to twelve (12) months after leaving their office.

Judges of the Superior Courts of Justice, Mayors and Councilors, within their jurisdiction, during their term and up to twelve (12) months after leaving their office.

While in office, officials of Executive institutions or public bodies, civil servants, managers and employees that work exclusively for state-owned enterprises, and according to the rules of the entity to which they belong, up to twelve (12) months after leaving their office. In the case of directors of public companies, the restriction applies, to the companies which they work for, up to twelve (12) months after leaving their office.

Those who by their office or work have influence, over decision-making power, or privileged information about the contracting process or conflicts of interests, up to twelve (12) months after leaving their office.

In the corresponding procurement process, individuals or legal entities who are directly involved in determining the technical characteristics, reference values, developing the terms of reference, selection and evaluation of bids in a selection process and in authorizing payments of contracts, except in the case of supervision contracts.

The scope and time established also apply to the spouse, partner or relatives to the second degree of consanguinity or affinity.

The legal entities in which those have or have had a stake higher than thirty percent (30%) of capital stock or equity, within twelve (12) months prior to the call of the respective selection process.

Within the scope and time established for the persons mentioned in the LCE, non-profit legal entities in which those participate or have participated as partners or members of their boards, within twelve (12) months prior to the call of the respective selection process.

The legal entities whose members of governing bodies, attorneys in fact or legal representatives are such persons. This restriction also includes individuals whose attorneys in fact or representatives are the persons mentioned.

Individuals or legal entities administratively sanctioned with temporary or permanent disqualification in the exercise of their rights to participate in selection processes and to contract with Entities, in accordance with the provisions of this Law and its regulations.

Persons condemned, in the country or abroad, for using public office for private gain, embezzlement, corruption, illicit enrichment, influence peddling, crimes committed in auctions or selection procedures, or equivalent crimes if they have been committed in other countries. This impediment is also extended to persons who, directly or through their representatives, have admitted and /or recognized the commission of any of the crimes described above in front of a competent national or foreign authority.

Legal entities whose legal representatives or related persons have (i) been convicted, in the country or abroad, for using public office for private gain, embezzlement, corruption of officials, illicit enrichment, influence peddling, crimes committed in auctions or selection procedures, or equivalent offenses if they have been committed in other countries; or (ii) directly or through their representatives, have admitted and /or recognized the commission of any of the crimes described above in front of any competent national or foreign authority. In the case of a consortium, the restriction is extended to their legal representatives or persons linked to any of the consortium members.

Persons or legal entities through which, by reason of their representatives, constitute or participate in their shareholding or any other verifiable circumstance, it is determined that they are a continuation, derivation, succession, or figurehead, of another person, or otherwise exercise the effective control, independently of the legal form used to avoid this restriction, such as merger, spin-off, reorganization, transformation or similar.

In the same selection procedure, natural or juridical persons who belongs to the same economic entity.

Persons registered in the Compensation Debtors Registry (REDERECI for its acronym in Spanish), either on their own behalf or through a legal entity of which they are shareholders, excepting for listed companies, as well as the Registry of sanctioned lawyers for professional malpractice, in the Registry of officials and servers who were sanctioned with dismissal by the time established by the corresponding Law and in all the registries created by Law which restrict contracting with the State.

Finally, the breach to fulfill with the provisions of the LCE generates the consequences and responsibilities established in the LCE.

# 4. Bidder Selection

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

The selection criteria considered in order to evaluate the bids are the price and other qualitative elements as established in the tender rules, such as the time to deliver the good or service, the characteristics of the goods or service, and the guarantees offered. In regards to the procurement of works and the mixed mode (services and works), the selection criteria are the same, the price and other qualitative elements as established in the tender rules. In the event that two (2) or more bids tie, drawing lots determines which party wins.

Finally, in the case of the procurement of a supervisory or consulting services, the procuring entity must evaluate not only the price, but must also consider the following topics: the methodology proposed, the experience and qualification of the personnel proposed, as well as the equipment or infrastructure offered.

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

The LCE does not regulate prequalification as an option. The Entity qualifies suppliers/providers according to technical, economic criteria, among other standards, as established in the regulations for the selection process. To this effect, the selection process documentation shall clearly state the requirements which are to be met by suppliers/providers in order to prove their qualifications.

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

There is not a specific "blacklist", but the public procurement framework establishes two sanctions, which can function as a "blacklist" for bidders. The LCE regulates: temporary disqualification and permanent disqualification, individuals who are sanctioned with one of these two sanction can be said to be on a "blacklist" of bidders, and they are restricted to contracting with the State.

## 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?

Yes, when a company is involved in the set-up of a procurement procedure (drafting the bidding rules, technical characteristics, setting the price, reviewing and evaluating bids ) the company is excluded from said procedure.

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

Yes, the LCE permits suppliers/providers to form consortiums in order to submit a bid jointly. It should be noted that all members of a consortium are jointly liable in front of the entity regardless of their respective ownership share. Therefore, in terms of potential consequences all members are jointly responsible.

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

The members of a bidder consortium nor their ownership shares can be changed during a procurement procedure.

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

The LCE establishes that no individual who belongs to an economic entity or is related to someone who is can be a party, bidder, contractor or/and subcontractor in a selection procedure with that same entity.

# 5. Specifications

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

The technical specifications, terms of reference, or technical reports shall be objective and accurate, or alternatively they can be formulated by the entity of contracting and approved by the user. Such technical specifications, terms of reference or technical reports shall provide access to the procurement process under equal terms and are not aimed to create barriers or affect the competition within the bidding process. Except for the exceptions established in the Regulations, the requirement does not make reference to any manufacturing process, or to any specific procedure characterizing such goods or services offered by a specific supplier/provider, or its trademarks, licenses or types, or to any origin or specific manufacturing process in order to sponsor or reject specific suppliers or products.

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

The bidders are not allowed to change the specifications or submit their own standard terms of business. The public entity publishes the tendered documents and then the bidders can formulate consultations and observations, which shall be answered by the entity. The entity shall publish a comprehensive report which answers these questions.

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

As a general rule, to act as a participant, bidder, contractor and/or subcontractor of the Government it is required to be registered with the Suppliers/Providers National Registry (RNP). However, the provisions which govern the Suppliers/Providers National Registry (RNP for its acronym in Spanish) and are regulated by the LCE are not applicable to micro-and small businesses (MYPES) duly registered with the National Micro-and-Small Business Registry (REMYPE)

# 6. Contract Award

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

The entity shall evaluate the bids presented (according to the criteria of selection procedures) and after this evaluation the entity shall determinate who is the winning bidder. The entity will publish the award and the parties are authorized to sign the contract. There are not specific rules on the award of contracts, because these rules are applied in the evaluation of the selection procedures.

Also, the LCE regulates another type of award, the simplified award, which is used for goods and services procurement, except for services rendered by individual consultants, as well as works which have a reference value, that is within the margins established by the budget law for public sector.

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

The RLCE establishes with respect to the contracting of consultancy, goods, and services in general that a bid should be reasonably doubted when the bid price is substantially lower than the estimated value, and after the revision of its constituent elements, however, it should be noted that some benefits are not planned or budgeted, for this reason there is a risk of breach of the bidder. In this situation, the bid shall be rejected.

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

The general rules establishes by the LCE are the same for every bid. In the event that two (2) or more bids tie, lots will be drawn in order to determine which party wins the bid.

# 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 LCE regulates direct contracting. Entities may contract directly with a specific supplier in the following cases:
- When one public entity contracts with another public entity, provided that it results more efficient and technically feasible to meet the need and does not contradict the provisions stated in Section 60 of the Political Constitution of Peru..

In the event of an emergency situation arising from catastrophic events, situations affecting the national defense or security, situations involving serious danger of any of the abovementioned assumptions, or a health emergency declared by the body governing the national health system.

In a shortage situation duly verified, affecting or preventing the entity from performing its activities or operations.

When the Armed Forces, the Peruvian Police Force and bodies that make up the National Intelligence System require to carry out procurements of confidential or secret nature, or for internal reasons, according to the law, and with the prior favorable opinion of the Comptroller General's Office of the Republic of Peru.

When goods and services are available only from a particular supplier/provider or a
particular supplier/provider has exclusive rights over them.

For personal services rendered and duly supported by individuals.

For advertising services provided to the State by the television, radio, press or any other media.

For consulting services, other than work consultancies, which are the continuation and/or update of a previous work performed by an individual consultant and approved by the Entity, provided that it has been selected in accordance with the individual selection process for consultants.

For goods and services for purposes of research, testing or development of a scientific or technological nature, the result of which belongs exclusively to the Entity for its use in the performance of its functions.

For the renting of real estate and purchasing of existing real estate.

For specialized services for example, legal, accounting or economic advice, or for the defense of officers or ex-officers, employees or ex-employees and members or ex-members of the Armed Force and Police, and for functional actions of the applicable law.

When the Entity has the urgent need to continue the execution of the non-performed services derived from a terminated contract or a contract declared null and void, provided that the other bidders who took part in the selection process have been invited and no acceptance to such invitation has been obtained.

For procurement of training services of institutional interest with authorized entities or international specialized bodies.

Corporate purchases may be made by direct procurement. The direct procurements are approved by Resolution of the Entity's Head, Agreement of the Board of Directors, Regional Council or Municipal Council, as applicable.

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

The consequence is a declaration of nullity. The Head of the Entity declares, the nullity of the acts of the selection process, however, this declaration does not prevent the party from appealing this decision. After signing the contracts, the Entity may declare the nullity by operation of law just in specific situations regulated by the LCE.

# 8. Remedies and Enforcement

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

Yes, there are remedies and enforcement mechanisms regulated for the LCE, depending on whether it is a procuring entity or a bidder or contractor who breaches the provisions. First, bidders or contractors are exposed to sanctioning procedures that might be initiated by the Court of Public Procurement. Finally, it is possible that the Court of Public Procurement or the Entity (depends on if the irregularity were before or after signing the contract) can declare the nullity of some acts.

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

Yes, there are remedies available outside the scope of procurement legislation. In the case of a dispute relating with the contract, for example a breach of contract, the contractor can initiate an arbitration against the procuring entity or vice versa.

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

In order to determine what forum will hear a dispute, it is necessary to determine the nature of the dispute. If the dispute is between bidders, the dispute will be heard by the Entity Responsible for Supervise Contracting with the State (OSCE). If it is a dispute between the contractor and the procuring entity, the LCE establishes that this contractual dispute shall be resolved by institutional arbitration and in special cases Ad Hoc arbitration. Finally, the Court of Public Procurement can also resolve disputes such as appeals.

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

In the case of the arbitration, there is not a specific time table regulated by the LCE. The amount of time can be agreed to in the contract. However, in the case of public entities the timing of the procedure shall be determined by the Single Text of Administrative Procedures (TUPA) of the public entity (OSCE). For example, in regards to procedures in front of Public Procurement Court, in principle, the court has thirty business days to review.

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

Any dispute between the parties on the performance, construction, resolution, inexistence, ineffectiveness or invalidity of the contract is resolved through conciliation or arbitration according to the agreement of the parties. Controversies regarding contract nullity may be solely subject to arbitration. The majority of the arbitration agreements are multi-tiered clauses, for this reason it is necessary to initiate a period of negotiation or a conciliation before the beginning of the arbitration.

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

There are several admissible grounds for starting a procedure, the most relevant are: violation of the provisions of the LCE or RLCE, the incorrect evaluation of a bid and the contractual breach.

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

No, bringing a contentious-administrative action (review proceeding by a judge) does not affect an on-going tender procedure or an awarded contract. However, if the judge institutes precautionary measures, these can affect an on-going 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?

In the case of a successful review proceeding, the winning bidder shall be the party who finished second in the evaluation. If the second place bidder is not available, the winning bidder shall be who the party who placed third in the evaluation.

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

The judicial proceeding can take approximately three years. This term can change depending on the type of dispute and procedure.

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

The opening of the bids is in public (economic and technical parts). For this reason, unsuccessful bidders are present when the public entity determinate who is the winning bidder and give the award.

## k. Are review proceedings common?

Yes, the review proceeding is common, of course depending on the dispute.

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

Through arbitration, the parties of the contract can claim damages. This kind of procedure is common when they are related with breach of the contract.

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

The leading courts are the forum for Arbitration (the LCE establishes the arbitration) and the Public Procurement Court (part of the OSCE).

# 9. Other Relevant Rules of Law

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

The most important bodies of law related with the public procurement are: the Entity that Supervises Public Procurement (OSCE), the Ministry of Economy and Finance and *Perú Compras* (corporative procurements).

# 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, there are not specific laws or practices that apply in the technology sector.

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

Yes, there are some institutions related to the defence sector. The defence sector can directly contract without a selection process. This is allowed because these contracts have a peculiar public interest that justify this exception, and therefore the law permits it.

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

There is a Law No. 26842, which is the General Law of Health. This sector has a peculiar public interest, for this reason it is important to check its specific regulation.

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

There are some laws that apply to different industries; one of the most important is the Law Decree No. 25844 that regulates electric concessions.

# 11. Looking Ahead

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

The LCE was recently modified by the Legislative Decree No. 1341, and the Supreme Decree No. 056-2017-EF recently modified the RCLE. In that sense, in principle, the public procurement framework should not change for a while.

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