Public Procurement World - Colombia

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# 1. The Laws

## 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.

# 2. Application of the Statutory Procurement Laws

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

Generally, all Government-owned Entities are subject to the Procurement Statute. Such term is defined broadly and includes the Nation and national level agencies, the territorial subdivisions such as departments, municipalities and districts and their agencies. There are several decentralized entities both at the national and local level which are specialized by the scope of their duties but are also owned or controlled by other national or local entities which are subject to provisions of the Procurement Statue as well. Mainly, the following entities are subject to procurement laws:

Entities from the national order

Entities from the departmental order

Entities from the municipal order

Provinces

Capital district

Special districts

Metropolitan areas

Municipalities associations

Native territories

Municipalities

Public establishments

Industrial and commercial state-owned corporations

Companies majority-owned by the nation or any public entities

Indirect decentralized corporations

All other legal entities majorly owned by the state

However, some specialized entities, either because of their special regimes of organization or because of the application of other specific statutes, are wholly or partially exempted from observing the Public Procurement Statute. Nonetheless, even though these entities are not required to apply the Public Procurement Statute, their contracts shall still uphold the general principles determined in the Public Procurement Statute.

Ecopetrol, for example, is a corporation and a national level Government- owned Entity that is subject to private contractual regime. Additionally, some specialized and decentralized entities are subject to the Public Procurement Statute unless they undertake activities in competition with private players. These entities include the so-called industrial and commercial establishments of the State, or corporations in which Government- owned Entities have participation greater than 50%. Public Utilities companies are not subject to statutory procurement laws either.

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

As a general rule, when purchasing goods or retaining services, private entities are never subject to the Public Procurement Statute. Only when they intend to act as supplier of goods or service providers to a Government-owned Entity which is subject to the Procurement Statute, private entities must follow the Public Procurement Statute.

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

Co-operations between public bodies are not exempted from the Public Procurement Law. However, they are not subject to the general rule on public tender. With the exception of insurance contracts, contracts between public entities are not subject to a public bid and may be contracted directly.

Contracts between public entities through direct contracting may only proceed when the contract is related to the undertaking partie's corporate purpose. Nonetheless, Co-operations between public entities must abide by the objective selection, public interest, economic and transparency principles detailed in the Public Procurement Statute.

## d. Which types of contracts are covered?

In principle, the procedure performed prior to the selection of a contractor with a Government-owned Entity subject to the Public Procurement Statute must comply with such statute. However, as a general rule, the contents of the agreement, rather than the procedure to select a contractor, are subject to the applicable private commercial or civil rules.

Therefore, all the types of contracts foreseen in private commercial law are covered by the Procurement Statute as long as one of the parties is a Government-owned Entity subject to the Procurement Statute.

The Procurement Statute specifically states that it directly regulates the following contracts:

civil works (construction) contracts;

concession contracts;

public trusts; and

public credit contracts.

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

As a general rule, state contracts may be modified when necessary to achieve their purpose. Amendments or changes to a contract must be done in writing and shall be agreed upon by following the same solemnities that were required when signing the original contract (public contracts and their amendments can only be perfected in writing).

The modification may be agreed upon between the parties, or if no agreement is reached, it may be unilaterally imposed by the administration when deemed necessary.

Changes to contract must be exceptional under the principles of planning and legal certainty. For this reason, modifications must obey a real and certain cause, and must be in accordance with the purpose originally being served by the contract. Therefore, changes to a contract can not alter its essence, since this would entail the undertaking of a new contract, which would require a new procurement procedure.

Price and time frames are not necessarily of the essence of the contract, and therefore may be modified, unless said modification is excessive (e.g. a 50% increase in price), which would alter the essence of the contract. Additional rules may apply for specific changes, such as transfers or assignment to new contractors, which are possible if the public entity expressly agrees to the change.

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

No additional or special conditions are set forth for framework agreements. Therefore theses type of contracts must comply with the Public Procurement Statute. Contractors who have been awarded a contract, may sub contract or hire third parties without a selection proceeding in order to help them perform the contract that has been awarded to them.

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

Public-private partnerships are regulated by Law 1508 of 2012, which determine the scope and reach of PPPs. Nonetheless, PPP projects of public initiative will proceed under public tender, as indicated by the Public Procurement Statute. Additional requirements may apply as stated by Law 1508 of 2012 and Decree 1467 of 2012.

Private entities may structure and submit confidential proposals, which will be subjected to the competent authority´s consideration. However, once the feasibility of the project is determined, the contractor shall be selected through public tender if the initiator of the project considers that public resources are necessary to fund the project.

On the other hand, if the originator of the project considers that it does not require public resources for its financing, then the contractor will be chosen by means of an abbreviated selection proceeding with prequalification.

## h. How are concessions dealt with?

Concessions are considered PPP's under law 1508 of 2012 and therefore, are subject to selection proceedings in accordance to law 1508 of 2012 and the Public Procurement Statute when applicable. Any concessions that were awarded prior to law 1508 of 2012, will be regulated in accordance to the law that was in effect at the time of its undertaking.

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

Yes. Colombian competition and criminal laws establish measures in order to assure that procurement contracting takes place under normal and unaltered competition procedures. In this sense, the Anticorruption Statute enacted by Law 1474 of 2011 provides that the act of entering into an agreement in order to unlawfully alter the procurement procedure in a public bid, public auction, abbreviated selection or merits qualification is considered a crime, punishable with imprisonment from 6 to 12 years and penalties between 200 minimum monthly wages (approximately US$66,000) and 1,000 minimum monthly wages (approximately US$330,000).

Additionally, the Procurement Statute sets forth strict limits to the use of trust funds by the Government-owned Entities to avoid the use of these funds to skip the selection procedures set forth by the law.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

Public entities have various procedures available to carry out public procurement. The general rule is that the transparency and objective selection principles must be observed. Although this is the general rule, the Procurement Statute offers mechanism to expedite procurement in the cases defined therein.

The procedures provided in the Procurement Statute are the following:

Public bid. Unless a specific rule provides that the selection of the contractor must be carried out through a different procedure, the Government-owned Entity must use this mechanism. The general principle is that once all bidders meet the minimum qualifications (experience, financial requirements, personnel available, etc,) the overriding awarding factor should be a mix of price and technical qualities offered. Additionally, and according to Law 1150 of 2007, state entities may decide to hold their public bid under a Reverse Auction Scheme if they find it appropriate.

Abbreviated selection. While similar to a public bid, this mechanism is shorter and simpler, and is generally used when the value of the contract to be awarded is considered to be low, in comparison to the public entity's overall budget, according to the criteria established by Law 1150 of 2007. It is also used to award contracts for the procurement of goods of standard quality such as stationery, common use machines, etc. When used to contract standard goods or services, the lowest price should be the key factor for the awarding of contracts.

Merit-based qualification. This procedure is used to select the entities or individuals that will provide Government-owned Entities with consulting services (e.g., the selection of an investment bank to privatize a Government-owned Entity or a lawyer to represent the entity in arbitration). Unlike other selection mechanisms, merit-based qualification or contest is usually not awarded on the basis of the lowest price criterion, but rather on the basis of experience and academic qualification. Therefore, consultants cannot be chosen on price, but rather by qualification.

Direct contracting. Entities are allowed to purchase goods or retain services without conducting competitive bidding in specific events, such as when there is an urgent need for the goods or services, when the value of the contract to be awarded is considered to be low, in comparison to the public entity's overall budget, according to the criteria established by Law 1150 of 2007, or when acquiring assets that are only provided by one competitor in the market. In practice, to avoid investigations by the controlling bodies, even in cases where direct contracting is allowed, the Government-owned Entity will use some form of competitive bidding, even if not subject to the same rules as provided in the other mechanisms.

De minims contracting. This is a very simple procedure used to award contracts for small values.

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

According to Law 1150 of 2007 and Law 527 of 1999, proceedings, administrative acts, documents, contracts and, in general, acts derived from pre-contractual and contractual activity, may take place by electronic means.

In accordance to Decree 1510 of 2013, State Entities are required to publish their contractual activity in the Contracting and Purchasing System (SECOP) an electronic data base containing information on public procurement. This obligation is supported by the fact that the contracts are executed with taxpayer's resources to deliver goods and services to the population, and therefore, everyone should have access to the corresponding information.

Public entities may also hold an electronic auction when proceeding under a Reverse Auction Selection Process. If the State Entity decides to perform the auction electronically, it must clearly establish the system to be used for the auction in the terms of reference, as well as the security mechanisms in place. The Electronic Reverse Auction is a dynamic process of online price negotiation between pre-selected suppliers.

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

According to the Public Procurement Statute, invitations to undertake contacts with public entities must be published in mass distribution journals from 10 to 20 days before the tender is open. This notice must be published at three different moments, 3 to 5 days apart from each other.

Additionally, and according to Decree 1510 of 2013, public entities must publish invitations or summoning's in the public contracting and purchasing system (SECOP), an electronic data base containing information on public contractual relationships.

The SECOP web page is as follows: <https://www.contratos.gov.co/consultas/inicioConsulta.do>

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

In principle, every competitive procedure for the selection of bidders should be open to any person that comply with the experience, financial and other technical qualifications required for the performance of the contract to be awarded. This means that grounds for exclusion of bidders should be general and not bidder-specific.

The Public Procurement Statute and concordant laws such as law 1474 of 2011, set forth several grounds that would prevent an individual or entity to participate in a public procurement procedure in the form of an incompatibility or inability regime. The general causes for exclusion of a person or company are, among others, the following:

those individuals or entities that cannot enter into contracts with a Government-owned Entity pursuant to the Constitution or the law;

those individuals or entities that were precluded by the law to enter into a contract with a Government-owned Entity on specific grounds and entered into a contract regardless of such prohibition (they become precluded to enter into other contracts that they would have been able to execute had they not breached the law);

those individuals or entities who were a party to a contract with a Government-owned Entity and whose contract was unilaterally terminated by the Government-owned Entity for material breach under the so-called declaration of caducity (contractual sanction consisting in the termination of the contract and banning form public procurement);

those individuals who have been judicially condemned to have their rights and public functions suspended (e.g., someone found criminally guilty for bribery);

those individuals or entities that refrained from performing a public contract that was awarded to them;

public officials; and

those with close family ties with a high ranking officer of the Government-owned Entity awarding the contract.

# 4. Bidder Selection

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

Selection criteria are largely defined by each public entity in the corresponding rules for the public bid, abbreviated selection, merits qualification or contest or direct contracting procedures. However, public entities must follow the principles and general rules established in the Procurement Statute in order to ensure the objective selection and the capacity and suitability of the contractor.

The Public Procurement Statute governs public contracting through an objective selection principle according to which the most favourable offer is selected. This choice does not take into consideration factors of affection or interest, or in general, any kind of subjective motivation. The most favourable offer takes into account criteria such as experience, organization, equipment, term, and price, which are all weighted in accordance with the terms of reference.

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

Merit-based qualification proceedings utilize prequalification as part of their process. Prequalification is considered an independent contest from the selection proceeding, which consists on the formation of a limited list of bidders to participate in one or more merit-based selection proceedings.

Prequalification may be used to create two different types of lists, a short list or multipurpose list. The short list is used when only one contractor will be selected, by means of single merit-based qualification proceedings and may require the submission of a Detailed Technical Proposal (PTD) or a Simplified Technical Proposal (PTS).

A multipurpose list is used to carry out several merit-based qualification proceedings, which apply when the following conditions are met:

The merit based qualification proceedings to be performed are determined or determinable;

The objects of the contracts to be executed are common or Similar; and

It requires the submission of a simplified Technical Proposal (PTS).

Prequalification proceedings may also be used in the selection of PPPs. The criteria for the prequalification will be determined in the regulation.

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

When proven that a registered party presented documents or information for registration, qualification or classification, that contain false information, its registration will be cancelled and it will be banned from public procurement for t 10 years, without prejudice of any criminal action that may also be available.

Contractors, based on their actions or omissions when performing a public contract, may be subject to the following:

In case civil or criminal liability is declared, public officers will be disqualified from holding public office and banned from public procurement for 10 years. The same penalty shall apply to individuals declared civilly or criminally liable.

In the event that any precautionary measures are filed against an individual relating to a particular act or omission relating to its contractual performance, those measures shall be relayed to the respective Chamber of Commerce, which shall amend the bidder registration to reflect these new circumstances.

In the event that precautionary measures are filed against the legal representative of a private entity as a result of acts or omissions in relation to their contractual performance, they shall be prevented from bidding or entering into contracts with state entities throughout the duration of the precautionary measure. If said legal representative is convicted, the private entity shall be banned from public procurement for 10 years.

If there are breaches of the contractor's obligations that may result in the risk of paralysis of the performance of the contract, the public entity is entitled to terminate the contract and ban the contractor from public procurement through the imposition of "caducidad."

Due process is strictly adhered to in the imposition of any of the previously mentioned sanctions. Therefore, if the sanction is to be imposed by the contracting entity, a due process hearing will take place, giving the contractor the opportunity to present its defense.

If the sanction is in fact imposed, and the contractor wants to be "unlisted" the contractor may file a reconsideration motion. During this period, the sanction is not effectively imposed, and is suspended until the reconsideration motion is decided. If the final decision is unfavourable, and there are grounds for judicial action, a contentious administrative action against the decision of imposing the sanction may be field before an administrative court. The contentious administrative action does not suspend the effects of the sanction unless the provisional suspension of the sanction is declared as a precautionary measure.

## 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?

Although not explicitly prohibited, all selection proceedings operate according to the transparency and equality principles, where all the proponents must participate in equal conditions.

Having participated in the set-up of a procurement procedure may be construed as an unfair advantage and may represent a conflict of interest, which may result in the annulment of the bidder's proposal.

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

Yes, the Procurement Statute provides that the bidders may combine to submit a bid using the following mechanisms:

Temporary union. This is an unincorporated joint venture by means of which two or more bidders may submit a single bid, and they must be jointly and severally liable for the fulfilment of the obligations of the contract if awarded to the temporary union. However, the fines that the contracting entity may impose should be imposed and enforced only against the member of the temporary union who breached the agreement, provided that the members of the temporary union clearly inform how the obligations under the agreement were to be divided when submitting the bid.

Consortium. This is an unincorporated joint venture by means of which two or more bidders may submit a single bid, and they must be jointly and severally liable for the fulfilment of the obligations of the contract and for any consequences arising from the breach of the agreement, including fines imposed by the Government-owned Entity.

Promise for future partnership. This is originally a non-incorporated joint venture for the purposes of the submission of a single bid. If the agreement is awarded, the parties shall complete the incorporation to perform the contract.

The same bidder cannot bid individually and at the same time through a combined form or as part of two or more combined bidders.

Every member of a consortium or any type of joint venture bid, is subject to the same scrutiny and requirements that an individual proponent would face, including all applicable anti-trust laws.

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

Proposals or bids in a selection proceeding cannot be modified once the public bidding stage is closed and the evaluation stage begins. Case law has determined that allowing changes to a bid once the public bid stage has ended would put other bidders in a disadvantage and therefore violate the equality principle present in public procurement.

Consequently and taking into account that consortiums and state contrasts are "*intuitu personae*" (contracting parties are a decisive factor in the contract), once the bidding stage is closed consortiums or other combined bidding figures can not change members as it would imply a change in the proposal.

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

The same bidder cannot bid individually and at the same time through a combined form or as part of two or more combined bidders, since this would violate the transparency and equality principles present in all public procurement activities.

# 5. Specifications

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

Selection criteria are largely defined by each public entity in the corresponding rules for the public bid, abbreviated selection, merits qualification or contest or direct contracting procedures.

However, public entities must follow the principles and general rules established in the Procurement Statute in order to ensure the objective selection and the capacity and suitability of the contractor. This means that they cannot request potential bidders to provide evidence of experience that is not relevant to the agreement to be awarded or that is so specific that it is designed to rule out potential bidders that are otherwise well-qualified for the job at hand.

Additionally, unduly burdensome or risky requirements that are not supported or necessary to perform the contract, may be construed as a violation to the transparency principle that governs public procurement activities.

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

According to the Public Procurement Statute, the contracting entity is in charge of drafting the specific terms and conditions during the selection process. Additionally, Article 30(6) of the Public Procurement Statute provides that bids must refer to and be subject to each and every one of the points contained in the terms of reference.

Nonetheless, according to article 23 of Decree 1510 of 2013, potential bidders may submit technical and economic alternatives and exceptions as long as they do not entail that the award be conditioned. The presented alternatives and comments shall be considered by the public entity in order to determine if they should be incorporated in to the terms of reference.

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

There are a series mechanisms and rules to encourage the participation of MSMEs in government contracting which tend to grant certain benefits and advantages to these types of companies over other competitors. Two main incentives are as follows:

The selection proceeding will be limited to national MSMEs with a minimum of one (1) year of existence in abbreviated selection proceedings and Merit-based qualifications where the value of the service or good being procured is less than USD $ 125,000.

If during the selection process bidders are found to be tied, the supply of domestic goods or services will be preferred over the supply of foreign goods or services. If the tie persists, then the offer presented by a national MSMEs will be preferred.

# 6. Contract Award

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

Yes, there are both procedural and substantive rules applicable to the awarding of contracts.

For example, on the procedural side, the general rule for awarding public contracts within a public bid process is by holding a public hearing (Law 1150 of 2007, Article 9) in which the decision has to be made. Regardless of the hearing, the decision must be documented in an administrative decision.

Substantive rules are applicable to different types of procedures. For example, in public bids for the procurement of goods the Government-owned Entity must award the agreement by either of the following methods for weighing both the quality and price of the goods offered (Law 80/1993, Article 5): (i) by designing a mathematical formulae to define the points awarded to the price level and the points awarded to the quality offered, in which case the bidder with the best score as per the predefined formulae is awarded the contract; or (ii) by weighing price and quality of the goods offered to determined the best ratio of cost-benefit.

In connection with abbreviated selection procedures, the same methods for awarding public bids may be used, unless the procedure is for the acquisition of standard goods in which case the contract must be awarded to the bidder offering the lowest price.

Both in public bids and abbreviated procedures experience, minimum financial factors and organization's capacity (measured by the number of employees available to perform the agreement) are mandatory requirements but in no way can higher scores be awarded to a bidder on account of these factors.

On the contrary, in a merit-based qualification or contest, both the technical aspects of the offer as well as the specific experience of the bidder and its work team are the decisive factors to award the contract. The price is irrelevant for the purpose of awarding a consulting agreement in a merit- based qualification or contest.

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

The price suggested by the bidder must be proportional to the value of the object or service being offered, otherwise an obvious discrepancy between the contracted object and its value would be generated. The price can not be derisory or vile, as this can mean a possible breach of contract, or possible conflicts due to unpredictability, injury, abuse of law, etc., which administrative contracting should avoid.

The so-called "artificially low price" is a price that is artificial or false, concealed, greatly reduced or diminished, but also that it does not find any basis or support in its structuring within the market. Therefore, the price cannot be justified and the Administration would be unable to admit it, under penalty of violating the principles of transparency, balance and impartiality that govern the contractual activity

Nonetheless the price, although low, may be reasonable and justified by special circumstances that have sufficient explanation, which must be evaluated by the Administration in its context, to determine if the offer may or may not be admitted. In order to establish if the price of the offer is artificially low, the reference point to be used is that of market prices, which must be consulted by the Administration.

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

The subject of alternative bidding is not expressly regulated in the Procurement Statute or any regulation regarding the matter. Government-owned Entities are reluctant to accept alternative bids since the selection of an alternative bid could be seen by the regulators as a mechanism to avoid the rules set forth in the relevant request for proposals, which once issued are binding on the Government-owned Entity.

Alternative biddings are generally only considered by the Government- owned Entity when none of the main bids complies with the terms of the request for proposals. Furthermore, even in this case, the Government- owned Entity is more likely to issue a new request for proposal derived from the alternative bids rather than awarding the contract directly based on the alternative 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?

Yes, the Procurement Statute sets forth certain events in which direct awarding is possible without a competitive bidding process. In these casesthe Government-owned Entity is not required to issue an open request for proposal or even request proposals from more than one potential contractor (Law 1150/2007, Article 2(4)). Among others, the cases in which direct contracting without a previous competitive bidding is allowed are:

when the goods or services are needed in an state of urgency;

when the goods and services are required for national defence purposes and they are of a classified nature;

when the contract is needed for the development of scientific and technological activities;

when there is no plurality of bidders in the market for the relevant product or service; or

the lease or acquisition of real estate.

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

If a Government-owned Entity initiates or conducts a selection proceeding while ignoring competitive bidding when applicable, any decision made during or after the selection proceeding, including the decision to award the contract, may be subject to be declared null and void by an administrative judge.

# 8. Remedies and Enforcement

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

*General remedies available to Government-owned Entities*

As a general rule, a party to an agreement where both of the parties exchange promises and the promises made by one party are given as consideration for the promises of the other party, the non-breaching party will be entitled to three types of remedies in the event of breach by the other party (Civil Code Articles 1613 and 1546): avoidance, specific performance and damages.

These three general remedies are available to Government-owned Entities. Because of their nature, the remedies of avoidance and specific performance are mutually exclusive – a Government-owned Entity acting as plaintiff may not request, at the same time, that avoidance and specific performance be awarded as a consequence of a breach of contract. Instead, it will be necessary for the Government-owned Entity to choose one of the two remedies as a first option, and the second one may only be awarded if the court does not award the first (Civil Code, Article 1546).

On the other hand, damages may be awarded independently or in addition to both the remedies of avoidance and specific performance, to the extent that the non-breaching party has sustained an indemnifiable loss.

Unlike other legal systems, Colombian courts do not have the discretion to award either avoidance or specific performance of a contract – a court is limited to the terms of the plaintiff's request.

*Special remedies available to the Government-owned Entities*

Government-owned Entities subject to the Procurement Statute must include certain specific clauses that vest them with special powers that can be enforced unilaterally through the issuance of administrative resolutions.

Agreements in which the inclusion of the special powers is mandatory are those agreements for the performance of a service or utility deemed public, concession agreements for the exploitation of public assets or of a monopoly of a public nature, as well as civil works (construction) agreements. The inclusion of these special powers is optional regarding agreements for the provision of services.

These special powers are:

Unilateral interpretation of the contract. If while performing the agreement, the parties disagree on the interpretation of a specific provision of the agreement and the difference may lead to paralysation of or a grave adverse effect on the public service to be satisfied or served, the Government-owned Entity may define how the agreement is to be interpreted.

Unilateral modification of the contract. If while performing the agreement the Government-owned Entity (i) realizes that the scope of the contract needs to be increased, modified or decreased, (ii) the parties fail to reach an agreement as to the required changes, and (iii) such failure may lead to the paralysation of or have a grave adverse effect on the public service to be satisfied or served by the contract, the Government-owned Entity may unilaterally order the modifications as necessary. Whenever the modifications ordered alter the value of the agreement in 20% or more, the contractor may terminate the agreement and cease its performance.

Unilateral termination of the contract. Upon the occurrence of certain specific events, the Government-owned Entity may unilaterally terminate the agreement before expiration of its term. Such particular instances include (i) events where the public service or utility affected by the agreement so requires, (ii) when the contractor that is an individual dies, (iii) when the contractor that is a legal entity is dissolved or enters into a procedure for its liquidation, or (iv) when the contractor generally ceases its payments.

Caducity. When the contract is materially breached by the contractor in way that gravelly,directly and adversely affects the performance of the contract, the Government-owned Entity may unilaterally terminate the contract. In this event, the contractor will be prevented to enter in contracts with Government-owned Entities in the future.

It should be noted that the decisions made by the Government-owned Entity may be challenged by the contractor before the competent courts. The contractor may request monetary relief resulting for undue interpretation, modification or termination of the agreement by the Government-owned Entity or seek adequate compensation to restore the balance of the contract disturbed by the unilateral interpretation or modification, even when accurate.

*Remedies limited to the private party in a contract entered into with a Government-owned Entity*

In case of breach of contract by a Government-owned Entity, the remedy available for the contractor, as established in the Procedural and Contentious Administrative Code (Law 1437 of 2011 Article 141), consists of a Contractual Action that can be filed against the contracting entity before Colombian administrative courts in order to seek a judicial declaration of breach of contract, the payment of the corresponding indemnifications and other declarations that may apply.

The issue of whether specific performance is available is generally not discussed because, as a general rule, the Government-owned Entity will be required to pay an amount of money instead of rendering a service. When the Government-owned Entity is subject to the Procurement Statute, even if such entity is the one to render the services or supply the goods, specific performance will as general rule not be available because there is a long- standing principle that courts cannot order administrative authorities to carry out a specific action, but rather should limit relief granted to awarding damages.

However, when the Government-owned Entity is authorized to deal as a private player and is not subject to the Procurement Statute, specific performance may be available against the Government-owned Entity.

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

There are no substantive restrains to the contractual freedom that the parties to an agreement, whether public or private, enjoy to negotiate and craft their own remedies in a contract.

The guiding principles as to contractually-fashioned remedies are that any agreed remedies are valid if:

they do not constitute a waiver of any statutory remedies for causes of action based on gross negligence or wilful misconduct, unless such waiver is made after the affected party becomes aware or could become aware of the occurrence of a gross-negligent action or a wilful misconduct (Civil Code, Article 1522); or

in the context of a consumer relation, a waiver of the legal warranty and of the safety warranty may be invalid.

As a matter of practice, a Government-owned Entity purchasing goods or retaining a service will generally request that the agreement includes both simple delay penalties as well as a liquidated damages clause.

A simple delay penalty allows the Government-owned Entity to impose a fine or penalty on the contractor for each day (or other period of time) in which the contractor is delayed in the delivery of the goods or performance of the service (e.g., a US$1,000 penalty for each week of delay in meeting the final date in which a completed construction must be delivered by the contractor). Delay penalties allow for double-dipping, that is, the Government-owned Entity may claim both the penalty as well as the damages resulting from such delay.

Liquidated damages are usually stipulated to relieve the Government-owned Entity from the burden of proving the damages it sustains on account of the breach by the contractor. Unlike a mere delay penalty, a liquidated damages clause does not allow for double-dipping, but the Government-owned Entity can waive the liquidated damages clause and instead sue for the actual damages resulting directly for the breach.

Remedies may be sought outside of the public procurement legislation. As a general rule, claims and disputes involving government entities are handled by contentious administrative law (Lay 1437 of 2011), there, contractual actions may be brought against the administration or the contractor. These proceedings are held before administrative judges. Additionally, the administration may settle contractual disputes through arbitration if a binding arbitration clause is agreed.

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

Absent a valid arbitration clause, the contractual controversies action must be brought before special courts that hear disputes where one of the parties is a Government-owned Entity.

While a Government-owned Entity may subject contractual disputes to arbitration (including international arbitration), if the contract is to be performed abroad, Government-owned Entities are generally reluctant to agree on arbitration as means of dispute resolution. The rationale behind this is that arbitration is generally expensive and Government-owned Entities have limited budgets that will not allow them easily to pay for expensive arbitration procedures and the fact that arbitration panels tend to be more even-handed in disputes to which a Government-owned Entity is a party to.

Additionally, when the Government-owned Entity is subject to the Procurement Statute, there are material limitations as to the competence of an arbitration panel since matters such as the invalidity of administrative decisions could be deemed as not arbitrable. That results in numerous Suits to challenge the award granted by the Government-owned Entities based on the ground that the decision by the entity was illegal.

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

Once a contract has been awarded, it will be considered final and binding for the bidding company and the public entity. The awarding decision is not subject to reconsideration or challenge before the public entity within the tender process and may only be challenged before an administrative court by means of a contentious administrative action.

A contentious administrative action may only proceed when the administrative decision of awarding a contract: (i) infringed the rules on which it should have been based on; (ii) was issued by an incompetent authority; (iii) issued irregularly or in contravention of due process laws; or (iv) was issued under false motivations or by means of a deviation of powers by the person who issued the administrative decision.

Disputes concerning decisions by a public entity issued before the contract is awarded are subject to a 4 month statute of limitations as from the date the decision was notified or communicated. Such decisions include the decision to award the contract, the assessment of a specific proposal or the decision not to award the contract, among others things.

Disputes arising directly out of the awarded contract are subject to a two-year statute of limitation. The two-year period generally begins upon the termination of the agreement, although specific rules may apply depending of the cause of the dispute.

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

In order to request the annulment of a decision that awarded a contract, the decision must be binding and in force. Additionally, the claim must be filed within 4 months as of the date of notification of the decision.

It is not possible to file a lawsuit before administrative courts against administrative decisions issued within the public procurement procedure prior to the awarding of the contract unless the available remedies of reconsideration and appeal have been filed before the public entity.

Additionally, if the lawsuit to be filed against an administrative decision issued within a public procurement procedure seeks for the annulment of the administrative decision and for the reestablishment of rights, it is mandatory to carry our a conciliation procedure before the lawsuit is filed (pre-condition).

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

As a general rule, decisions may be subject to an annulment proceeding when they violate applicable laws, when the decision has been taken by entity acting outside their jurisdiction, in an irregular manner, or by false motivation, among others.

Therefore, in procurement proceedings, the eventual decision to award a contract may be attacked, among others, when it was issued while:

ignoring the proper procedure;

ignoring the objective selection principle when applicable;

through false motivation; and

in violation of applicable rules and laws.

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

As a general rule, any bidder has the right under the Statute of Public Procurement to challenge any administrative act or decision issued during the public procurement selection process (e.g., issuance of the terms of reference, evaluation reports and the act of award of the contract). The challenge must be filed before the contentious administrative judges after exhausting the administrative remedies before the contracting entity when applicable. A contentious administrative action may be filed before or after the contract is signed or its performance begins. The action does not suspend the subscription of the contract nor its performance. However, precautionary measures may be requested within the contentious action, requesting for the provisional suspension of the contract's performance in order to prevent any further damage that may arise from the contractual performance. It is worth noting that Colombian administrative courts are reluctant to grant these types of measures.

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

Depending on the merits of the case and the type of claim that is filed, success could result in that the selection proceeding as a whole is declared null and void, or that the sole decision to award the contract be overturned. If the party filed an annulment and reestablishment of rights claim, the plaintiff may be awarded damages.

If a party claims that the selection proceeding was unlawful and violated due process, the whole selection proceeding may be declared null, and may be repeated if necessary. If the selection proceeding is seen to be lawful, but the decision to award a contract was illicit, then only the decision to award the contract would be declared null. If the claimant considers that its offer should have been awarded with the contract and filed an annulment and reestablishment of rights claim, the judicial decision may order that the claimant be compensated for any loss arising from the decision.

Finally, if the administrative decisions supporting the awarding of the contract are annulled, the contract will be declared to be null and void as well. Regardless of an Annulment, the performance of the contract up to the point of the annulment will be recognized and duly paid to the Contractor.

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

Contractual claims or Annulment and Reestablishment of rights proceedings usually last around a year and a half before a first instance decision is made. If the decision is appealed, second instance proceedings can take from a year and a half to two years.

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

According to law 1150 of 2007 Article 9, the decision to award a contract must be announced in a public hearing where bidders are present. The winner is understood to be notified of the award in said hearing. Additionally, the awarding must be published in the SECOP which is accessible to the general public.

## k. Are review proceedings common?

Review proceedings, understood as contractual claims or annulment and reestablishment of rights claims are common under contentious administrative law. These claims are usually filed against an administrative decision that awards a contract to a specific proponent or against any decision made by the public entity within the public procurement proceeding that is found to be unlawful. The Procedure and Contencious Administrative Code provides that pre contractual decisions and acts may also be subject to claims frrm the affected party.

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

It is common to request damages by means of an Annulment and Reestablishment of rights claim, under contentious administrative law.

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

None.

# 9. Other Relevant Rules of Law

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

Yes, while the Procurement Statute is the body of law that governs public contracting, several laws have expanded and amended The Procurement Statute and added new regulations. Several of these laws have been mentioned before and they include, among others, Law 1150 of 2007, Law 1474 of 2011 and Law 1508 of 2012

It is important to mention that on 7 November 2011, the government enacted Decree 4170 of 2011, which created the new National Public Procurement Agency, which has been charged with the task of designing and monitoring the public policies regarding procurement, analysing the market and proposing new regulations in order to achieve greater efficiency, transparency and optimization of State resources.

# 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?

As mentioned above, the Procurement Statute establishes the development of scientific and technological activities as an event in which a direct contracting procedure may be carried out. Additionally, public entities may acquire, through an Abbreviated Selection Process, equipment of uniform characteristics (equipment or goods that have the same technical specifications, and share objectively defined patterns of performance and quality) such as computers, cell phones, and others.

However, depending on the scope and purpose of the particular technology procurement, other laws regarding privacy and intellectual property may apply.

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

As a general rule, procurement of goods and services related to national defence and security are performed through an abbreviated selection procedure which is a short-form competitive selection procedure (Law 1150/2007, Article 2(2)(i)).

Additionally, and according to Article 2(4)(d) of law 1150/2007, the procurement of classified goods and services for the defense sector, can be handled through a direct contracting scheme. Regardless of this possibility, in practice, Government-owned Entities in the defence sector still follows some form of competitive bidding even when the goods to be procured or services to be retained are of a classified nature.

Lastly, 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.

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

According to Law 1150 of 2007 and Decree 2025 of 2009 State entities that require the provision of health services, will select their contractors through an abbreviated selection process. In any case, the person or company who provides the contracted services must be registered in the special national registry of the Ministry of Social Protection, in accordance with Law 10 of 1990.

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

The general rule in the public procurement is a public bid. However, law 1150 of 2007 provides a list of exceptions to the rule, where contracts are not subject to this proceeding. Most exceptions are related to formal characteristics of the contract, such as overall price and the number of bidders. Nonetheless certain activities are subject to a different procedure, such as:

The Defense Sector;

The Healthcare Sector;

Contracts that develop scientific and technological activities; and

Loan contracts.

# 11. Looking Ahead

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

At the moment, there are no formal proposals to change the current Procurement Statute.

The national government has stated in the media that it intends to carry out a massive state reform in the near future, which will likely impact the current laws regarding public procurement.

Additionally, jurisprudence regarding public procurement is generally evolving and, thus, courts will play an important role in public procurement matters.

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