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Colombia

PUBLIC PROCUREMENT

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This country-specific Q&A provides an overview of public procurement laws and regulations applicable in Colombia.

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COLOMBIA PUBLIC PROCUREMENT



1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL)

Colombia has been a member of the WTO since April 30, 1995, has been an observer country of the Public Procurement Agreement - ACP since February 27, 1996, has been a member of UNCITRAL from 1968-1971, 1977-1983, and from 1998 to 2004, 2004 to 2010 and 2016 to 2022. Thus, Colombian domestic legislation has opted to include within its normative development, some principles that these organizations promote for the procedures they seek to regulate, with the WTO and the ACP, for example, instituting the principles of (i) transparency, since minimum standards are established regarding the publication of conditions for contracting, (ii) fair competition, so that all possible bidders are treated fairly, and lastly, (iii) non-discrimination, since Colombia opens up its market so that different suppliers of goods and services can compete in order to select the best, following the principle of objective selection.

In addition, Colombia is also part of the International Institute for the Unification of Private Law -UNIDROIT-. This institute has created the principles for international commercial contracts, which have been recognized in Colombian legislation, such as good faith and business loyalty. These principles established by UNIDROIT can be applied to public procurement, since article 13 of Law 80 of 1993 establishes that contracts entered into by the entities referred to in article 2 of this statute shall be governed by commercial regulations and relevant civilians' provisions, except in matters particularly regulated in this law. Thus, Colombian law enables the application of the rules of private law for all matters not regulated in the public procurement laws.

Lastly, it should be noted that compliance with public procurement laws is subject to scrutiny by international investment arbitration tribunals. As recent experience has shown, the contractual conduct of contracting public

entities, or of any entity of the State that has a direct impact on the state contract, can lead to the violation of international standards of protection such as the prohibition against illegal expropriation and fair and equitable treatment.

See, as an example, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, in which the arbitral tribunal determined that the declaration of termination of the contract by the competent authority constituted a violation of the standard of fair and equitable treatment. For its part, to date Colombia faces approximately seven (7) investment arbitration claims derived from contracts with the State.

2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements?

In Colombia, the types of contracting or selection modalities that exist are found in Law 1150 of 2007: (i) Public bidding; (ii) Abbreviated selection; (iii) Contest of merits; (iv) Direct contracting; (v) Minimum amount. The general rule is public bidding, and the regulations establish the cases in which the other modalities can be applied, according to the object and amount of each Contracting Process.

It is important to specify that in Colombia there are two legal regimes of contracts entered into by the Public Administration. On the one hand, the legal regime of state contracts, whose applicable regulations is Law 80 of 1993 and whose contractual typologies are provided in article 32 and indicate as contracts: i) the provision of services; ii) consulting; iii) the concession; iv) public works; v) public fiduciary and fiduciary commission. However, under the same article, the Public Administration is empowered to enter into the contracts provided in private law or those derived from the autonomy of the will.

On the other hand, there are special contracting regimes, that is, contracts concluded by the Public Administration that have a different legal regime from that provided in Law 80 of 1993, with private law being the regulation that governs its legal framework, and which are the following:

1. Law 142 of 1994 (art. 31 and 32): Law of domiciliary public services, contracts are governed by private law;
2. Law 143 of 1994 (art. 8 and 76): Electricity sector law, contracts are governed by private law;
3. Law 182 of 1995 and Law 335 of 1996: television law, these contracts have their own regime;
4. Law 31 of 1992: Organic Law of the Bank of the Republic;
5. Law 105 of 1994 (art. 54): law of the transport sector, the same regime of art. 38 of Law 80, this implies that they will have their own contracting regime;
6. Law 100 of 1993 (art. 195 no. 6); Public hospitals are governed by private law but can incorporate the necessary exorbitant clauses;
7. Law 1118 of 2006 (art. 6): All legal acts, contracts and actions necessary to administer and develop the corporate purpose of Ecopetrol S.A., once constituted as a mixed economy company, will be governed exclusively by the rules of private law, without the percentage of the state contribution within the capital stock of the company. Ecopetrol is the most important oil company in Colombia, hence the importance of establishing a special contracting regime.

3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction?

No. In Colombia there are no specific financial thresholds, however, there is a special selection modality when the amount of the contract is relatively low.

Law 1150 of 2007 established the contracting of a minimum amount as a contractor selection modality for those events in which works, goods and services are required, whose amount or value does not exceed 10 percent of the amount of the smallest amount of the entity, regardless of its purpose. The criteria for determining the value of the lower number of public entities are provided for in article 2 (2) (b) of Law 1150 of 2007. This modality was motivated in the respective

legislative debate based on the idea of a procedure that turns out to be "quite agile and guarantees the plurality of bidders, with innovations as important as the possibility for the public entity to make purchases in department stores, which guarantees more convenient prices of the market for the entity". This procedure has fewer formalities than the other selection modalities and presents special characteristics that must be taken into account in the rules that regulate it, that is, number 5 of article 2 of Law 1150 of 2007, modified by Article 94 of Law 1474 of 2011 and other regulations on the matter.

4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.

As mentioned in the previous answer, contracts with a relatively low value must be entered into by the minimum amount selection modality, applicable in all cases where, regardless of the particular object, goods, services and works that are acquired, whose value does not exceed ten percent (10%) of the lowest amount of the awarding entity. Consequently, all contracts whose amount is between 1% and 10% belong to that percentage, then it is fair to say that, in Colombia, the applicable procedure for the selection of bidders for low value contracts is the minimum amount.

5. For the procurement of complex contracts*, how are contracts publicised? What publication or journal is used for these purposes?

In Colombia, for the signing of complex contracts, public bidding is the general rule. It is used in those cases where the contracts to be signed are not assigned to another selection modality. The regulation of public bidding for state contracts is contained in article 30 of Law 80 of 1993.

In this selection modality, law establishes that within ten (10) to twenty (20) calendar days prior to the opening of the tender, up to three (3) notices will be published with intervals between two (2) and five (5) calendar days, as required by the nature, purpose and amount of the contract, on the website of the contracting entity and in the Electronic Public Procurement System -SECOP- so that the interested parties are notified of the opening of the process. If these communication resources do not exist, in the small towns, the advertising will be read by side and will be posted by notices in the main public places for a term of seven (7) calendar days, including

one of the market days. in the respective population. The notices have information on the object and essential characteristics of the respective tender.

Then, within three (3) business days following the beginning of the term for the submission of proposals and at the request of any of the persons interested in the process, a hearing will be held to specify the content and scope of the specifications, and everything will be reported in the minutes of the meeting signed by the intervening parties, at the same hearing the risk hearing will be able to be held where the contractual risks will be classified, estimated, and assigned to the parties. However, the law mentions that the period that must pass between the date on which the proposals can be submitted, and the closing date will be written down in the tender documents following the nature, object, and amount of the contract.

6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders?

As has been said, the general rule for selecting a contractor in complex contracts is the public bidding procedure provided for in Article 30 of Law 80 of 1993. It is worth mentioning that this selection procedure does not establish an initial stage of selection of bidders prior to the public invitation to tender. On the contrary, the selection of the bidder arises because of the development of a regulated procedure that has as a first stage by the state entity the prior and complete study of the need that it wishes to satisfy and that is specified in the specifications and in the previous studies that contain the rules of the contractual procedure to be developed. Once the bidder follows the conditions needed in the tender specifications and in the previous studies, he will present his proposal to the entity, which must assess whether the proposal meets the entity's needs. If so, the entity will award and enter the contract with the bidder whose proposal best meets the interests of the contracting entity.

When the entity enters to assess the future bidder, it must analyze whether he or she is involved in any of the causes of inabilities and incompatibilities regulated in the law, these are raised to determine if the bidder has limited capacity, aptitude, or quality to be able to aspire to hold a state contract, since it is immersed in one or more causes of inability and incompatibility referred to in article 8 of Law 80 of 1993.

However, if a bidder is not immersed in inabilities or

incompatibilities, he can become part of the contractor selection process. Law 1150 of 2007 mentions that the choice of the contractor must be made in accordance with the principle of objective selection, which means that the selection of the offeror is made based on the offer that is most favorable to the interests of the entity and without it being found motivated or supported by eminently subjective considerations.

Consequently, the selection and qualification factors established by the entities in the bidding documents or their equivalents, will take into account the so-called enabling requirements, which are conditions that measure the ability of the bidder to execute a state contract. According to the Law, the enabling requirements are:

1. **Capacity:** it is the power of a person to enter into contracts with a State Entity, that is (i) to be obliged to fulfill the object of the contract; and (ii) not be immersed in inabilities or incompatibilities that prevent the conclusion of the contract
2. **Experience:** is the knowledge of the bidder derived from his previous participation in activities equal or similar to those provided for in the object of the contract. This requirement is accredited with the contracts previously entered into by the bidder for each of the goods, works and services offered to the state entity.
3. **Financial capacity:** this indicator measures the financial soundness of the bidder, seeking to prove:

a) Liquidity ratio: current assets divided by current liabilities;

b) Indebtedness ratio: total liabilities divided by total assets; me

c) Interest coverage ratio: operating profit divided by financial expense.

4. **Organizational capacity:** through this indicator the profitability of investments and the efficiency in the use of the interested party's assets are measured:

(a) Return on equity: operating profit divided by equity;

(b) Return on assets: operating profit divided by total assets

Once the qualifying requirements of the bidder are accredited, the state entity passes to the phase of the procedure consisting of the following assessment of the

technical and economic aspects of the proposals submitted by the bidders, who will be assigned a score. The way in which the state entity determines to give it a score is a matter that is specified in the specifications in accordance with the expected specifications. At this point, whoever meets the qualifying requirements and achieves the highest score in their proposal will be the contract winner.

7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so what are those grounds of mandatory exclusion?

If the state entity starts a contractor selection process for the award of a state contract and realizes that an offer is subject to an inability or incompatibility provided in article 8 of Law 80 of 1993, must exclude them from the contractual procedure, since their capacity or legal aptitude to link a contractual legal relationship with the state is limited.

In addition to the grounds included in article 8 of Law 80 of 1993, Law 2014 of 2019 introduced a new inability to be a state contractor, means it is not possible to contract with those natural persons declared judicially responsible for committing crimes against the Public Administration, or any of the crimes or misdemeanors contemplated by Law 1474 of 2011 (Anti-Corruption Statute) or any of the criminal behaviors contemplated in the anti-corruption agreements or treaties signed and ratified by Colombia, as well as legal entities who have been declared administratively responsible for the conduct of transnational bribery. This inability also proceeds in a preventive manner, since it can work even in cases where the challenge of the sentence is pending.

Likewise, legal entities who have been ordered to suspend their legal status under the terms of the law or whose legal representatives, de facto or legal administrators, members of the board of directors or their controlling partners, their parent companies, subordinates and / or the branches of foreign companies that have benefited from the application of a principle of opportunity for any crime against the Public Administration or State assets.

8. Please describe a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures.

As noted earlier, the selection modality applied to

celebrate a complex contract is Public Bidding. In general terms, the procedure is developed as follows:

1. **Identification of the need.** The state entity must identify the need corresponding to the acquisition of goods, works and services. For this purpose, they must prepare a detailed purchasing plan that specifies the convenience and timeliness of the object of the contract, its adaptation to the entity's investment plans, the budget and appropriation law, as the case may be. If the work, good or service requires plans, studies, etc., the study made by the entity must be accompanied by these supporting documents.
2. **Preparation of the draft specifications.** The state entity must proceed to prepare the specifications, which constitute the roadmap or rule of the contractual process or, as the jurisprudence of the State Council has called it, the contract law. There, the characteristics of the project to be carried out by the state entity are condensed.
3. **Request for clarifications or explanations for the draft specifications.** In accordance with article 2.2.1.1.2.1.4. of Decree 1082 of 2015, interested parties can make comments on the draft specifications as from their publication. In the case of public bidding, the term to make comments on the tender specifications is ten (10) business days.
4. **Notification of the opening of the bidding process and publication of the opening resolution.** In this selection modality, the law establishes that within ten (10) to twenty (20) calendar days prior to the opening of the tender, up to three (3) notices will be published with intervals between two (2) and five (5) calendar days, as required by the nature, object and amount of the contract, on the website of the contracting entity and in the Electronic Public Procurement System - SECOP so that those interested in the bidding process are notified of the opening of process. If these communication resources do not exist, in the small towns, the advertising will be read by edict and will be posted via notice in the main public places for a term of seven

(7) calendar days, including one of the market days in the respective population. The notices contain information on the object and essential characteristics of the respective tender.

Next, the state entity will open the contractual procedure for the selection of the contractor through a general administrative act that will contain the following information: 1. The contractual object 2. The description of the selection modality to be implemented (public tender for the case at hand), 3. The schedule of the contractual procedure, 4. The physical or electronic place where you can consult and withdraw the specifications and previous studies, 5. The call for citizen oversight, 6. The certificate of budget availability, 7. Other pertinent matters that must be taken into account in the contracting procedure.

5. **Hearing on the scope of the specifications, assignment, review and distribution of risks.** Subsequently, within three (3) business days following the beginning of the term for the submission of proposals and at the request of any interested person in the process, a hearing will be held to specify the content and scope of the specifications, and everything will be reported in the minutes of the meeting signed by the intervening parties. However, in the same hearing they may carry out the classifications, estimation and assignment of the contractual risks.

It is important to note that the state entity may modify the specifications through the addenda that may be issued before the expiration of the term for submitting offers; in accordance with the provisions of article 2.2.1.1.2.2.1 of Decree 1082 of 2013.

6. **Delivery of proposals.** Those interested in the contractor selection procedure must submit proposals in accordance with the request, in the place and within the term indicated in the tender specifications as established in the schedule, which is also mandatory.
7. The entity must verify the qualifying requirements of the bidder and score the bids

submitted.

8. **Publication of the evaluation report.** The state entity will prepare a report containing the evaluation of the qualifying requirements of the bidders and the proposals made by each of them, which will be published in the SECOP for five (5) days and / or in the secretary of the entity so that the participants can comment on the aspects they consider pertinent and present the respective observations. It is important to clarify that through the comments, the bidders may not in any case complement, add, modify and improve their proposals.
9. **Analysis of comments.** The entity will analyze the comments presented by the bidders and will summon them to define the process in a hearing that is carried out according to the schedule indicated in the tender specifications.
10. **Award hearing.** Once the hearing is installed, the legal representative of the entity, the official who has been delegated the power to adjudicate, the officials of the entity who have participated in the stage of studies and evaluations of the proposals and the bidders. If one of the bidders fully complies with the requirements set forth in the tender specifications, the entity will award the contract. Otherwise, the second-best bid will be awarded if it complies, otherwise, if no other bidder meets the requirements, the bid is declared void.

9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured?

For the execution of contracts whose value is relatively low, Law 1150 of 2007 (art. 2, no. 5) has established a special selection modality, which is called: minimum amount. This modality applies when the amount of the contract does not exceed 10 percent of the amount of the smallest amount of the entity, regardless of its purpose, it will be carried out in accordance with the following rules:

1. A call will be published, for a period of no less than one (1) business day, in which the object to be contracted will be indicated, the budget assigned for that purpose, as well as the technical conditions required.
2. The term established in the invitation to present the offer may not be less than one (1) business day.
3. The entity will select, through communication of acceptance of the offer, the proposal with the lowest price, if it complies with the required conditions.
4. The communication of acceptance together with the offer constitutes for all purposes the contract entered into, on the basis of which the respective budget registration will be made.

10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?

Regarding state contracts, there are several good practices that must be implemented by the contractual parties in order to achieve the contractual purpose agreed by them, as well as the common interest and its satisfaction. These good practices are tools that streamline and make possible the development of a state contract, by preventing the emergence of negative scenarios which make unfeasible a correct execution or fulfillment of the contract and leads contractors to conflicting situations that in most cases are decided in judicial instances. We must state that these good practices are binding and enforceable to state entities and to contractors.

In that vein, and according to the Handbook of Good Practices for Public Contractual Management issued by National Planning Department, it is necessary to determine which practices must be applied depending on the stage of the contract.

1. Contracting planning stage: this stage is crucial, since the contract is configured at this point, the state entity must assess the need to satisfy from multiple edges, for example technical edge, financial, economic, environmental, social, predial, budgetary, legal, so that, this kind of business (state contracts) are born into legal life properly thought through, well-reasoned and supported, with a clear roadmap, seeking to put aside incorporation of unplanned

business. this is maybe one issues most ignored and the one that generates the majority of conflicts between those involved in the legal relationship. Thus, it is necessary to emphasize on contract planning of contracts entered into by public entities, since it is public assets and common interests the worst affected by undue planning.

2. Pre-contractual stage: there are issues at this point, such as the legality of the act of awarding the contract, which imply or require from the part of the state entity and its officials a complete knowledge and compliance of the law regarding state contracts in so far as the development of the contractual procedure for selecting the contractor, since complying with the law and abiding by its mandates is a duty of the administration in this kind of regulated procedures that avoids the emergence of liability scenarios for the entity for the issuance of arbitrary decisions, subjective, and lacking legal support.
3. Contractual stage: in this stage, the state contract is being executed, that is, the contractual benefits agreed by the parties are already being given, therefore, it is necessary to have good practices such as contractual management, forecasting in the execution of the contract, payment of the advance and its adequate implementation, the proper execution of the contract or compliance with agreed contractual obligations, the payment of the Administration to the contractor in the stipulated time provided it complies, the non-arbitrary use of discretionary and exorbitant powers, which should be governed by the fundamental right to due process and defense in case the contractor is involved in these scenarios. Likewise, at this stage, the duty imposed by law on contracting entities to maintain during the development and performance of the contract the economic, technical, and financial conditions laid down at the time of conclusion of the contract is fundamental, in the event of unforeseen and unanticipated circumstances. To this end, the entities have the mechanisms for adjusting, updating, and reviewing prices, which can be implemented directly by the Administration.
4. Liquidation stage: The liquidation stage of the contract is the stage in which the contractual relationship is terminated, and the accounts are crossed between the administration and

its collaborator. At this point, the parties are already known to be due or not, in favour of whom there are balances, whether or not all the resulting contractual obligations were performed. Therefore, in accordance with the principle of contractual good faith, the obligation to liquidate the contract in good time and with honesty and loyalty arises.

11. Please explain any rules which are specifically applicable to the evaluation of bids.

1. All the rules applicable to the bid evaluation must be enshrined in the tender specifications published by the State Entity in the respective Contracting Process.
2. The bid evaluation will be carried out by an Evaluation Committee appointed by the Public Entity (art. 2.2.1.1.2.2.3 of Decree 1082 of 2015).
3. Committee will be governed by what is stipulated in the specifications about how to evaluate the offers.
4. The Committee will objectively compare and evaluate the offers.
5. The result of the evaluation by the Committee will be enshrined in a document called "evaluation report."
6. The evaluation results (enshrined in the evaluation report) will be presented to the expense authorizing officer, as well as to the other interested in the process, by means of their publication in the SECOP (Electronic Public Procurement System) within the term established for it.

12. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder.

Law 80 of 1993 along with Law 1150 of 2007 establish that, within the contracting process (which goes from the opening of the tender to the award and signing of the contract), the contracting entity must provide the reasons that support the score and the reasons for choosing the winning bidder in two moments, namely:

1. The first moment is previous to the award of the contract, where according to numeral 8 of article 30 of Law 80 of 1993, "The evaluation

reports of the proposals will remain in the entity's secretary for a term of five (5) working days for the bidders to present the comments they consider pertinent. In exercise of this faculty, the bidders may not complete, add, modify or improve their tenders".

2. The second moment is in the awarding, where article 9 of Law 1150 of 2007 establish that the awarding of a tender will be made in a mandatory way in a public hearing, a reasoned decision, which will be notified to the favored bidder at the hearing. Where "during the same hearing, and previous to the adoption of the final award decision, the interested parties may pronounce on the response given by the contracting entity to the observations presented respect the evaluation reports."

Based on the foregoing, it is clearly clarified that there is an obligation of the contracting entity to report the results of the evaluations of the tenders, before and during the course of the award hearing, which guarantees the application of the principle of transparency, because, according to numeral 2 of article 24 of Law 80 of 1993, this principle guarantees that the interested parties have the opportunity to know and dispute the evaluation reports and its reasons.

13. What remedies are available to unsuccessful bidders in your jurisdiction?

The selection of a contractor in our legal system must be made through an administrative act in accordance with article 9 of Law 1150 of 2007. For this reason, the proponent who has not been selected and who perceives irregularities in the procedure can use different instruments to attack the decision of the state entity. For this reason, article 77 of Law 80 of 1993 express that in all contractual actions all the rules that govern the procedures and actions of the administrative function will be applicable. Thus, Law 1437 of 2011 can be applied (Code of Administrative Procedure and Contentious Administrative) and in the absence of provisions, Law 1564 of 2012, current General Code of Process, will be applicable.

Article 77 of Law 80 of 1993 says that: "Administrative acts issued due to contractual activity will only be subject to appeal for reversal and the exercise of contractual action, in accordance with the rules of the Contentious Administrative Code". For this reason, in front of administrative acts issued due to the contractual activity, only the appeal for reversal and the exercise of the action of contractual disputes in accordance with

article 141 of Law 1437 of 2011 will be applicable.

At this point we have to make the following precision:

i) About the administrative acts previous to the celebration of the contract, the bidder may challenge the administrative acts through the appeal for reversal before the entity, they may also attack it judicially through the restoration of rights and nullity action of article 138 of the Law 1437 of 2011. In case of an administrative act previous to the contract of general content (the specifications are general), a simple nullity claim could be initiated.

ii) The contractual administrative acts may be attacked by an appeal before the entity and defendants before the jurisdiction through the means of control of contractual disputes (art. 141 of Law 1437 of 2011) or, if preferred, the means of control of restoration of rights and nullity (art. 138 of Law 1437 of 2011).

It is very important to indicate that in the Colombian legal system the paragraph of article 77 of Law 80 of 1993 establish that: "the awarding act will not have resources through the government way. This may be challenged through the exercise of the restoration of rights and nullity, according to the rules of the Administrative Litigation Code". It is worth mentioning that this administrative act does not have recourse at administrative level (such as the appeal for reversal) and the interested party must sue this act through the exercise of the action for nullity and restoration of the right in accordance with article 138 of Law 1437 of 2011.

14. Are public procurement law challenges common in your jurisdiction?

As mentioned above, in Colombia, litigation in public contractual matters has its own judicial action (action for contractual disputes) and its special jurisdiction (jurisdiction of contentious-administrative matters). The judicial controversies known by this judge may have an estimated term between twelve (12) to fifteen (15) years to be resolved in all their instances, this, due to the representative delay that this jurisdiction presents given the number of processes that are there.

However, the parties by mutual agreement through an arbitration agreement may remove from the contentious administrative jurisdiction any controversy that arises on the occasion of the celebration, execution, liquidation and termination of a state contract, in this case, if the term of duration of the process is not agreed, this, by supplementary rule, may not exceed six (6) months from the first hearing of the procedure in accordance with article 10 of the Arbitration Statute - Law 1563 of 2013.

Likewise, this term may be extended by the parties without it exceeding six (6) months, which would give us as a result that a dispute in arbitral instances would have a term of one (1) year at most.

15. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case).

There are two levels of jurisdiction. In the first instance, the law grants the judicial operator the peremptory time of one-year (1 year), extendable for six (6) months to resolve the cases under its consideration, subject to the penalty that, if the respective term of a year without having issued the corresponding ruling, the official will automatically lose competence to hear the process. In second instance, according to article 293 of the Law 1437 of 2011, the terms for ruling will be reduced to half of those indicated for the first instance. However, the instances or levels of jurisdiction often take longer.

16. What rights/remedies are given to bidders that are based outside your jurisdiction?

In Colombia when we talk about public contracting, we talk about the Colombian legal system, where we must apply our laws and regimes for practically all contractual acts, for this reason, for all purposes we must refer to the following regulations: Law 80 of 1993, Law 1150 of 2007, Decree Law 4170 of 2011, Decree 1082 of 2015, Law 361 of 1997, Law 590 of 2000, Law 816 of 2003, Law 1474 of 2011, Decree Law 19 of 2012; These regulations make up the public procurement regime in Colombia.

The mandatory application of the public procurement regime is the reason why all the rights and solutions that Colombian law grants to national bidders are also granted to bidders located outside of our jurisdiction, only if, in their respective countries, the proponents of goods and services of Colombian origin face equal opportunities. Membership of the host state in the EU or GPA is not a prerequisite.

Regarding the contractual remedies explained in question 13, it can be stated that, in Colombia, there are remedies for pre-contractual acts the interested party want to sue, such as the restoration of rights and nullity action, which in this case has a term of 4 months to file from the publication of the act, or its notification, in accordance with literal (c) of article 164 of Law 1437 of

2011.

It is important for the answer to this question to establish that article 13 of Law 80 of 1993, about the regulation applicable to state contracts, says in its last paragraph that “contracts that are celebrated in Colombia and must be executed or fulfilled in the foreigner, may submit to foreign law”. But this paragraph has a condition imposed by the Constitutional Court in sentence number C-249 of 2004, according to which this paragraph must be interpreted “(...) with the understanding that both the celebration and the part of the execution carried out in Colombia are subject to Colombian law”. The Court took into account article 4 of the 1991 Constitution which establishes that “all conducts, facts and events that take place in Colombia must be subject to the rule of the Constitution and the law of our country, in accordance with the respect and compliance that nationals and foreigners must profess to the authorities”.

17. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract?

Law 80 of 1993, in its article 20, establishes that “in state contracting processes, the proposer of goods and services of foreign origin will be granted the same treatment and under the same conditions, requirements, procedures and award criteria as the treatment granted to the national”. Therefore, the applicable rules in the bidding of a bidder based abroad and a subsidiary in Colombian territory will be the same as those of national bidders.

18. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues?

Yes, in Colombia the competence to hear any matter or controversy resulting from state contracts from the contentious-administrative jurisdiction. The foregoing by provision of article 104 of Law 1437 of 2011 (Code of Administrative and Contentious-Administrative Procedure). In addition, you must be aware of the processes related to contracts, whatever their regime is, in which a public entity or a natural person is a party in the exercise of State functions and those related to contracts entered by any entity that provides housing, public services, which include or should have included exorbitant clauses.

However, it can settle disputes through arbitration and the signing of arbitration clauses or commitments within the state contract and, in accordance with Presidential Directive 04 of 2018, if these correspond to an explicit public management decision. For the above to be carried out, the entity must carry out a prior evaluation that considers the contracting parties, the object of the contract and the amount of the process, among others.

19. Are post-award contract amendments/variatio
ns to publically
procured, regulation contracts subject to
regulation in your jurisdiction?

Yes, Law 80 of 1993 regulates variations or amendments to contracts already awarded in our jurisdiction. This law establishes that only the contracting state entity is entitled to carry out the unilateral modification of the contract, which proceeds “if during the execution of the contract and to avoid the stoppage or serious impairment of the public service that must be satisfied with it, were necessary to introduce variations in the contract and previously the parties do not reach the respective agreement, the entity, in a duly motivated administrative act, will modify it by deleting or adding works, supplies or services”.

The modification referred to in article 16 of Law 80 of 1993 may be made through a duly motivated administrative act, through figures such as suspension, addition of works, supplies or services.

It should be noted that the power to unilaterally modify the contract is an exceptional clause to the common law applicable to state contracts governed by Law 80 of 1993 (review art. 14 of Law 80 of 1993). However, in Colombia, contracts celebrated by state industrial and commercial companies, mixed economy companies in which the State has a stake of more than 50%, their subsidiaries, and partnerships between public entities with a majority stake higher than 50%, they are exempt from the application of the contracting rules contained in Law 80 of 1993 when they carry out commercial activities in competition with the private and / or public sector, national or international, or in regulated markets (review article 14 of the Law 1150 of 2007). In these cases, state contracts are governed by private law regulations, so the contracting state entity does not have the exceptional power to unilaterally modify the contract, unless the parties agree to it in the contract.

In any case, both in state contracts governed by Law 80 of 1993 and by private law, the contracting parties may introduce modifications to the contract by mutual agreement through the signing of modifying contracts.

20. How common are direct awards for complex contracts (contract awards without any prior publication or competition)?

Direct contracting is known in Colombia as a selection modality foreseen in Law 1150 of 2007 that proceeds only and exclusively in the cases provided by law, so its application is restrictive. The situations in which it proceeds are the following:

- Manifest urgency (article 2 of Law 1150 of 2007);
- Contracting of loans (article 2 Law 1150 of 2007);
- Contracts or inter-administrative agreements (article 92 Law 1474 of 2011);
- Hiring for the development of scientific and technological activities (Article 2 Law 1150 of 2007);
- Events in which there is no plurality of bidders (Article 2 Law 1150 of 2007);
- Contracts for the provision of professional services and management support, or the execution of artistic works that can only be entrusted to certain natural persons (Article 2 Law 1150 of 2007);
- Contracts for the lease or acquisition of real estate (article 2 Law 1150 of 2007);
- Fiduciary contracting contracts celebrated by territorial entities when they initiate the Liability Restructuring Agreement referred to in Laws 550 of 1999, 617 of 2000 and the regulations that modify or add them, only if they are celebrated with financial entities of the public sector (Article 2 Law 1150 of 2007);
- The contracting of goods and services in the Defense Sector, the National Intelligence Directorate and the National Protection Unit that require a reserve for their acquisition.

In this moment, one might think that direct award could be used to sign a complex contract in which there is only one bidder, in order to save time and prioritize the administrative principles of efficiency and effectiveness. However, this is not very common.

Lastly, taking into account that paragraph 8 of article 24 of Law 80 contains the express prohibition of elude the procedures provided by law for the selection of the contractor, it is evident that, as a general rule, the elusion or modification of these procedures must conclude with the absolute nullity of the contract for explicit violation of the prohibition regime.

For their part, in state contracts governed by private law,

precisely because they are not subject to the norms enshrined in Law 80 of 1993, the causes of direct contracting are established in the contracting manual of the respective state company.

21. Have your public procurement rules been sufficiently flexible to allow contracting authorities to respond to the COVID-19 pandemic? What measures have been most used and in what areas have any difficulties arisen? Is it likely that lessons learned from procurement during this period will give rise to longer term changes?

Yes, our state contracting regulations have been flexible enough to allow contracting authorities to respond to the pandemic generated by COVID-19. We see different legislative decrees that support this idea such as:

1. Legislative Decree 440 of 2020 that allows virtual public hearings in selection and disciplinary procedures, also establishes measures regarding emergency contracting, and allows the addition and modification of state contracts.
2. Legislative Decree 482 of 2020 on "measures on the provision of the public transport service and its infrastructure within the state of emergency" that allows the extension of concession contracts in APP schemes (public-private associations) and authorizes the suspension of transport infrastructure contracts.
3. Legislative Decree 486 of 2020 that allows the Ministry of Agriculture to contract directly to guarantee food safety and the supply of products and supplies.
4. Legislative Decree 481 of 2020, which "establishes that contracts for the provision of administrative services to public entities (surveillance, cleaning, cafeteria, transportation and other similar ones) may not be suspended during confinement policies."

Like these legislative decrees that provide different contractual solutions to the pandemic, we find other legislative decrees (l.d.) such as: l.d. 499 of 2020, l.d. 537 of 2020, l.d. 544 of 2020, concerning to the measures adopted about the State contracting of acquisitions in the international market.

In our opinion, the most important measure, and the call

to survive, is the application of virtuality to public procurement processes, where the process, the bidders and all stages of public procurement can be managed

through technological resources, which will allow a faster, more efficient, and transparent public procurement.

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