

Public Procurement

Contributing editor
Totis Kotsonis



2018

GETTING THE
DEAL THROUGH

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Totis Kotsonis

Eversheds Sutherland

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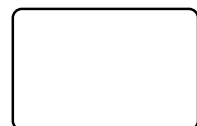
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Preface

Public Procurement 2018

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of Public Procurement, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Angola, Cape Verde, Chile, Mozambique, Panama, São Tomé and Príncipe and Tanzania.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editor, Totis Kotsonis of Eversheds Sutherland for his assistance with this volume.

GETTING THE
DEAL THROUGH 

London
May 2018

Chile

Felipe Bahamondez and Paulina Farías

DLA Piper BAZ|NLD

Legislative framework

1 What is the relevant legislation regulating the award of public contracts?

Act No. 19,886 of 30 July 2003 about the Administrative Contracts Bases for Supply and Provision of Services (Act No. 19,886/2003) (the Act), and its regulation, Decree No. 250 of 24 September 2004, set the basic rules for the procurement of goods and services by public entities.

The Act establishes, as a general procurement rule, the public bidding system, but in exceptional cases a public entity may contract through a private bidding process or through a direct deal.

2 Is there any sector-specific procurement legislation supplementing the general regime?

In the construction field, Decree No. 75 dated 1 December 2004 (Decree No. 75/2004) and Decree No. 48 dated 9 September 1994 (Decree No. 48/1994), both issued by the Ministry of Public Works, establish special procurement rules that apply to the construction of public works and public works advisories.

The energy supply services executed by the public distribution service's concession companies are also governed by a specific statute, regulated in the General Act for Electric Services (Force of Law Decree No. 4, dated 5 February 2007) and its regulation, approved through Supreme Decree No. 106 of 2005.

Additionally, the assignment of concessions by public bodies is subject to special statutes, regulated among others by the following acts:

- concession for use of exclusive ways to perform public transport (Act No. 18,696, dated 31 March 1988);
- public works concession (Decree No. 900, dated 18 December 1996 and Decree No. 956, dated 20 March 1999); and
- concession for the use of municipal property (Force of law Decree No. 1, dated 26 July 2006).

3 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Chilean public procurement legislation shares principles similar to those governing the public procurement system of the European Union (EU), and which are advocated by the World Trade Organisation.

The public procurement system establishes that, as a general rule, state entities shall purchase goods and contract services through public bidding processes, in which all natural and legal persons, local or foreign, that are interested may participate. The procurement through private biddings or direct deals is allowed only exceptionally.

Also, this regulation prevents any type of arbitrary discrimination between providers, so request-for-bids documents must establish impartial participation conditions and objective evaluation criteria, which may not give any advantage to certain competitors.

Additionally, the technical description of the goods and services to be contracted cannot refer to specific brands nor to requirements that exclude certain competitors.

To promote the transparency of these processes, all requests for bids and the resolution of the procurement processes are published on the website Mercado Público.

4 Are there proposals to change the legislation?

Currently, some amendments to the Act are being processed, which, among other things, aim to promote the participation of small and medium-sized enterprises (SMEs); strengthen the prohibition on dividing contracts in order to qualify for the procurement procedure; introduce improvements to the procurement system through framework agreements; establish additional prohibitions to contract with the state administration; and ensure that companies that contract with the state comply with labour obligations to workers.

Applicability of procurement law

5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The Act expressly excludes purchases made by the Army and the Forces of Order and Public Security from this procurement system, including war material, military and police vehicles, equipment and advanced information technology systems.

Finally, state-owned companies, which are created by law, are not subject to this system.

6 Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The procurement of goods or services, the value of which are less than 3 monthly tax units (UTM), are excluded from the public procurement system, and can be directly contracted by public bodies.

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Public procurement regulations, as a general rule, allow the amendments of contracts, especially when this modification is based on the well-founded public interest.

Thus, the Act expressly recognises the power to modify a contract based on certain causes that may be set in the request-for-bids documents and in the contract signed between the parties.

For its part, on infrastructure matters, Decree No. 75/2004 establishes that contracts for public works construction may be modified, providing an increase or decrease of works, if it respects certain limits. The same applies to public works concessions, which recognise the power of the Ministry of Public Works to require the modification of the characteristics of the works and services contracted.

Finally, the legal system bans the amendments of administrative contracts, as is the case, for example, with the Telecommunications Act, which prohibits the modification of the conditions established in the request-for-bids documents for the granting of the Public Telecommunications Services Concession.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

The General Comptroller of the Republic, with respect to the contracts governed by the Act, has declared that the modification of a contract cannot include new goods and services, except those necessary to fulfil the original agreement. Doing otherwise requires a new deal (Opinion No. 12,473/2009).

9 In which circumstances do privatisations require a procurement procedure?

Privatisations will generally be preceded by a bankruptcy procedure, when there are two or more interested persons involved in the service that will be privatised. A technical evaluation of the submitted projects is carried out in order to verify that they fulfil the minimum required conditions. The adjudication shall be decided based on different factors depending on the service (eg, lower rates for users, better technical conditions and higher offer prices).

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

As a general rule, PPPs arise from bankruptcy procedures. One of the most successful systems in this area corresponds to the public works concessions system, governed by Decree No. 900/1996, which states that procurements shall be regularly subject to a local or international public bidding process, in which natural or legal persons, local or foreign, may participate.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

The calls for public bids governed by the Act are published in the Public Market Portal, which can be accessed through the Mercado Público website.

In addition, there are other web portals where calls for bids are published, such as the Licitacion Eseelectricas, for contracting electricity supply services from energy distribution concessionaires, and Transantiago, for public transport concessions.

Without prejudice to the existence of websites, calls for bidding processes must be published in newspapers of national circulation.

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

As a general rule, there are no limitations in this matter. However, some procurement systems include the possibility of prequalifying bidders, especially in the infrastructure field, when the size and complexity of the works make necessary to ensure the technical and financial capacity of the bidders.

For example, Decree No. 900/1996, on public works concessions, establishes a prequalification process, to which all interested persons are subject. Only the bidders that have approved this stage may be able to apply for the public bidding process.

On the other hand, Decree No. 75/2004, issued by the Ministry of Public Works, on public works' construction, includes a pre-selection process, according to which only providers who are registered in the Contractor's Registry (administered by the Ministry) may be able to participate in the biddings called.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

In Chile, public procurement systems do not include the possibility of establishing a maximum or minimum numbers of providers for the purposes of awarding a contract through a public bidding process.

However, when private biddings are carried out, the bidding entity shall invite at least three providers to participate.

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

As a general rule, interested people who are prohibited from participating in bidding processes may do so once the legal terms of the prohibition elapse. There are several public entities that administer the records of prohibited providers, which must prove they meet the requirements to be reintegrated into the system.

If the registration of a provider has been suspended due to minor offenses, it will be automatically activated when the suspension term has elapsed.

In case of serious and exceptional cases related to fraud in procurement processes, Law No. 19,886/2003 establishes that the Director of Purchasing and Public Procurement may permanently remove registered providers from the registry.

The procurement procedures

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

The public procurement legislation expressly establishes that bidding processes shall be based on the principles of free competition among bidders, equal treatment and non-arbitrary discrimination, strict adherence to request-for-bids documents and transparency, among other factors.

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Chile does not have a centralised public procurement body, so each public entity conducts their own contracting. Regarding these, the Act provides that public officials who, for any reason, do not have sufficient impartiality must abstain from intervening in the procurement processes.

Also, to safeguard the impartiality during the offers' evaluation stage, all procurements exceeding 1,000 UTM are evaluated by a commission of at least three members.

17 How are conflicts of interest dealt with?

As indicated above, the Act establishes that public officials of bidding entities are subject to conditions that reduce their impartiality, and requires that they abstain from participating in procurement processes. Additionally, this regulation states that the evaluation commission's members cannot have any conflict of interest with bidders at the time of the evaluation. Their appointment is published in the Mercado Público system, for purposes of transparency.

The above-mentioned norm is complemented by Public Procurement Directive No. 14, on recommendations for the functioning of the Evaluation Commissions, in which it is suggested that all of a commission's members shall be requested to make affidavits in which they express they have no conflicts of interest with bidders. It also indicates that, in the case of a the conflict of interest arising after the commission's members' appointment, the member involved must refrain from participating in the evaluation, and shall inform his or her superior in this circumstance, so that he or she can be replaced.

18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The Act considers the possibility that, prior to the elaboration of request-for-bids documents, bidding entities may carry out formal consultation procedures with suppliers, in order to obtain information on the prices, characteristics of goods and services, and an offer's preparation time. These consultation processes are convened through public and open calls via Mercado Público and newspapers of national circulation.

The Concessions Act, for its part, provides that if the prequalification bases requires, prequalified bidders may propose improvements, additions or adjustments to the definitive project's design to the Ministry of Public Works, through filings that will be public. The Ministry, after requesting additional necessary studies from independent entities, shall communicate the additional contents and adjustments that will be incorporated in the request-for-bids documents.

In both cases, potential bidders do not directly participate in the preparation of the request-for-bids documents nor do they make decisions in relation to their content; they provide information without prejudice, which could be relevant to define certain conditions of a proposal.

19 What is the prevailing type of procurement procedure used by contracting authorities?

The general procedure of contracting is public bidding. In the event that no bidders are interested in the public bidding process (or the private bidding process if the type of procurement makes using it advisable), it may be contracted by direct deal, as long as the reasons that make it appropriate according to the law are verified.

20 Can related bidders submit separate bids in one procurement procedure?

The public procurement regulations do not expressly prohibit the filing of offers by related proponents or by those who belong to the same business group. However, the request-for-bids documents may establish restrictions in this regard, which is a matter that happens in practice. Also, certain publicity measures are established, which allow the participation of related proponents to be transparent.

21 Is the use of procedures involving negotiations with bidders subject to any special conditions?

The procedures in which negotiation with bidders occurs correspond to the mechanism of private bidding and direct contracting, whose use is subject to certain conditions. In the first place, these are procurement mechanisms that can be exceptionally used, and their use shall be duly founded.

Causes and facts argued to access to this procurement mechanism shall be included in a duly founded resolution issued by the contracting entity and published through the Mercado Público system, as well as the administrative acts where the purchase appears.

The occasions where this mechanism may be used include:

- when there are no bidders in a public bidding process;
- in case of emergency, urgency or unforeseen circumstances;
- when there is only a single supplier of a good or service;
- when the service to be contracted has a confidential nature or if its diffusion affects national security or national interests; and
- when the purchases made are less than 3 UTM.

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

Except for the cases mentioned in question 21, where a negotiation with bidders is carried out owing to the nature of the contracting that is being performed, our legislation does not expressly consider other negotiation mechanisms, such as the competitive dialogue system established by the EU.

Notwithstanding the foregoing, a similar system can be found in Decree No. 900/1996 on public works concessions, which establishes that the Ministry of Public Works may receive, from prequalified bidders, suggestions and filings for complementing or adjusting the request-for-bids documents that will be published later, and to which said prequalified persons may apply.

23 What are the requirements for the conclusion of a framework agreement?

According to the Act, public bidding processes called by the Direction of Purchasing and Public Procurement shall precede framework agreements.

Bidding entities are obliged to contract through framework agreements if the required good or service is available through such system, unless they are able to obtain more advantageous conditions on their own, that shall be objective and demonstrable, and in which case they may contract outside the framework agreement.

24 May a framework agreement with several suppliers be concluded?

Framework agreements are generally awarded to various suppliers, which are included by categories of goods and services in a catalogue.

Public entities can directly contract with any supplier that is in the catalogue, through the issuance of a purchase order, unless it is about contracts of more than 1,000 UTM in which case the bidding entity shall communicate its intention to purchase to all the suppliers awarded in the appropriate category of goods or services required.

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

As a general rule, suppliers' temporary unions or consortia may make changes in their composition when one of their members is affected or has any cause of disability to participate in the procurement processes. In this case, consortia are allowed to exclude the disabled member or to withdraw their offer.

Also, in the event of suspension of the registration in the Contractors' Registry that enables a member of a consortium to participate in the procurement process, another interested person with a current registration may replace it.

26 Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

In recent times, measures to encourage the participation of SMEs in the procurements governed by the Act have been adopted. One of the most important is the possibility of applying through a 'suppliers temporary union', which allows these companies to access to procurement processes that, due to their size and guarantee requirements, were previously reserved for larger companies.

Likewise, bidding entities were granted greater flexibility to require guarantees of seriousness of the offers, in processes with amounts less than 2,000 UTM, depending on the risk involved in the operation.

Additionally, this regulation allows a contract to be awarded to various bidders.

27 What are the requirements for the admissibility of variant bids?

The Act does not prevent the filing of more than one offer per bidder. However, in accordance to the principle of equal treatment, this possibility shall be expressly included in the request-for-bids documents, which occur in practice. When the filing of multiple offers is prevented, as general rule it is established that the first offer entered into the system will be accepted, and the rest of them will be excluded.

28 Must a contracting authority take variant bids into account?

The bidding entity shall take variant proposals into account, unless the possibility of filing multiple offers has been expressly prohibited in the request-for-bids documents.

29 What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

The bidders who vary the proposed conditions after filing their offers, or who retract from the contract after being awarded, may be sanctioned with the execution of the guarantee of seriousness of the offer, if it was required at the moment of applying.

30 What are the award criteria provided for in the relevant legislation?

Public procurement legislation establishes that the request-for-bids documents shall consider objective technical and economic evaluation criteria. These can include:

- the price;
- experience;
- technical quality and after-sales support;
- delivery time;
- environmental considerations;
- previous contractual compliance; and
- any factors that are relevant to the characteristics of the goods of services tendered.

The criteria must be defined by the bidding entity, without prejudice. Cost can never be the only criterion.

It is important to note that when the contracting customary services, such as a cleaning service, are tendered, the request-for-bids documents shall include the employment and remuneration conditions as a technical criterion.

31 What constitutes an 'abnormally low' bid?

The Act considers an abnormally low offer as one that is 50 per cent lower than the price offered by the precedent offerer, if the costs of the offer are economically inconsistent.

In turn, Decree No. 75/2004 on public works contracts establishes that an 'abnormally low' offer will be more than a 15 per cent lower than the official budget of the project, or more than 20 per cent lower

Update and trends

The establishment of the public procurement system in Chile, regulated by Act 19.886/2003, has made it possible to significantly improve the standards of transparency in purchases of goods and contracting of services carried out by the public administration, and increases the levels of competition among suppliers, which has allowed important fiscal savings. A result of this positive evaluation of the system, is that other bodies that are not within the scope of this law have voluntarily joined.

One of the most important trends of recent times has been to introduce modifications to the system that allow the participation of microbusinesses and SMEs, such as allowing their participation in consortia in large purchasing processes and establishing greater flexibility in relation to the guarantees requested. This trend has continued, and currently Congress is studying the approval of additional modifications in the same line.

Also, the possibility of increasing the scope of application of Act 19.886/2003 has been proposed, in the sense of granting greater powers of the Public Procurement Tribunal, so that it can know the resources

presented in direct contracting processes and in those contracts made by organisations that voluntarily have been incorporated into the public procurement system.

Additionally, modification of regulations regarding framework agreements is being researched, in order to ensure commercial mobility and the entry of new suppliers, as well as to ensure that these are executed correctly, increasing control over certain aspects of the agreements.

The National Congress is studying more modifications, such as introducing new evaluation criteria (eg, for those contracts where a direct service is provided to citizens, where it is mandatory to consider 'the lowest rate offered', and new causes of disability) to contract with the state.

In the long term, we believe it is very likely that modifications will be made to the claim process of the Public Procurement Tribunal, incorporating measures that improve the rights of claimants and ensure that the measures adopted by this body are effective.

than a variant offer, unless the request-for-bids documents establish a different percentage for this purpose.

32 What is the required process for dealing with abnormally low bids?

The aforementioned offers can be awarded by the bidding entities through the issuance of a founded resolution, and requesting an increase in the amount of the guarantee of faithful compliance, for the price difference.

Also, according to Decree No. 75/2004, if the price of the accepted offer is low on the ranges set, an additional guarantee for faithful compliance of the contract will be required. Its amount shall be the price difference reduced by 15 per cent or 20 per cent, depending on the cause invoked, or by the percentage indicated in the request-for-bids documents.

Review proceedings

33 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

In general, the same contracting entity decides on the review applications. In the event that the interested party is not satisfied with the administrative decision, it may appeal before the Ordinary Courts or the Public Procurement Court (a specialised body in procurement matters), depending on what stage the procurement process is at. In both cases, the first-instance decision can be reviewed by a court of appeal.

Also, aside from the judicial system, the General Comptroller of the Republic may be required to review the decisions adopted by the bidding entity, in its role of supervisor of public bodies.

It is important to note that there are special dispute resolution systems, such as the Technical Concessions Panel, which must decide in a non-binding manner on any discrepancies that may arise between the parties during the execution of a concession contract. The Panel's decision may be submitted to arbitration review.

34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

The recourses filed before the mentioned authorities are different, and each one is processed based on a special procedure that includes various stages.

35 How long do administrative or judicial proceedings for the review of procurement decisions generally take?

In general, these procedures are meant to be brief, due to the nature of the disputes. According to the legislation in the matter, procedures before the public entities shall take a maximum of six months to be resolved; however, in practice, they commonly take longer.

In turn, before the Public Procurement Court, the term between the filing of the lawsuit and the issuance of the judgment may be approximately one year. If appeals, are filed against the first-instance judgment, it may take another six months approximately until the judgment of the Court of Appeals.

36 What are the admissibility requirements?

Various administrative recourses may be filed before the bidding entities, which must be done within a term of five days, one year and up to two years. The first recourse only requires demonstrating that the administrative decision affects a right or legitimate interest of the claimant. In turn, recourses that must be filed within one and two years require the concurrence of additional elements, mainly related to certain administrative irregularities that shall be proven when filing the claim.

Chilean legislation contemplates a broad definition of 'interested party', so claiming legitimacy to a claim is not a problem.

The filing of administrative recourses does not suspend the term to file judicial appeals. This may cause a problem if the administrative recourses are not solved before the expiration of the judicial term. Also, the cases under review before administrative authorities cannot in turn be filed before tribunals.

A problem in relation to administrative and judicial recourses is that their filing does not suspend the contested administrative act, so this action could have produced all its effects at the time of solving the claim ordering the cease of effects.

37 What are the time limits in which applications for review of a procurement decision must be made?

Administrative recourses must be filed within a period of five days, one year and up to two years, from the notification of the administrative act. Lawsuits before the Tribunal of Public Procurement must be filed within 10 business days. The time limit for making a claim before Ordinary Tribunals is five years.

Also, there is a special Protection Action, which can be filed before the Court of Appeals within 20 business days.

38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

No, it does not, but when filing the application for review the claimant may expressly request the additional suspension of the procurement process. Furthermore, before ordering the suspension, the relevant entity hears both parties involved, owing to the principle of impartiality.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

See question 38.

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

There are no obligations to notify the unsuccessful bidders in this case, provided the calls for bidding process are public and are available in the Mercado Público website, for all bidders interested in participating.

41 Is access to the procurement file granted to an applicant?

The bidding processes governed by the Act are published in the Mercado Público online portal, where request-for-bids documents and all the resolutions issued in the process can be found.

For its part, the special procurement processes (ie, those for construction and public works concessions and energy supply) are published in specific web portals where the relevant information about them can be found. In these processes, as a general rule, only the bidders that have formally received request-for-bids documents may submit offers.

42 Is it customary for disadvantaged bidders to file review applications?

It is common, in procurement processes that involve large amounts of money, for bidders that are not awarded a contract to file applications for review. There is no official data on the recourses filed before the public administration; however, during 2017 about 300 lawsuits were filed before the Public Procurement Court.

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Disadvantaged bidders can claim compensation for damages before Ordinary Courts by filing a civil lawsuit within five years after the event claimed.

Such filings are not subject to greater requirements, apart from having to be submitted within the legal term and having to specify the claimed damage.

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

It is possible for a contract to be terminated after a review is requested by an interested person, if irregularities in the award are detected. The imposition of this penalty is not common, but it has occurred when manifest and serious irregularities have been detected.

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Interested parties who contract with the public administration through direct deals can file the same administrative recourses as those that have contracted through a public bidding process. Additionally, they may file recourses before Ordinary Courts and the Court of Appeals, and before the General Comptroller of the Republic.

The only difference in this matter with respect to public biddings is that parties that have contracted through a direct deal cannot file lawsuits before the Public Procurement Court, as this entity has no competence to review procurements of that nature.

46 What are the typical costs of making an application for the review of a procurement decision?

The affected persons can file administrative recourses without needing to be represented by an attorney. In this sense, the cost will be associated with the time invested in the preparation and processing of the recourse. The same occurs in the case of filing recourses before the General Comptroller of the Republic.

The filing of the Protection Action before the Court of Appeals can also be made directly by the affected person, but usually an attorney is hired for that purpose. Additionally, certain procedural expenses must be assumed.

For its part, lawsuits filed before the Public Procurement Court require the representation of attorney, and procedural expenses must also be assumed. The same happens for recourses filed before ordinary courts.



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