

# Public Procurement 2020

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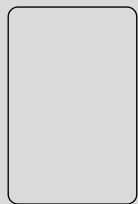
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# Public Procurement 2020

**Contributing editor****Totis Kotsonis****Pinsent Masons**

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Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Public Procurement*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology 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 Lexology 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 Greece, Israel, Mexico, Nigeria and Romania.

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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.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Totis Kotsonis of Pinsent Masons, for his continued assistance with this volume.



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# Chile

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## LEGISLATIVE FRAMEWORK

### Relevant legislation

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

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

Additionally, there are various guidelines that explain in detail certain matters related to public purchases, which are issued by ChileCompra, the body in charge to oversee public procurements.

### Sector-specific legislation

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

Procurement processes related to military equipment, public transportation utilities and construction contracts, among others, are subject to the following special procurement regulations:

- purchases by the military defence sector: Decree No. 746 dated 18 October 2011 issued by the Ministry of Defence;
- concession of public transport services: Law No. 18,696 dated 31 March 1988 and Decree No. 23 dated 9 April 2008, both issued by the Ministry of Finance;
- purchase of energy supplies: Decree No. 106 dated 16 June 2016 issued by the Ministry of Energy;
- contracts for the execution of public works and public works consultancy: Decree No. 75 dated 1 December 2004 and Decree No. 48 dated 9 September 1994, both issued by the Ministry of Public Works; and
- public works concession: Decree No. 900, dated 18 December 1996 and Decree No. 956, dated 20 March 1999.

### International legislation

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

Chile has had observer status in the World Trade Organization's Agreement on Government Procurement since 29 September 1997. In this regard, many of the essential principles set out in the Agreement have served as a basis for developing national legislation on government procurement and have been reflected in it.

Chile's general public procurement regulations were based on Spanish public procurement legislation, so many EU principles and directives are reflected in the Chilean system.

In relation to the above, the Chilean 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. Procurement through private bidding or direct deals is allowed only in exceptional circumstances. Also, the system 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 Mercado Público website.

### Proposed amendments

4 | Are there proposals to amend the legislation?

Currently there are some bills in the pipeline, which mainly aim to amend the Public Procurement Law by establishing new causes that prevent suppliers from contracting with the state, promote sustainable procurement, boost productivity and entrepreneurship, ensure compliance with labour and social obligations of workers by the company hired and implement measures to strengthen transparency in public procurement processes.

## APPLICABILITY OF PROCUREMENT LAW

### Contracting authorities

5 | Which, or what kinds of, entities are subject to procurement regulation?

The bodies of the public administration are subject to the general regulation of public purchases, which correspond to the ministries, the government officials, the regional governments, and the bodies and public services created for the fulfilment of the administrative function, including the General Comptroller of the Republic, the National Television Council, the Central Bank, the Armed Forces, the Forces of Order and Public Security and the municipalities.

Excluded from this law are purchases made by the Forces of Order and Public Security and Armed Forces related to war material, defence services and strategic services, among others.

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

### Contract value

6 | Are contracts under a certain value outside the scope of procurement regulation? What are these threshold values?

The procurement of goods or services whose value is less than three monthly tax units (UTM) (approximately US\$215) are excluded from

the public procurement system and can be directly contracted by public bodies.

Direct contracting of less than 100 UTM (approximately US\$6,029) for minor operations may be excluded from the public procurement system, provided that the total amount of these resources has been approved by a substantiated resolution and conforms to the corresponding budgetary instructions.

#### Amendment of concluded contracts

##### 7 | Does the legislation permit the amendment of a concluded contract without a new contract award procedure?

As a general rule, amendments to contracts already concluded are not permitted. However, modification of the contract is allowed when required for reasons of public interest or national security, which must be duly justified by the public body.

The early termination of contracts is allowed when one of the following causes is present: mutual agreement between the parties, serious breach of obligations by the contracting party, state of notorious insolvency of the contracting party, when the contracting party registers unpaid balances of remunerations or social security obligations, and others that may establish the basis of the bidding.

##### 8 | Has case law clarified the extent to which it is permissible to amend a concluded contract without a new contract award procedure?

The jurisprudence of the Supreme Court and the Comptroller General of the Republic, which supervises the actions of public bodies in Chile, has established that any modification of a contract must be duly justified by a resolution. It cannot, under any circumstances, have the purpose of unduly increasing the amount of the contract, or include services or goods that were not previously considered.

Likewise, it is not possible to use the modification of contracts to avoid the public procurement system, unduly prolonging the duration of the contract.

#### Privatisation

##### 9 | In what circumstances do privatisations require the carrying out of a contract award procedure?

When the state outsources public activities, it generally does so by granting a concession for these services to a private entity, which must provide them in exchange for a fee that is paid by the users of the respective service.

This concession is subject to certain efficiency standards and the application of sanctions in the case of non-compliance. Also, in the event of serious non-compliance, the state may terminate the concession.

As a general rule, the granting of concessions is preceded by a public tender and the award is made to the concessionaire that offers the lowest rate for the service or that requires the lowest subsidy from the state, depending on the nature of the concession.

#### Public-private partnership

##### 10 | In which circumstances does the setting up of a public-private partnership (PPP) require the carrying out of a contract award procedure?

PPPs are generally subject to a prior bidding and award process.

This is applicable, for example, in the case of public infrastructure, energy supply and telecommunications networks, among other areas.

## ADVERTISEMENT AND SELECTION

#### Publications

##### 11 | In which publications are calls for the expression of interest in regulated contract awards advertised?

The tenders governed by Law No. 19,886/2003 are published on [www.mercadopublico.cl](http://www.mercadopublico.cl), which is publicly accessible.

Calls for bids governed by special statutes (eg, public infrastructure, electricity supply) must be published in a national newspaper and special web pages are set up to publish the background to these processes, which are also publicly accessible.

#### Participation criteria

##### 12 | Are there any limits on the ability of contracting authorities to determine the basis on which to assess whether an interested party is qualified to participate in a contract award procedure?

In the case of contracting procedures governed by special regimes, such as in the case of public infrastructure and military equipment, there are special registers, to which suppliers that meet the experience and economic solvency requirements can be added. Only bidders who are registered may participate in the contracting processes called by the respective public bodies.

Also, in the case of complex tenders requiring a high level of specialisation, for example in the field of concessionary public infrastructure, a process of pre-qualification of bidders is carried out, which mainly assesses the experience of potential bidders. Subsequently, only those who have been pre-qualified may participate in the tender.

The bidding processes for the provision of general goods and services, governed by Act No. 19,886/2003, generally do not consider bidder pre-qualification processes, even though this Act allows public bodies to carry out a prior technical pre-qualification process with regard to the offerors.

##### 13 | Is it possible to limit the number of bidders that can participate in a contract award procedure?

For bidding processes governed by Law No. 19,886/2003, it is not possible for public bodies to limit the number of bidders that can participate in the process.

However, in contracting processes that require a high degree of technical specialisation, it is possible to carry out bidder pre-qualification processes.

#### Regaining status following exclusion

##### 14 | How can a bidder that could be excluded from a contract award procedure because of past irregularities regain the status of a suitable and reliable bidder?

In the case of purchases governed by Law No. 19,886/2003, there is a public registry of suppliers that are suspended from contracting with the state, which is administered by ChileCompra. The term of suspension depends on the seriousness of the irregularity performed by the relevant supplier. Once the period of suspension has ended, the supplier must send a request to ChileProveedores to be removed from the register. Once this occurs, the supplier will be able to contract with state agencies again.

In the case of special registries, the public agency in charge of its administration is responsible for entering and removing suppliers from the registry of suspensions, once the suspension period is over.

## THE PROCUREMENT PROCEDURES

### Fundamental principles

- 15 | Does the relevant legislation require compliance with certain fundamental principles when designing and carrying out a contract award procedure?

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 principles.

### Independence and impartiality

- 16 | Does the relevant legislation or case law require that a contracting authority is independent and impartial?

Impartiality and independence are derived from the principle of administrative probity that is expressly established in article 6 of the Constitutional Organic Act on the General Bases for the Administration of the State (Law No. 18,575/2001). The principle of administrative probity must be observed by all administrative bodies in all procedures they execute, including public procurement procedures.

The previous article is complemented by article 62 of Law 18,575/2001, which establishes the conduct that affects the administrative probity and impartiality of the officials, establishing their prohibition.

Likewise, article 6-bis of the Regulation under Law 19,886/2006 obliges public authorities and officials to abstain from participating in procurement processes in which there is a circumstance that may affect their impartiality.

### Conflicts of interest

- 17 | Does the legislation address expressly the issue of conflicts of interest?

Article 6-bis of the Regulation under Law No. 19,886/2003 expressly regulates conflicts of interest, under the title 'duty to abstain', which establishes that persons who may have a conflict of interest or are involved in a circumstance that may detract from their impartiality with respect to a purchase process must abstain from participating in that process.

In addition, complementing the legal provisions, ChileCompra issued Guideline No. 14, which regulates, in detail, the conflicts of interest that may affect the members of the bid evaluation committees.

### Bidder involvement in preparation

- 18 | Are there any restrictions on the ability of a bidder to be involved in the preparation of a contract award procedure?

It is prohibited for a public official to prepare the bidding bases and, in turn, participate as a bidder in the same process, as this would directly violate articles 6 and 62 of Law No. 18,575/2001 and the duty to abstain regulated in article 6-bis of the Regulation under Law 19,886/2003.

### Procedure

- 19 | Which procurement procedure is primarily used for the award of regulated contracts?

Public purchases must be executed through the public tender system. If there are no interested parties in the public tender, the private tender system can also be used, and at least three suppliers must be invited to participate. If there are no interested parties in the private bidding or some of the causes established in the law are verified, direct treatment can be used.

Both the private tender and the direct treatment must be justified by a resolution that the public body must issue for these purposes.

### Separate bids in one procedure

- 20 | Can related bidders submit separate bids in the same procurement procedure?

Act No. 19,886/2003 does not expressly regulate the submission of bids by related suppliers. However, the Code of Ethics issued by ChileCompra establishes that any conduct aimed at distorting the outcome of the bidding process, including that of two related suppliers who agree to submit bids in a bidding process, is unethical.

According to the above, two related companies may submit bids in the same bidding process, as long as this is not prohibited in the Bidding Rules and the conduct is not executed with the purpose of being unethical.

### Negotiations with bidders

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

The general rule of the purchasing process is that the terms of the contract are not negotiated with the bidders. In fact, the same Bidding Rules include the model contract to be signed with the successful bidder, which must only be completed with the conditions of the awarded bid.

The negotiation of contracts with bidders is very limited and only takes place in complex contracts from a technical point of view. However, these negotiations cannot lead to an increase in the originally approved budget.

- 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?

The negotiation of contracts with bidders is very limited and only takes place in complex contracts from a technical point of view.

### Framework agreements

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

ChileCompra must establish the framework agreements that will be tendered each year, based on the requirements made by public bodies and its own analysis of purchasing needs. The award of such framework agreements is subject to a public bidding process.

Public bodies are obliged to contract first by means of a framework agreement, if the good or service is available in the catalogue of framework agreements.

In this way, if the good or service is not included in the catalogue, or at the time of contracting the market is offering better contracting conditions (which must be duly proven and supported by material documentation by the public body), a purchase process can be initiated outside the framework agreement.

- 24 | Is it possible to conclude a framework agreement with several suppliers?

The awarding of framework agreements generally ends with the awarding of several suppliers. These suppliers are included in a public catalogue, which is subsequently accessed by public bodies wishing to contract goods and services.

In the case of acquisitions via a framework agreement that exceed 1,000 monthly tax units (approximately US\$60,300), public bodies

must communicate their intention to purchase to all the suppliers awarded in the respective category of the framework agreement to which the required good or service is assigned, through the online purchasing system.

### Changing members of a bidding consortium

**25** | Is it possible to change the members of a bidding consortium during the course of a contract award procedure?

Act No. 19,886/2003 provides for the possibility of submitting bids through a joint venture of suppliers (UTP).

When the UTP is dissolved (because there are fewer than two members) during the evaluation of the bids, it cannot be awarded. If the dissolution occurs during the execution of the contract, the contract must be terminated early.

If a UTP consists of three or more members and one of them withdraws, the contract continues to be executed with the remaining members, provided that there are no variations in the execution of the contract and that the withdrawing member was not essential to the award of the contract.

### Participation of small and medium-sized enterprises

**26** | Are there specific rules that seek to encourage the participation of small and medium-sized enterprises in contract award procedures?

One of the most important changes in public procurement regulations, which has encouraged the participation of small and medium-sized companies, has been the establishment of the UTP, which has allowed these companies to become partners and to jointly meet the requirements of experience and economic solvency that are demanded in large public procurement tenders. Before the regulations allowed the UTP, only large companies could win the most important tenders.

Likewise, the legislation considers the possibility of including in the bidding bases criteria and weightings of high social impact, such as the promotion of smaller companies.

### Variant tenders

**27** | What are the requirements for the admissibility of variant tenders? Are bidders free to decide whether to submit a variant tender or is this subject to the contracting authority expressly permitting it in the tender documentation?

As a rule, public procurement processes do not consider the submission of variant tenders.

For variant tenders to be permitted, it must be expressly stated in the Bidding Rules. In this case, it must be expressly established that it must include the base bid and it can be offered in an additional form. The objective criteria that will be used to award points to the bidders must also be established.

The Comptroller General's Office has clearly indicated that the principle of objectivity is affected when the bidders offer additional goods or services not contemplated in the bidding bases, as it is not possible to apply impartial evaluation criteria in those cases.

**28** | Is a contracting authority obliged to consider any variant tenders that might have been submitted?

If the Bidding Rules expressly provide for the possibility of submitting variant tenders, these must be evaluated according to the criteria set forth in the Rules.

### Tender specifications

**29** | What are the consequences if a tender does not comply with the tender specifications?

Act No. 19,886/2003 expressly establishes that bids that do not comply with the tender specifications will be disqualified and may not be awarded.

### Award criteria

**30** | Does the relevant legislation specify the criteria that must be used for the evaluation of submitted tenders?

Act No. 19,886/2003 establishes that bidding bases must include objective technical and economic evaluation criteria. This can include: price; experience; technical quality; warranty; delivery time; environmental considerations; previous contractual compliance; and any factors that are relevant in consideration of the characteristics of the goods or services tendered.

The criteria must be defined by the bidding entity based on the nature and characteristics of the acquisition required. Price can never be the only criterion.

When the contracting customary services, such as a cleaning service, are tendered, the request-for-bids documents must include the employment and remuneration conditions as a technical criterion.

### Abnormally low tenders

**31** | Does the relevant legislation specify what constitutes an 'abnormally low' tender?

Act No. 19,886/2003 considers an abnormally low offer as one that is 50 per cent lower than the price offered by the precedent offeror, if the costs of the offer are economically inconsistent.

**32** | Does the relevant legislation specify how to deal with abnormally low tenders?

The abnormally low offers can be awarded by the bidding entities by issuing a resolution justifying the reasons that make it advisable to award this bid and requesting an increase in the amount of the guarantee of faithful compliance.

## REVIEW PROCEEDINGS

### Competent review bodies

**33** | Which bodies are competent to review alleged breaches of procurement legislation? Is it possible to appeal against a review body's decisions?

The Chilean public procurement system provides for complaint actions that can be filed before the same authority that issued the administrative act to be challenged.

It is also possible to request the Comptroller General of the Republic, who has a supervisory role over the administrative bodies, to review the procurement procedure and the administrative acts issued therein.

It is also possible to file a challenge before the Public Procurement Court, which is a jurisdictional body specially created to review procurement procedures.

**34** | Do the powers of competent review bodies to grant a remedy for a breach of procurement legislation differ?

The powers of the administrative bodies are quite similar to those of the Public Procurement Tribunal: both may review the contested



administrative act, order a probationary period, order the suspension of the administrative process and terminate the act.

In the case of the Comptroller General's Office, the functions are different: it must carry out an investigation, and if it detects an abnormality, it must order the administrative body involved to correct the act and apply the corresponding administrative sanctions.

### Time frame and admissibility requirements

#### 35 | How long do administrative or judicial review procedures generally take?

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

#### 36 | What are the admissibility requirements for an application to review a contracting authority decision?

For an application to review to be accepted, the deadline set for its submission must be met, one of the grounds for submission must be met (eg, the lack of notification and the emergence of new records (only in the case of long-term appeals)) and it must be shown that the submitter is an interested party.

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

#### 37 | What are the time limits within which applications for the review of contracting authority decisions must be made?

Administrative appeals are subject to different time limits and different grounds for appeal. As regards time limits, appeals may be lodged within five days, one year and two years from the date of issue of the act complained of, depending on the seriousness of the offence reported.

In the case of the Public Procurement Court, the challenge action must be filed within 10 days.

Complaints to the Comptroller's Office do not have a time limit.

### Suspensive effect

#### 38 | Does an application for the review of a contracting authority decision have an automatic suspensive effect on the contract award procedure?

The Chilean public procurement system does not provide for the immediate suspension of the procedure once the complaint has been filed.

Notwithstanding the above, the system provides for the possibility that the claimant may request the suspension of the procedure in a well-founded manner. The administrative body or the Public Procurement Court must decide whether to grant the suspension, based on the background of each case.

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

The Chilean public procurement system does not provide for the immediate suspension of the procedure once the complaint has been filed.

### Notification of unsuccessful bidders

#### 40 | Is the contracting authority required to notify unsuccessful bidders of its intention to conclude the contract with the successful bidder and, if so, when does that obligation arise?

Procurement processes are generally public and accessible to all bidders. Thus, it is a legal requirement that all the documents of the purchasing process (the bidding bases, the evaluation report and the award decree, among others) are published in full on [www.mercadopublico.cl](http://www.mercadopublico.cl) and on the other websites enabled in the case of special regimes.

In accordance with the above, both the winning bidder and the remaining bidders are informed simultaneously of the award decree and other relevant background information of the bidding process.

### Access to procurement file

#### 41 | Is it possible for an applicant seeking the review of a contracting authority's decision to have access to that authority's procurement file?

Yes, the information on the procurement process is published in full on the relevant web portals, which are accessible to all bidders.

Only in very exceptional cases can public bodies declare certain procurement processes to be secret, when, for example, their publicity affects state security, commercial strategies and the industrial rights of bidders, among other qualified grounds.

### Challenges to contracting authority decisions

#### 42 | How customary is it for contracting authority decisions to be challenged?

In 2018, 300 lawsuits were filed with the Public Procurement Court and in 2019, this increased to 390 cases.

There are no official records of appeals filed with the administrative authorities.

### Violations of procurement law

#### 43 | If a violation of procurement law is established in review proceedings, can this lead to the award of damages?

If there is a violation of the procurement rules, it is possible to bring an action for damages before the civil courts.

Among other criteria, the courts' case law has established that damages must be awarded to the bidder that proves that there was a high probability of winning the tender, if there was no infringement of the rules. Thus, compensation is not granted for the total value of the award, but only for the utility of the goods or services, discounting the costs that the bidder should have assumed to provide them.

#### 44 | Is it possible for a concluded contract to be set aside following successful review proceedings?

Yes, it is possible for the administrative authorities or the procurement court, as appropriate, to order the annulment of a contract; however, this does not happen often.

Annulment occurs only in cases where it can be proved that there was bad faith on the part of the successful bidder and that there was indeed a defect in the procurement proceedings.

If there was no bad faith on the part of the successful tenderer, case law has generally established that the rights acquired by the contractor in good faith must be respected, and, therefore, annulment of the contract is not permitted. The claimant may bring an action for damages against the administrative body that committed the defect.



## Legal protection

**45** | Is legal protection afforded to parties interested in a contract that might have been awarded without an advertised contract award procedure?

Chilean courts only grant legal protection to contractors that act in good faith. In this case, even if there is an error or an illegal act by an administrative body, the contract will subsist. On the contrary, if the contractor acted in bad faith or was aware of the illegality committed by the administrative body, the contract will be voided, without prejudice to further criminal proceedings against the supplier and its suspension from contracting with the state.

## Typical costs

**46** | What are the typical costs involved in making an application for the review of a contracting authority decision?

Regarding administrative actions, these can be filed by any person and the services of an attorney are not required. In this sense, the cost will be associated with the time invested in the preparation and processing of the action. The same occurs in the case of filing recourses before the General Comptroller of the Republic.

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

## UPDATE AND TRENDS

### Emerging trends

**47** | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or, on the contrary, been restricted?

The latest trends in purchasing processes have been oriented towards the following: making contracting mechanisms as flexible as possible to encourage the participation of small and medium-sized enterprises; generating greater coordination with other public bodies, which will make it possible to obtain better contracting conditions by means of the demand aggregation system; and modernising the system of framework agreements, establishing shorter updating times for them so that the available contracting conditions do not become obsolete, especially with regard to technological products.

### Coronavirus

**48** | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

As a result of the covid-19 pandemic, the government has taken the following measures in relation to public procurement:

- Public agencies have been authorised to omit the processes of large purchases (public bidding within a framework agreement), when purchases over 1,000 monthly tax units (UTM) (approximately US\$60,300) must be made for products or services needed to combat covid-19.
- The use of the direct treatment mechanism has been reinforced, to acquire equipment needed to treat and combat covid-19.



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- Decree No. 821 of 21 January 2020 of the Ministry of Finance was published, which approved a new purchase modality: 'agile purchase'. This modality allows making purchases of less than 30 UTM (approximately US\$1,800), which requires only three direct quotations to the suppliers. Subsequently, the public body will issue a purchase order to the most convenient supplier.

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