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Public Procurement & Government Contracts

Second Edition

Peru

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[chambers.com](https://www.chambers.com)

2019

Law and Practice

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Payet, Rey, Cauvi, Pérez Abogados has a highly recognised Public Procurement Law practice group, with extensive experience in all matters related to clients' legal interactions with government authorities and public entities, including administrative proceedings, public procurement processes, works for taxes projects (investment projects in which a company executed a socially relevant project in exchange

for reductions in its income tax payments), public-private partnerships (PPP), concessions, permits, licences and authorisations (PLA) requirements, and industry-specific regulations. Additionally, the team supports the firm's Corporate practice group in transactional work, especially transactions related to industries with heavy governmental oversight.

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1. General

1.1 Legislation Regulating Procurement of Government Contracts

The main statute regulating the execution of public procurement contracts is Law No 30225, the Public Procurement Law. The purpose of this law is to maximise the value of public resources, to invest in a result-based management approach, and to guarantee procurement efficiency and the public interest. Each process conducted under this law is developed in accordance with the principles of free concurrence and competition, equality and transparency, among others.

The Public Procurement Law is complemented by its Regulations, approved by Supreme Decree No 344-2019-EF. Moreover, the Supervisory Authority on Public Procurement (OSCE by its acronym in Spanish) has issued several provisions (called Opinions) and directives stating the correct application of those regulations and the procedures enlisted in the Public Procurement Law.

According to OSCE data, in 2017 the Peruvian Government procured for PEN36,176.4 million (approximately USD11 billion) through 45,764 contract award procedures. The procurements carried out under the scope of Law No 30225 represented 77.8% of the total awarded value.

In addition, there are special regulations for certain types of public procurement. This is the case, for example, in the Petroperú SA Acquisitions and Contracting Regulations, and the measures to expedite the investment process and other activities in the framework of development of the XVIII Pan American Games of 2019 and the Sixth Parapan American Games of 2019, established by Legislative Decree No 1248.

1.2 Entities Subject to Procurement Regulation

The scope of the Public Procurement Law covers almost the entire public sector (with some exceptions expressly established in the law), including the executive branch of government (ie, ministries and their dependencies), regulatory agencies, Congress, judicial courts, autonomous constitutional bodies, local and district governments, and public companies.

1.3 Type of Contracts Subject to Procurement Regulation

The Regulations contemplate a procurement system based on the characteristics of each provision, which could be qualitative, quantitative or dimensions-based. These provisions may involve the provision of works, goods, services or consultancies, or may be considered a mixed modality. All the procurements must fall under one of the following procurement systems:

- lump-sum amount, in which the procurement characteristics are defined by the basis and the bidders offer a fixed full amount under a certain time limit;
- unit prices, in cases where quantities or magnitudes required by the entity are unknown or uncertain;
- mixed schemes of lump-sum, tariffs and/or unit prices;
- rates, for general consultancy contracts or works with uncertain or unknown time limits in the provision of services;
- percentage-based for collection, recovery or similar procurement services; or
- fixed-fee or success-fee payments for cases of contracting services.

1.4 Openness of Regulated Contract Award Procedure

A regulated contract award procedure is open to any interested party from any jurisdiction. In order to submit an offer and execute contracts, foreign individuals or corporations must be registered before the National Supplier Registry (RNP, by its Spanish acronym), in accordance with article 34 of the Public Procurement Law (both domiciled and non-domiciled). The procedural requirements for the registry will depend on the domicile of the company and, if non-domiciled, whether the company has representatives in Peru.

The domiciled companies will conduct the procedure of registration labelled as a local branch, under similar requirements to Peruvian companies. For non-domiciled companies that have a representative in Peru, the procedure must be started by the representative, who must present a copy of the official documents (issued in the country where the foreign company was incorporated) in order to accredit the company's purposes.

In the case of non-domiciled contractors without representatives in Peru, the contracting entity will be responsible for the procedure of registration, complying with the formalities required by the relevant regulations. This does not imply that the award will be direct, since it solely involves registration of the bidder before the RNP so that the bidder can present his or her proposal and continue with the regular procedure.

The specific rules for registration in the RNP are contained in Directive No 15-2016-OSCE-CD.

1.5 Key Obligations

Registration before the RNP is an essential requirement to be involved in the public procurement system, since the Peruvian public procurement legal framework sets registration in the RNP as a requirement to submit price proposals for any public procurement contracts. The RNP is managed by OSCE and certifies the existence of the company in accordance with Peruvian laws.

Interested parties can be restricted from participating in public procurement procedures if they have been sanctioned with breaches of the public procurement legal framework under the corresponding sanctioning proceedings. Moreover, other interested parties may be impeded from participating as bidders, participants or contractors in procurement processes if they have been barred from specific procurement processes, if they have held public office, if they are relatives of high-ranking public officials, or if they have been found guilty of corruption by courts, amongst other reasons set forth in Article 11 of the Public Procurement Law.

2. Contract Award Process

2.1 Prior Advertisement of Regulated Contract Award Procedures

The public procurement framework requires the publication of the Annual Procurement Plan, which provides for the procurement of goods, services and works covered by the budget of each entity.

For contract award procedures, the entities carry out the calling through a publication in the Electronic System of Public Procurement (SEACE, by its Spanish acronym), which allows the exchange of information and dissemination of the public procurement, as well as the completion of electronic transactions.

The Annual Procurement Plan is published both in the SEACE and on the institutional website of each entity. For its part, the calls for award procedures are published on the SEACE website.

In the tender calls, the information of the entity requiring the provision must be published, as well as basic information items such as the description of the public procurement's object, the identification of the contract award procedure, the Reference Value, the costs of reproduction of the documents of the contract award procedure, the procurement calendar, the terms of performance of the provisions, and other appropriate information. The calls must also attach the requirement of expressions of interest, containing the currency in which the economic offer ought to be presented, the qualification requirements and evaluation factors, among other specifications.

2.2 Preliminary Market Consultations by Awarding Authority

It is mandatory for the Reference Value for goods and services to be calculated on the basis of market consultations. For works consultancies procurement, a market consultation is not required, but can be carried out by the entity. Once the Reference Value is published, calls and market consultations must be made to determine the values of goods and services before starting the selection procedure. The market consulta-

tions carried out may use existing information similar to the award procedure.

2.3 Tender Procedure for Award of Contract

The legislation mandates the tender procedure or procedures that may be used for the award of a contract, as follows:

- *Public tenders*: public tenders are called for the procurement of goods, supplies and works, as well as for procurement services of any nature, and for mixed modalities (works and services).
- *Simplified award*: a mechanism used for the procurement of goods, services and the execution of works (except for the services of individual consultants) that do not imply a significant contract value. The maximum value required to apply for a simplified awarding process is established in the Public Budget Law.
- *Selection of individual consultants*: this is used for procurements of consultancy services in which no additional staff or personal or professional support are needed, and in which the experience and qualifications of the person who provides the service are the primary requirements to fulfil the demands. This mechanism does not apply to construction consultancy procurement.
- *Pricing comparison*: this is used for the procurements of goods and services of immediate availability (other than those of consultancy) that do not need to be manufactured or provided according to specific indications provided by the entity. The procured goods or services must be easily obtained under market standards and must not exceed a Reference Value of 15 Peruvian Tax Units (approximately PEN62,250).
- *Selection of individual consultants*: for the contracting of consulting services that do not require staff teams or additional professional support.
- *Electronic reverse auction*: this applies for the procurement of common goods and services that require a technical form elaborated and approved by the Public Procurement Central – PERU COMPRAS – and are included in the List of Common Goods and Services.
- *Direct procurements*: exceptionally, government entities can request procurement directly for a certain provider. These exceptions are expressly set forth in the Public Procurement Law and include emergency situations (catastrophe, security or declared health emergency), proven shortage situations of the contracting entity, and when the goods or services can be obtained from only one provider, among other scenarios.

For all cases, except for the Electronic reverse auction and the Direct Procurement, the public budget law of each year establishes the parameters for the amounts of value.

The Peruvian public procurement legal framework does not establish any price negotiation mechanisms; all offers are awarded or rejected under a combination of price-based and

competition-based mechanisms, considering the economic offerings presented by the contractors and their compliance with minimum technical requirements. Thus, bidders generally compete by proposing offers below the Reference Value.

2.4 Choice/Conditions of Tender Procedure

The choice of procedure is under the discretion of the awarding authority. The type of tender procedure will depend on the characteristics of the contract, such as the type of the provision (goods, services, works or consultancies), the qualitative and quantitative characteristics or the magnitude of the provision, and the value of it. Each year, the public budget determines the parameters of reference values of each type of applicable procurement procedure.

Law 30879, the Public Budget Law for 2019, established the minimum-value conditions of the contract award procedures, according to the following:

- for works procurement through public tenders, the Reference Value must equal or exceed PEN1,800,000 (approximately USD600,000), or be carried out through a simplified award if the Reference Value is less than this amount;
- for goods procurement through public tenders, the Reference Value must equal or exceed PEN400,000 (approximately USD120,000), or be carried out through a simplified award if the Reference Value is less than this amount;
- for services procurement through public tenders, the Reference Value must equal or exceed PEN400,000 (approximately USD120,000), or be carried out through a simplified award if the Reference Value is less than this amount; and
- for the selection of individual consultants, the Reference Value must be equal to or less than PEN40,000 (approximately USD12,000).

2.5 Timing for Publication of Documents

The calendar of the selection procedure is the schedule of the call forms in which the deadlines of each stage of the award procedure are set. This calendar is published along with other documents that are relevant to the procedure, at the time of the calls.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The legislation does not specifically regulate the time limits for the receipt of expressions of interest in a contract award procedure or the submission of tenders. The regulation establishes that the basis or requests for expressions of interest must be published, as appropriate, in the calls. Within these documents are the instructions for the structure of offers, which includes the terms and the formalities. However, prior to the presentation of expressions of interest or

the presentation of offers, suppliers that intend to participate in a contract award procedure must register as participants.

2.7 Eligibility for Participation in Procurement Process

The legislation establishes requirements that determine the capacity of the interested parties to execute the contract, as follows:

- legal capacity, which enables the interested parties to carry out the economic activity procurement matter;
- technical and professional capacity;
- the experience of the interested parties in the speciality; and
- the economic solvency for the bids called to undertake the execution of works.

2.8 Restriction of Participation in Procurement Process

It is not possible to restrict participation in the procurement process to only a small number of qualified suppliers. The qualified suppliers must comply with the requirements of the provision and its relationship to the need of the entity. However, there are direct procurement modalities that allow the entities to contract directly with a provider due to its personal characteristics, such as experience or speciality, and the complex characteristics of the provision.

2.9 Evaluation Criteria

The main criterion for evaluating offers to determine the winner of the contract award procedure is the price. However, the legislation establishes other objective evaluation factors. For example, in the case of goods and services, in addition to the price, other factors such as the delivery date of the goods or services, aspects related to environmental and social sustainability, commercial and factory guarantees and others that are provided for may be used in the standard basis that OSCE approves.

In the case of consultancies, in addition to the price, the interested party's experience, the proposed methodology, project knowledge, environmental or social sustainability, and interviews, among others, can be used as factors.

3. General Transparency Obligations

3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

Both the qualification requirements of the interested parties and the evaluation factors of the proposals or offers are published, together with the other documents in the calls. The basis applicable for public tenders, simplified adjudication and electronic reverse auction must also contain the technical specifications, terms of reference, and technical data or work file, among other documents. On the other

hand, requests for expressions of interest for the selection of individual consultants must include the terms of reference.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

According to the Regulation, the admission of offers is only revealed at the end of the procedure and does not include details other than the objective fulfilment (or not) of the requirements. Moreover, the Regulation establishes that bids whose qualification requirements were not analysed or reviewed by the selection committee are not disclosed.

3.3 Obligation to Notify Bidders of Contract Award Decision

The award is published through the SEACE on the same day it is made. The comparative table detailing the results of the qualification and evaluation will be published together with the awarding document.

3.4 Requirement For 'Standstill Period'

The Peruvian framework does not regulate a standstill period between the notification of the contract award decision and the conclusion of the contract.

4. Review Procedures

4.1 Responsibility for Review of Awarding Authority's Decisions

Depending on the value of the contract, disputes that involve the review of the award decisions may be known and resolved by the Head of the Contractor Entity or by the Tribunal for State Procurement. In this sense, if the value is equal to or less than 50 Tax Units (approximately USD60,000), the appeal will be submitted to the Head of the Contractor Entity. If the value is higher than the amount established, the appeal will be resolved by the Tribunal for State Procurement.

4.2 Remedies Available for Breach of Procurement Legislation

In accordance with the Law, in the administrative field, the appeal is the remedy to challenge any act dictated during the contract award procedure. If the instance that resolves the appeal is not pronounced within the period established for such purposes, the appeal shall be deemed denied. This situation, or the resolution that resolves the appeal, exhausts the administrative route. In the judicial field, it is possible to file a contentious-administrative action against the resolution or non-pronounced denial that exhausts the administrative route.

Outside the awarding stage (ie, during the definition of the basis requirements), public entities or private companies can also denounce a breach of procurement legislation before the Tribunal for State Procurement.

4.3 Interim Measures

The filing of the appeal suspends the contract award procedure. Any act that contravenes this legal provision will be considered null. The instance that resolves the appeal must state this fact in the SEACE, on the same day as the filing.

4.4 Challenging Awarding Authority's Decisions

The Regulation establishes that the appellant must be a natural or legal person, individual or consortium that is legally qualified to exercise civil acts, that has not been the winner of the award and that has interest to act or procedural legitimacy to object to the act in question. If the objector does not have interest to act, the appeal will be declared inadmissible.

4.5 Time Limits for Challenging Decision

Any decision or act that has been issued by the awarding authority and that is the subject of an appeal may be questioned within eight business days of the adjudication of the award, as a general rule. For cases of simplified adjudications, selection of individual consultants and pricing comparison, the appeal must be submitted within five days of the notification of the granting with the award. For cases of electronic reverse auction, the period of filing the appeal will depend on the value of the contract.

4.6 Length of Proceedings

Appeals filed with the same calling entity are resolved within a period not exceeding ten business days from the filing of the appeal. In the case of the Tribunal for State Procurement, the approximate term is 20 business days.

4.7 Annual Number of Procurement Claims

The Tribunal for State Procurement may resolve approximately 3,000 claims a year, including not only the review of awarding decisions but also the evaluation of several denouncements for breaching other aspects of the public procurement regime.

4.8 Costs Involved in Challenging Decision

The Regulation establishes that the filing of the appeal should be supported with the granting of a guarantee equivalent to 3% of the value of the contract award procedure, if this amount will not exceed 300 Tax Units (approximately USD380,000). The guarantee must be valid for 30 days if the

appeal is filed with the calling entity, and for 60 days if it is filed with the Government Procurement Tribunal; it must be renewed until the time of exhaustion of the administrative route.

However, this guarantee is enforced when the appeal is declared inadmissible or unfounded, or when the appellant desists.

5. Miscellaneous

5.1 Modification of Contracts Post-award

The contract could be modified in such a way that it is more efficient to achieve the objectives sought by the contracting entity at the moment of carrying out the contract award procedure. No change may affect the financial equilibrium – ie it cannot affect the principle of equity. According to the legislation, there are only three cases in which the contract could be modified, namely: i) for the execution of additional benefits, ii) for the reduction of provisions, and iii) for the authorisation of extensions of time. This is in addition to other cases contemplated in the Law and the Regulation.

5.2 Direct Contract Awards

Direct Procurement is an exceptional modality used to determine the procurement of goods, services, consultancies or works. The regulation regulates 13 cases in which direct contracting is applied, as follows:

- when a public entity contracts with another, respecting the current constitutional framework;
- in emergency cases derived from catastrophic situations;
- in situations of shortage;
- police or military procurements that require confidentiality or internal order;
- when the goods required by the entity can be obtained by a certain supplier, or when the latter has exclusive rights over those provisions;
- for very personal services provided by natural persons;
- for advertising services provided to the Government, in accordance with the law of the matter;
- for consulting services that are the update of another service contracted by the regular contract-award procedure, if it is not a work of consulting;
- for goods and services of a scientific, technological or research nature that may serve the entity;
- for the acquisition and lease of real estate;
- for legal, accounting and economic specialised services and related matters, for the defence of officials and former officials in acts related to the fulfilment of their obligations;
- when there is a need to continue with the provision of a contract resolved or declared null, and the bidders who participated in the original contract award procedure do not accept the invitation; and

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- to contract training services with authorised entities or international organisations.

5.3 Legislative Amendments Under Consideration

The Law was recently modified in several substantial aspects. For its part, the Regulation came into force in January 2019, and it is unlikely that more amendments will be passed in the coming months.

However, based on the powers granted by the Regulation, OSCE could issue directives that may specify some of the public procurement rules.