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Public Procurement & Government Contracts

Panama

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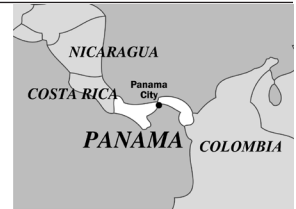
PANAMA

Law and Practice

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1. General

1.1 Legislation Regulating Procurement of Government Contracts

There are generally four legal procurement frameworks in the Republic of Panama that contractors will follow when providing goods and services to the government:

- Law 22/2006, as subsequently amended, which governs the government bid process of general application in the Republic of Panama, regulated by, among others, (i) Executive Decree No 40 of 2018, (ii) Decree No 317-Leg of 2006, which regulates the use of bonds in public bids, and (iii) Decree No 517 DFG of 2015, which regulates the inspection guidelines of public funds conducted by the General Comptroller's Office (the "Law 22/2006 regime");
- Title XIV of the Constitution, developed by Law 19 of 1997 and regulated by Agreement No 24 of 4 October 1999 issued by the ACP, as subsequently amended (Acquisition Regulation applied by the Panama Canal Authority, or ACP's Acquisition Regulation);
- Law 51 of 2005, as subsequently amended, regulated by, among others, Resolution No 38,491-2006 JD issued by the Social Security Administration (Caja de Seguro Social, or CSS), as subsequently amended (CSS's Acquisition Regulation);
- Law 23 of 2003, as subsequently amended (Law 23/2003), regulated by, among others, Resolution 005-JD 2017 issued by the Tocumen Airport company (AITSA's Concessions Regulation);
- Law 5 of 1988, as amended (Law 5/1988), regulates the system for the execution of public works through concession schemes; and
- Resolution No JD-2728 of 2001 as subsequently amended ("PPA's Regulations") issued by the National Authority of Public Services relating to the applicable provision that governs bids conducted by the public transmission company (ETESA) for power purchase agreements (PPAs). Although technically such PPAs are not public contracts, but contracts entered into by the three private distribution companies established in Panama and the awarded generator(s), since the electric market in Panama is heavily regulated, ETESA not only prepares the bid documents and decides the conditions, but also conducts the bid procedures and awards the contracts to successful bidders.

Lastly, recent additions to the general procurement frameworks are:

- Law 93 of 2019 ("Law 93/2019"), adopting the possibility to enter into public contracts through public-private partnerships (PPPs); and

- Resolution JD-010-2019 ("Resolution 010/2019") issued by the Maritime Authority (AMP's Concessions Regulation).

1.2 Entities Subject to Procurement Regulation

All government entities are subject to the respective government procurement law, including ministries, independent entities (*entidades autónomas*) and state-owned corporations (when the state holds a majority interest in the company).

1.3 Type of Contracts Subject to Procurement Regulation

All contracts entered into by public entities are subject to procurement regulations.

Under the Law 22/2006 regime, the procurement and contract mechanisms are as follows:

- Minor Contracts – contracts below USD50,000;
- Simple Bids – where the contract is awarded to the lowest bidder, usually in simple purchases of products or services;
- Best Value Bids (BVB) – for contracts over USD100,000 with a high level of complexity (where the contract is awarded to the bidder presenting the best technical offer, which is not necessarily the lowest bid);
- Best Value Bids with Separate Evaluation (BVBSE) – for contracts over USD100 million with a high level of complexity and where the bids are evaluated in two separate stages (first the technical component, then the economic component) and the contract will be awarded to the bidder presenting the best technical offer, which is not necessarily the lowest bid;
- Framework Agreement Bids – where contracts are entered into by the government with one or more pre-qualified bidders for the acquisition of mass consumption products and services, with prices and conditions determined during a defined period of time through a reverse auction mechanism;
- Exceptional Procedure/Special Procedure Bids – where the contract is awarded directly to one bidder without the need of a bid or bid when special circumstances occur; and
- Auction of public property for the sale or lease of government property.

Generally, Minor Contracts are governed by procedures that are less cumbersome than Simple Bids, but they still apply, and such procedures include less time for the publication of documents and the possibility to submit an offer without posting a bid bond. Also, for bids to be convened under the Exceptional Procedure/Special Procedure Rules, certain pre-authorisations are required, which will be triggered according to value thresholds (the higher the value, the higher the entity that needs to authorise the contract).

On the other hand, according to ACP's Acquisition Regulation the bid processes are as follows:

- Public Bid based on the lowest price (similar to Simple Bids);
- Negotiated Bid (based on lower price, best value or reverse negotiated solicitation at the price of the lowest bidder);
- Non-negotiated Bid based on best value (similar to BVB); and
- Two-Step Public Bid.

Also, the procedures for each type of bid differ substantially.

Similarly, according to CSS's Acquisition Regulation, there are Bids for purchases of goods and services, Contests for advisory contracts related to studies and designs for investment projects, and Auctions for the sale or lease of CSS property. Furthermore, bids are classified as Lower Value Bids (for contracts under USD30,000) or High Value Bids (for contracts over USD30,000), and procedures for both types of bids differ substantially, according to the CSS's Acquisition Regulation, including the timing for the publication of bid documents and the possibility to submit an offer without posting a bid bond.

According to AITSA's Concessions Regulation, contracts are Aeronautical and Non-Aeronautical in nature, and both procedures also differ substantially.

Please note that Panamanian government procurement laws and regulations tend to be extremely formal in nature, and the prescribed procedures as well as the established bid requirements are usually strictly enforced. Therefore, prospective bidders are better served if they adhere strictly to the letter of the bid documents and refrain from interpreting their nature and the logic of the requirement. If there is any doubt, one should not hesitate to ask questions of the contact person designated for that purpose. Also, bidders intending to submit proposals before a Panamanian government entity should seek qualified legal advice well before the submission of a proposal, preferably as early as the day the terms of the bid are known to the bidder, since compliance with the administrative and regulatory requirements may take some time to be completed, and non-compliance may render a very good technical (or even economical) proposal null and void due to simple formalities.

1.4 Openness of Regulated Contract Award Procedure

Generally, contract award procedures are open to any interested party from any jurisdiction; only parties from a country where retaliatory measures under Law 48 of 26 October 2016 (Law 48/2016) were imposed may be banned from participating in government contracting procedures.

According to Law 48/2016, countries that discriminate against Panama may be subject to retaliatory measures, including banning companies originating in such countries from participating in government procurement procedures.

In March 2018, the following countries were listed as discriminating against Panama: Brazil, Chile, Colombia, Ecuador, El Salvador, Peru, Uruguay, Venezuela, Croatia, Slovenia, Estonia, France, Greece, Lithuania, Poland, Portugal, Cameroon, Georgia, Russia and Serbia. However, effective retaliatory measures have not yet been imposed on those countries, so any interested bidder from such countries should seek qualified legal advice from a local lawyer before presenting a proposal since a simple Cabinet decree, issued at some point prior to the bid, imposing retaliatory measures on the origin country of a bidder may render an otherwise competitive proposal null and void.

1.5 Key Obligations

Generally, an awarded bidder should:

- comply with the object and conditions of the contract within the agreed term;
- collaborate with the bidding entity in what is necessary to fulfil the object of the contract;
- comply with the instructions issued by the contracting entity during the development of the contract (provided that they are covered by the contractual relationship);
- act with loyalty and good faith in the different contractual stages, avoiding delays that may arise;
- guarantee the quality of the works carried out, as well as the goods and services contracted, and respond accordingly with conditions of the agreement; and
- respond exclusively to the obligations or claims that arise from the contractual relationships acquired within the contractual term, including administrative, civil, commercial, labour or any other type that implies some degree of responsibility in the matter.

2. Contract Award Process

2.1 Prior Advertisement of Regulated Contract Award Procedures

Panamanian legislation generally mandates the prior advertisement of regulated contract award procedures.

For contracts governed by Law 22/2006, terms of bids should be published in PanamaCompra. For contracts governed by AITSA's Concessions Regulations, a summary of the bids is published in two local newspapers for three consecutive days, depending on the nature of the contract, and the complete terms of the bid are to be purchased in AITSA's offices. For contracts

governed by the CSS procurement procedure, the bid terms are published in two local newspapers for two consecutive days, and also published in PanamaCompra.

For contracts governed by the ACP Acquisition Regulations, bid terms should usually be published in ACP's portal. However, bid terms related to negotiated contracts are made known in a private setting, and participation in the event is limited only to authorised employees of the Authority.

Generally, the information that must be disclosed relates to the date, time and place of the proposal submission (if a printed submission is made), complete bid conditions including a description of the goods or services to be acquired (including technical specifications, if any), rules and conditions related to the evaluation of the bid proposals, model forms, and a model contract. For bid procedures under Law 22/2006, the reference price also should be disclosed; only BVBSE are excluded from the contracting entity's obligation to publish reference prices.

2.2 Preliminary Market Consultations by Awarding Authority

Law 22/2006 and ACP's Acquisition Regulation provide the option to conduct market research to determine possible suppliers, market practices and the availability of the product or service in the market. In such cases, active participation and responses by interested companies are recommended, as they may influence the process in favour of the respondent.

2.3 Tender Procedure for Award of Contract

The Panamanian government has a formal process for soliciting proposals from potential government contractors, which will differ in certain aspects depending on the type of contract or the legal basis used to launch the particular bid; however, they generally follow the same structure.

Notice

After a government agency identifies a particular need, it prepares the bid containing the procurement terms and conditions. Notices of the bids are generally published in advance on the PanamaCompra website (for contracts under Law 22/2006), which is only available in Spanish. Such notices include the terms of the bid, comprising detailed technical and legal terms for the proposal, as well as a date for the site inspection (if any), a date for the open meeting (if required by law or regulation) and the deadline for proposal submission. In some cases, as is the case for bids issued by the Tocumen National Airport for awards of concession contracts, notices are published only in national newspapers, where the deadline for proposal submission is included as well as the information regarding the date and place for interested companies to purchase the legal and technical bid conditions.

Furthermore, it is important to bear in mind that any bid process of the ACP is dealt with through its Bid Online System (SLI, which is also available in English). When submitting bid proposals, bidders should pay special attention to every single detail of the notice and bid documents, since the Panamanian government bid process is generally driven by formality in the documents submission and even an otherwise curable defect might render a proposal void.

Prior Open Meeting

According to Law 22/2006, bids valued in excess of USD175,000 require the respective government agency to hold a prior open meeting, where parties may present their questions and concerns related to the project. The purpose of the meeting is to standardise the terms and conditions of the bid documents. The government agency may modify the bid documents based on questions raised at the open meeting; however, after a meeting is held and questions and concerns are presented, prospective contractors that submit proposals are deemed to agree and accept the terms of the bid documents as established by the government entity.

Proposals

Written proposal submissions are made online at the PanamaCompra website or directly in a paper-based submission to the government agency at the set place and time. In all online bid systems, either PanamaCompra or SLI, there is a need to register before submitting a proposal. Also, even if a bidder decides to deliver a paper-based submission, and not submit through the PanamaCompra website, said bidder needs to register in the database as a bidder. Therefore, it is recommended that prospective contractors initiate the paperwork early to register in the respective online system, as first-time users might find the registration process a cumbersome task (especially with the PanamaCompra online system).

Award

After proposals are submitted, an Evaluation Commission issues a report recommending to the head of the government entity the issuance of a formal award to the winner of the bid. The report may or may not be accepted by the head of the respective government agency. If the evaluation report is accepted, the head of the government agency awards the contract; otherwise, the head of the agency might request a new analysis of the offers or cancel the bid. Bid awards are subject to legal actions that differ according to the legal framework used to launch the particular bid.

Only under the ACP's Acquisition Regulation are there "negotiated bids", where the opening of bid submissions is not made publicly but rather in the presence of ACP authorised personnel. Bids may be submitted online or by other means authorised by

the bid documents. The ACP may make changes in the requirements on negotiated bids after the opening of bids has been held, as long as these changes are caused by a variation in the needs of the ACP and do not modify the contract objective.

Negotiated bids might be based on the lowest price (where awards are granted to the proposal with the lowest price presented by a qualified offeror); based on the “best value” (where awards are granted to bids having the best technical evaluation score and also comply with all of the requirements of the bid document, contain the lowest price and are not rendered as onerous if they exceed a certain threshold of the bid reference price as established by the ACP); or reverse negotiated solicitations, where a contract is awarded to the lowest bidder competing in real time on the internet to determine the best price in a predetermined period of time.

2.4 Choice/Conditions of Tender Procedure

Usually, Panamanian government procurement legislation provides for the one-bid procedure as the choice of procedure for each relevant entity, situation or contract type to be entered into.

2.5 Timing for Publication of Documents

Panamanian legislation imposes obligations regarding the timing for the publication of all of the bid documents and conditions, depending on the applicable legislation.

According to Law 22/2006, the publication period of the bid documents will vary according to the type of contract involved, from three working days (for contracts over USD10,000 but below USD50,000) to 30 working days (for contracts up to USD7 million) prior to the bid submission date, depending on the reference amount of the bid. The publication period might be extended to 40 days for contracts covered under the US-Panama Trade Promotion Agreement or the European Union-Central America Association Agreement.

For contracts under CSS's Acquisition Regulation, the publication period is from four to 25 working days prior to the bid submission date, depending on the reference amount of the bid.

For contracts under ACP's Acquisition Regulation, the procedures for purchases up to USD10,000 shall be posted on the internet during periods of not less than eight business hours. Offers may be known immediately after this period has elapsed, and the procedures for simplified purchases over USD10,000, and their offers, shall be posted on the internet for a period of not less than five business days, with the understanding that such period will commence on the business day following the date the announcement is placed. Offers may be made known immediately after this period has elapsed.

Under AITSA's Concessions Regulations, the publication period will be determined according to the nature of the contract, but in any case should be no less than 15 working days prior to the bid submission.

According to Law 5/1988, for the pre-qualification process, proposals should be submitted five calendar days after the last publication of the pre-qualification notice in two national newspapers (such publication should be made for three consecutive days). The bid process notice to potential bidders should be published no less than 30 calendar days before the established date for the submission of proposals.

PPA's Regulations states that the call for the bid will be made as widely as possible. Notices will be published in two national newspapers for two consecutive calendar days, in one newspaper of international circulation for two consecutive calendar days and in a specialised magazine, such as *Business News Americas*, *United Nations Development Business* (UNDB), or similar, and on the webpage of ETESA and the company or companies of electrical distribution for a minimum of 30 calendar days from the first day of publication in the newspapers.

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

Usually, Panamanian legislation determines that any expression of interest should be submitted subject to a predetermined deadline previously defined in the bid documents, including date, time and submission means (electronic or live submission).

2.7 Eligibility for Participation in Procurement Process

Typically, the participation criteria will be defined in the bid documents. However, some general requirements are applicable to all bids, as follows:

- they should have contracting capacity (and not have a declaration of disability to contract with the state by the General Directorate of Public Procurement (DGCP) or the ACP);
- they should have no outstanding debts with the Panamanian treasury or the CSS;
- they should not come from a country where retaliation measures have been applied;
- they should be registered as a bidder in PanamaCompra or SLI;
- for construction contracts, they should be registered with the Technical Board of Engineering and Architecture; and
- for professional service contracts, they should have the respective professional qualifications issued by the regulator of the profession in question.

Bid documents usually require bidders to accredit sufficient financial capacity, as well as sufficient technical capacity, which will be defined in each bid document.

2.8 Restriction of Participation in Procurement Process

According to the Law 22/2006 regime, an exceptional pre-qualification process restricting participation in a subsequent bid to only a small number of qualified suppliers is possible, on the basis of a Cabinet decision considering issues like the value or complexity of the project. Furthermore, the BVBSE also eliminates, in the same procurement procedure, candidates that did not comply with the technical/legal criteria, allowing the opening of economic proposals only from candidates that complied with all requirements (technical as well as legal). Moreover, the minimum number of qualified suppliers that may be invited to participate in a contract award procedure is two; otherwise, the contract will be handled as a contract under Exceptional Procedures.

Similarly, according to the ACP's Acquisition Regulation, the ACP may, exceptionally and with previous authorisation from the board of directors, use the pre-qualification procedure to determine the bidders who may participate in the corresponding bidding process, or use the Two-Step Public Bid procedure, which ultimately eliminates candidates at the technical stage before the submission of the economic proposal. Also, the ACP may establish the maximum number of bidders suitable to participate in the corresponding bid in the Prequalification Document.

Also, under CSS's Acquisition Regulation, a pre-qualification process restricting participation in the bid process to only a small number of qualified suppliers is possible, on the basis of a resolution issued by the legal representative of the Social Security Administration.

AITSA's Concessions Regulations do not provide for a pre-qualification process but the procedure is similar to the BVBSE, where a candidate may be eliminated at the technical stage before the opening of the economic proposal.

The shortlist or list of pre-qualified bidders will be determined according to their financial situation, technical information (experience), legal background and administrative capacity demonstrated in the pre-qualification process.

Under Law 5/1988, there are rules for pre-qualification and no minimum of qualified suppliers is established.

Under PPA's Regulations there are no rules for a pre-qualification process.

2.9 Evaluation Criteria

Generally, the eligibility of bidders will be determined by due submission of:

- legal documents and formalities that are required of all bidders – corporate authorisations to participate in the bid as well as a power of attorney, certificate of incorporation of companies issued by a qualified entity in the country of origin, a document attesting to the ability to conduct the business in the country of origin, sworn declarations and good standing certificates, among others. Bidders will need to be registered as such, in the respective database, before submitting proposals;
- a technical proposal according to the bid documents, including a description of the goods or services provided; and
- an economic proposal.

The winner is determined subject to the following general rule: under Simple Bids, the contract is awarded to the lowest bidder, whereas under BVB and BVBSE procedures, the contract is awarded to the bidder who presents the best combination of a technical/economic offer (which is not necessarily the lowest bid).

3. General Transparency Obligations

3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

Panamanian legislation imposes obligations regarding the publication/disclosure of all of the documents, including the criteria or other elements of the evaluation methodology on the basis of which bidders are selected, and bids evaluated. Furthermore, evaluation committees are typically not allowed to use criteria that have not previously been disclosed in the bid documents.

Generally, such disclosure takes place in the bid announcement itself (for bids covered under the Law 22/2006 regime, Law 5/1988, ACP's Acquisition Regulation, CSS's Acquisition Regulation and PPA's). However, for contracts covered under AITSA's Concessions Regulations, the bid announcement will disclose a location where a bidder may purchase the complete set of bid documents, including the selection/evaluation criteria.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

For bids covered under the Law 22/2006 regime and CSS's Acquisition Regulation, the complete evaluation of a pre-qualification process should be disclosed in PanamaCompra, and publication in PanamaCompra is deemed to be service of pro-

cess to all interested parties, including bidders, triggering the deadlines to submit claims.

For bids covered under ACP's Acquisition Regulation, the complete evaluation of a pre-qualification process should be disclosed in ACP's portal, and publication in such electronic portal is deemed to be service of process to all interested parties, including bidders, triggering the deadlines to submit claims, where applicable.

AITSA's notices to all bidders should be submitted simultaneously by email; however, third parties are not made formally aware of the bid results.

PPA's Regulations expressly provides for ETESA's obligation to publish the award decision for five days in two national newspapers and keep the information available in ETESA's webpage (<https://www.etsa.com.pa/es/compras-energia>) for a minimum of 30 days.

Law 5/1988 does not contain express provisions related to this issue.

3.3 Obligation to Notify Bidders of Contract Award Decision

For bids covered under Law 22/2006 and CSS's Acquisition Regulation, the complete evaluation of a bid process should be disclosed in PanamaCompra, and publication in PanamaCompra is deemed to be service of process to all interested parties, including bidders, triggering the deadlines to submit claims.

For bids covered under ACP's Acquisition Regulation, excluding Negotiated Bids, the complete evaluation of a bid process should be disclosed in ACP's portal, and publication in such electronic portal is deemed to be service of process to all interested parties, including bidders, triggering the deadlines to submit claims, where applicable.

For bids covered under AITSA's Concession Regulations, notices to all bidders should be submitted simultaneously by email; however, third parties are not made formally aware of the bid results.

Law 5/1988 does not contain express provisions related to this issue. PPA's Regulations provides for the obligation of ETESA to publish the award decision for five days in two national newspapers and keep the information available in ETESA's web page (<https://www.etsa.com.pa/es/compras-energia>) for a minimum of 30 days.

3.4 Requirement for Standstill Period

Usually, disappointed bidders have a standstill period during which they can challenge the decision, and where different procedures will apply depending on the legal support of the respective bid. For bids awarded according to the Law 22/2006 regime, disappointed bidders may challenge the bid process through:

- Claims (*Acción de Reclamo*) submitted before the General Directorate of Public Procurement of the Ministry of Economy and Finance, which may be filed by bidders against any illegal or arbitrary act or omission that occurred during the bid process at any time before it is formally awarded through a resolution; or
- a Legal Challenge (*Recurso de Impugnación*) to be submitted before the Public Procurement Administrative Tribunal (TACP), which is an independent court that will hear cases filed by bidders after the bid is formally awarded through a resolution, within five business days of the service of process in PanamaCompra. To be admissible, a Legal Challenge requires posting of a bond (10% of the proposal for purchase contracts and 15% of the proposal for construction contracts). Once a Legal Challenge is admitted, the contracting process is suspended until the TACP decides.

According to ACP's Acquisition Regulation, the bid documents or awards may be challenged through a Protest before the contracting office, presented within eight working days of the award notice. Such process suspends the contracting procedure until the issue is resolved.

Law 5/1988 does not provide for a special dispute resolution mechanism for disappointed bidders, hence if the bid documents lack a special procedure, Law 38 of 2000, which regulates the general administrative procedure, supplementarily applies and claims could be filed by bidders after the bid is formally awarded through a resolution, within five business days of the service of process. Such process suspends the contracting procedure until the issue is resolved.

Awards under PPA's Regulations do not benefit from a specific standstill period; however, ASEP's decision may be challenged before the Third Chamber of the Supreme Court, to be submitted within two months of the notice. The Third Chamber of the Supreme Court may suspend the procedure.

4. Review Procedures

4.1 Responsibility for Review of Awarding Authority's Decisions

For contracts awarded according to the Law 22/2006 regime, the TACP is the entity responsible for the review of the awarding

authority's decisions. TACP's decision may be challenged before the Third Chamber of the Supreme Court.

According to ACP's Acquisition Regulation, bid documents or awards may be challenged through a Protest, before the Contracting Officer.

According to CSS's Acquisition Regulation, any challenge to an award should be submitted directly before the Third Chamber of the Supreme Court, and the decision of such entity is final.

According to AITSA's Concession Regulation, the award is not subject to any challenge but, although not part of the formal process, the Tocumen Airport board may hear any comments submitted by disappointed bidders. Notwithstanding AITSA's Concession Regulation related to the lack of opportunities to challenge awards, according to the Judicial Code, decisions from administrative authorities in Panama may always be challenged before the Third Chamber of the Supreme Court, provided the administrative proceeding to the challenged resolution was completed. A decision of the Supreme Court is always final.

According to PPA's Regulations, the National Authority of Public Services will review any decision issued by ETESA relating to PPP's.

Law 5/1988 does not provide for a special dispute resolution mechanism for disappointed bidders, hence if the bid documents lack a special procedure, Law 38 of 2000, which regulates the general administrative procedure, supplementarily applies. However, in any case, once the administrative procedure is exhausted, decisions can be challenged before the Third Chamber of the Supreme Court of Justice.

4.2 Remedies Available for Breach of Procurement Legislation

As discussed before, bidders have the following remedies available for breach of procurement legislation.

Under the Law 22/2006 Regime

- Claim (*Acción de Reclamo*) submitted before the General Directorate of Public Procurement of the Ministry of Economy and Finance, which may be filed by any person against any illegal or arbitrary act or omission that occurred during the bid process at any time before it is formally awarded through a resolution.
- Legal Challenge (*Recurso de Impugnación*) to be submitted before the TACP, which is an independent court that will hear cases filed only by bidders after the bid is formally awarded through a resolution, within five business days of the service of process in PanamaCompra. To be admissible, a Legal Challenge requires posting of a bond (10% of the

proposal for purchase contracts and 15% of the proposal for construction contracts). Once a Legal Challenge is admitted, the contracting process is suspended until the TACP decides.

- Claim before the Third Chamber of the Supreme Court (*Demanda Contencioso Administrativa de plena jurisdicción*), to be submitted within two months of the notice of TACP's decision. The party can also request the suspension of the process within the claim. Decisions of the Third Chamber are final.

ACP's Acquisition Regulation

- Protest (*Protesta*), to be submitted against the bid documents, the award, the disqualification of the bidder, or the pre-qualification process in different terms, before the ACP. Only protests against awards suspend the process.
- Claim before the Third Chamber of the Supreme Court, to be submitted within two months of the notice of ACP's decision. The party can also request the suspension of the process within the claim. Decisions of the Third Chamber are final.

CSS's Acquisition Regulation

- CSS's Acquisition Regulation provides that CSS awards and resolutions within bid processes are final in the administrative jurisdiction.
- Written Complaint (*Escrito de Inconformidad*), to be submitted by a bidder before the award, against the violation of any right within the bid process. The filing of a written complaint does not suspend the bid process.
- Claim before the Third Chamber of the Supreme Court, to be submitted within two months of the notice of CSS's decision. The party can also request the suspension of the process within the claim. Decisions of the Third Chamber are final.

AITSA's Concessions Regulation

- AITSA's Concessions Regulation provides that AITSA awards and resolutions within bid processes are final in the administrative jurisdiction.
- Claim before the Third Chamber of the Supreme Court, to be submitted within two months of the notice of AITSA's decision. The party can also request the suspension of the process within the claim. Decisions of the Third Chamber are final.

Law 5/1988

- Law 5/1988 does not provide for a special dispute resolution mechanism for breach of procurement legislation; however, it can be set forth in the bid documents, hence if the bid documents lack a special procedure, Law 38 of 2000, which

regulates the general administrative procedure, supplementarily applies.

- Claim before the Third Chamber of the Supreme Court, to be submitted within two months of the notice of the Authority's decision. The party can also request the suspension of the process within the claim. Decisions of the Third Chamber are final.

PPA's Regulations

- Claim before the Third Chamber of the Supreme Court, to be submitted within two months of the notice of AITSA's decision. The party can also request the suspension of the process within the claim. Decisions of the Third Chamber are final.

4.3 Interim Measures

For contracts awarded according to the Law 22/2006 regime, the admission of a Legal Challenge before the TACP will suspend the contract award procedure. However, a TACP decision further challenged before the Third Chamber of the Supreme Court may or may not be suspended, depending on the Supreme Court criteria as to the urgency of the suspension request.

According to ACP's Acquisition Regulation, the admission of a Protest suspends the contract procedure.

Challenges to an award submitted before the Third Chamber of the Supreme Court, according to CSS's Acquisition Regulation, will suspend the contract award process if the Supreme Court judge in charge of the file considers that the claimant's rights were violated.

Challenges to an award of a concession in the Tocumen Airport may be filed before the Tocumen Airport board; such challenges may suspend the contract award process, depending on the board's criteria.

According to Law 5/1988, the admission of a claim automatically suspends the contract procedure.

According to PPA's Regulations, there are no interim measures as such specifically available; however, the admission of a claim by the Third Chamber of the Supreme Court may suspend the contract procedure.

4.4 Challenging Awarding Authority's Decisions

In all cases, only bidders have standing to challenge the awarding authority's decisions.

4.5 Time Limits for Challenging Decisions

For contracts awarded according to the Law 22/2006 regime, challenges may be submitted to the TACP within five business

days of the service of process in PanamaCompra. Process is deemed serviced two business days after the decision is published in PanamaCompra.

For contracts awarded according to ACP's Acquisition Regulation, CSS's Acquisition Regulation and AITSA's Concessions Regulations, as well as TACP's decision rendered under the Law 22/2006 regime, further judicial actions may be filed before the Third Chamber of the Supreme Court within 60 days of the challenged decision being notified to the bidder.

4.6 Length of Proceedings

Depending on the complexity of the bid, proceedings related to procurement claims and challenges last between four and six months, if the proceeding remains before the DGCP or the TACP. Proceedings before the Third Chamber of the Supreme Court may take years to resolve.

4.7 Annual Number of Procurement Claims

The TACP will usually receive between 150 and 250 cases per year, whereas the Third Chamber of the Supreme Court receives thousands of cases a year and no statistics are publicly available.

4.8 Costs Involved in Challenging Decisions

Costs will depend on several factors, including the complexity of the bid, the number of bidders and the length of the proposals. Qualified legal advice on procurement matters related to claims may be as low as USD4,500 or as high as USD30,000, depending on the circumstances.

5. Miscellaneous

5.1 Modification of Contracts Post-award

According to the Law 22/2006 regime, modifications to the contract based on public interest can be made if they are authorised by the appropriate entity according to the new cost, if they do not entail modifications to the nature and object of the contract, and if the contractor has the obligation to continue the work. The price per unit of an item or the total value of the contract can only be revised if the modifications to the contract alter the amount of the items or the total or initial value of the contract, respectively, by 25% or more. In any case, the sum of all the modifications made to a public procurement contract during its validity may not exceed 40% of the total amount originally agreed.

According to ACP's Acquisition Regulation, the contracting officer is authorised to make modifications to contracts, but may not subscribe nor effect a change that may result in an increase in the price of the contract without a certification of availability of funds. No modifications should be made with the purpose

of avoiding the competitive process, and they should be limited to changes that are within the scope of the contract within 15% of the contract (construction contracts require ACP's board approval to exceed the 15% limit). Also, when the contracting officer suspends or stops the performance of a contract for reasons not attributable to the contractor, that contractor has the right to request modifications of the contract, including an extension of time for contract performance, and reimbursement for proven cost increases incurred during the period counted from the suspension of performance until its resumption.

5.2 Direct Contract Awards

Panamanian legislation permits direct contract awards, under certain circumstances. According to the Law 22/2006 regime, an Exceptional Procedure is possible when special circumstances occur, as follows:

- when contracts are for the acquisition or lease of goods or services in which the state acts as a lessor or lessee, as well as the sale of goods or services of the state in which there is not more than one bidder or in those where there is no adequate substitute;
- for the contracts of works of art or technical works, whose execution can only be entrusted to renowned artists or recognised professionals;
- for social benefit contracts or when there is an obvious urgency;
- for swap contracts for the acquisition of movable or immovable property, after a corresponding appraisal;
- for contracts exceeding USD300,000 that constitute simple extensions of existing contracts, provided that the price does not exceed the originally agreed price, that the essential characteristics of the contract (parties to the contract, object, amount and validity) are not varied, and that the extension is authorised by the competent authorities; and
- for contracts signed by the National Assembly that exceed the sum of USD50,000.

Under CSS's Acquisition Regulation, if a bid is convened and only one bidder submits a proposal, the CSS may either cancel the bid or award the contract directly to the sole bidder, as long as the bidder's proposal falls within the economic parameters of the bid. Also, in the case of evident urgency and shortage of goods required for the attention of human health, the CSS board may authorise a direct award of up to USD50,000, subject to certain requirements – ie, that the urgency is concrete for a particular case, objective and related to an urgent need, that it is accredited and based in pertinent studies, that is unforeseen and not able to be planned or predicted, and that it is immediate and unable to be postponed.

According to AITSA's Concession Regulation, aeronautical concessions may be entered directly, without the need of a bid. Aeronautical concessions are granted to parties that require a physical space to perform activities related to air transport services (eg, airline counters, airline offices, and repair and maintenance facilities).

5.3 Recent Important Court Decisions

Several decisions of the TACP were issued during 2019 whereby procurement procedures were declared null and void due to poor drafting of the bid documents where the procuring entity included confusing provisions as well as illegal provisions, either because they were against Law 22/2016 or against any other applicable law from the Republic of Panama. By the same token, several proposals were disqualified by the TACP since proponents did not submit certain documents that were not expressly included as requirements under the bid documents drafted by the procuring entity but are otherwise required by law.

The TACP overruled a procuring entity's decision to reject all proposals and cancel a bid, a possibility authorised by Law 22/2006 under certain circumstances, since the procuring entity did not properly substantiate its decision in public interest reasons as required by Law 22/2006.

The TACP clearly overruled a procuring entity's decision to cancel an existing and valid construction contract based on contractor's delays, due to the fact that such contractor's delays were clearly attributable to the procuring entity and not a direct responsibility of the contractor.

5.4 Legislative Amendments Under Consideration

There is a legislative initiative to amend Law 22/2006, which passed the third debate phase before the National Assembly (*Asamblea de Diputados*), requiring a Presidential approval and publication in the Official Gazette. Some relevant changes are:

- to allow for submission of the full proposal by electronic means without the need to send the bid bond in person;
- to eliminate the bid bond requirement for tenders under USD3 million;
- to allow submission of claims before the General Directorate of Public Procurement of the Ministry of Economy and Finance, electronically;
- a special recognition of arbitration as an acceptable means of dispute resolution in contracts governed under Law 22/2006; and
- provisions increasing transparency and due process, bureaucracy reduction, as well as creation of accountability mechanisms to prevent corruption.

Galindo, Arias & López has an eight-member public procurement and public contracts department that works closely with the litigation and energy departments. It advises private clients on procurement regulations applicable to all sectors; advises public entities, including the Panama Canal Authority, on procurement regulations; reviews and analyses tender documents; prepares and presents bid proposals on behalf of private clients;

reviews and negotiates public contracts on behalf of clients and the administration; and submits bid protests and challenges to awards or the termination of contracts. The firm's partners regularly participate in the drafting of new legislation, including the Administrative Disputes Code, the recent amendment to the Government Procurement Law and the USD5 billion arbitration process related to the Panama Canal Expansion project.

Authors



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