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LEGAL ALERT

The new Goods and Services Public Procurement Act

In July of 2003, the Public Procurement of Goods and Services Act ("Public Procurement Act") 1 was issued. Its purpose was to unify the existing regulation of public procurement, protecting the principles of transparency and competition.

One of the improvements of the Public Procurement Act was the creation of the Public Procurement Court for the resolution of disputes between offerors and bidders. The Court was specially designed for the parties to challenge irregularities that may arise in the public bidding processes.

Included in the jurisdiction of this Court are disputes that occur in a time frame beginning with the publication of bidding conditions until the occurrence of the bid award, both included. The claim's term is 10 working days after the publication of the disputed administrative act on the Public Market's web page (www.mercadopublico.cl). The Public Procurement Court is empowered to declare both the nullity of the claimed act and the claimant's right to request damages before ordinary Courts of Justice.

Notwithstanding the above, the Public Procurement Court is not the only authority that has the ability to solve conflicts during a bidding process. Due to the multiple issues between the Administration and the offerors, disputes may also be solved by other competent authorities, including: (i) the General Comptrollership of the Republic; and (ii) the bidding entities.

In some cases, the interested parties may file a petition with the General Comptrollership of the Republic requesting the rejection of an approved contract, or requesting the rejection of a direct deal (when sent to the Comptrollership for approval). Also, an irregularity may be solved or fixed by the bidding entity or its hierarchical superior, because the administrative remedies of the General Administrative Procedures Act 2 are applicable to these cases. If an administrative remedy is filed before the bidding entity, the claimant will obtain the suspension of the appeal term before the Public Procurement Court 3.

In solving these cases, the authorities have applied various criteria, such as explicit regulations, “economic” or “public interest” interpretations, and sometimes only the Administration’s own convenience criteria.

Some relevant concepts, which are usually analyzed in several disputes, are:

1. The principle of strict adherence to the public bidding conditions.

The Public Procurement Act established the principle of strict adherence to the public bidding conditions. This principle sets out the idea that neither the Administration nor private entities may infringe the bidding conditions in any way. Most existing disputes on this matter are solved through the application of this principle. This prioritizes a literal application of the conditions and the bidding documents over any other interpretation. The principle applies despite the existence of good or bad faith of the contractors, or the public entities’ convenience 4.

2. The principles of transparency, competition and offerors’ fairness.

The Public Procurement Act also established the principles of transparency, competition and offerors’ fairness. The bidding entities, with no exception, should adapt their actions to these principles.

In this regard, the authorities have voided bids where the conditions are evidence of competitive advantages in favor of a determined bidder, attempting to distort the bid’s fairness and competitiveness.

Also, it has been declared that all the items for offers’ evaluation must be written in the bidding conditions and the entity cannot reserve some discretionary standard that has not been transparent to the offerors. Moreover, it has been established that the bidding conditions cannot have unreasonable restrictions that could decrease the number of offerors.

Considering that the purpose of the Public Procurement Act was to improve the efficiency of public procurement, the National Economic Prosecutor Office (Fiscalía Nacional Económica), which promotes competition and prosecuting antitrust infringements, has placed an emphasis on public procurement and eventual collusion cases in public bids.

Indeed, in April of 2011, the Competition Agency published a Guide entitled “Public Procurement and Competition”, which was addressed to public entities. The Guide enumerated a number of situations that could easily facilitate collusion or its traces, such as: (i) information exchanges between offerors (competitors); (ii) absence of offers of one or more candidates or withdrawal of submitted offers; and (iii) submissions of offers aimed to fail. The above

demonstrates that the bidders are taking turns in being awarded with the offer.

Finally, it is important to consider that the Competition Court (Tribunal de Defensa de la Libre Competencia), a Court that has the power to impose sanctions in antitrust matters, has adopted a strict standard in bidding collusion cases. In a ruling issued in January of 2013, regarding an alleged cartel designed to boycott a bid 5, and currently before the Supreme Court, the Competition Court sustained that in order to establish the collusion infringement, there must be: (i) express or tacit agreement between competitors; (ii) that the agreement grants certain degree of market power; (iii) that the agreement's objective and effect is, actually or potentially, to alter a bidding process.

Even though the Procurement Court plays an important role in solving conflicts emerging from a state entity's public bids, depending on the characteristics of the particular case, the procedural options must be completed. This must be accomplished either in an alternative or cooperative way, with administrative remedies, requests before the General Comptrollership of the Republic, or filings before the Competition Court, in cases of antitrust infringements.

1 March of 2004, the Public Procurement Bylaw (Supreme Decree 250 of Treasury Ministry) was issued, which permitted the effective execution of the Public Procurement Act.

2 Act N° 19.880.

3 The actions described above do not impede a suit before ordinary Courts of Justice, during the contract execution, through a contract's breach remedy or a public law nullity remedy, depending on each case background.

4 In this regard, the Public Procurement Court has voided offers that have missed documents or background required by the bidding conditions, regardless of the fact that those documents were in the Administration's possession before the bidding, as technical backgrounds, of a product or service contracted previously by the same entity. Also, on several occasions, the Court has compelled the bidding authority to declare as void an offer regarding a breach of some procedural or substantive and essential requirement, without considering if the offer was more convenient to the bidding entity.

5 National Economic Prosecutor Office requirement, against ACHAP and others.

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