

## Introduction to the study of public procurement in the USA<sup>1</sup>

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### 1. INTRODUCTION

Public procurement in most democratic countries that obey a state constitutional, is governed by principles and norms for its correct execution and consummation.

It should be noted that the principles and norms have different objectives, because while first raise a demand for justice and equity that must be part of the reasoning that seeks such an end through the rules, which tend to be canons that apply to a certain situation or not. Understood in this way, the principles constitute the guide for the obligatory reasoning that must be done to apply a norm<sup>4</sup>.

1 Traducción al inglés del texto: Introducción al estudio de la contratación pública en Estados Unidos, de autoría de Ph.D César Augusto Romero Molina.

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4 Dworkin addresses the issue of principles by observing that lawyers argue not only from rules, but

- Consequently, through this writing, what is intended is to look at some of those principles guiding public procurement by the United States government North America, either Federal or State, considered the largest public consumer of the world<sup>5</sup>, emphasizing those related to ethics, transparency and integrity, without exclude the importance of others such as efficiency, best value, uniformity, transparency, competition, integrity.

## 2. HISTORICAL REVIEW OF PUBLIC CONTRACTING IN THE UNITED STATES

Government contracting in the United States dates back to 1795. At that time In history, Congress passed the Purveyors of Public Supplies Act. of Public Supplies), where the Navy and the Army were empowered to sign contracts with individuals, in order to supply their supplies. Later and starting the 19th century, Different laws were approved that shaped some of the current parameters. In In the same century, around the year 1861, the Civil Sundry Appropriations Act was approved.

- Civil Acquisition of Diverse Objects), where the principles referring to the publicity of the recruitment were retained until after the end of World War II. From those beginnings, the congress through laws focused on the publicity of the contracting, with in order to prevent acts of corruption from taking place. During World War II, the tendency to make the contract public was abandoned for emergency reasons based in the approach to the war, but once it was over, the practice of respecting the advertising as a principle in public procurement<sup>6</sup>.
- After the war, the Administration in the United States began to establish regulations and norms referring to public procurement, with the purpose of unifying the laws that they existed. In the civil sphere, the General Services Administration approved in 1959 the Federal Procurement Regulations (FPR). Furthermore, the Department of Defense enacted the Armed Services Procurement Regulation (ASPR) to regulate acquisitions of the Armed Forces, which in the second half of the 20th century came to be identified as the Regulation of Defense Acquisitions (Defense Acquisition Regulation - DAR). In 1984, the Federal Procurement Regulations (FPR) became the

also from other types of standards that are definitely not standards. Among these other types of standards, Dworkin points out two (although he lets see that there may be others): principles and policies. here are interested only the first ones, which Dworkin loosely defines as follows: << I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality>>.

- 5 Cf. M, Worthington., F, Alsto., L, Goldsman. Contracting with the Federal Government. 4 Edition. 1998. P.33.
- 6 Cf. A.B. Bianchi. 'Theory of administrative contracts. Some critical reflections on dangerousness or uselessness of a general theory of the administrative contract (A perspective from administrative law of the United States) Second Part', El Derecho Magazine, 185-714, 1999.

Federal Acquisition Regulation (FAR) where the FPR, the DAR and the regulations that regulate NASA acquisitions were unified.

- The FAR is currently incorporated as Chapter 1 of the Code of Federal Regulations and are divided into 52 parts, are published in the Federal Register, which gives them legal force. Therefore, it can be affirmed that the regulations indicated in the subject of public procurement in the United States are the Federal Acquisition Regulations (FAR). Despite the existence of numerous norms that differ from the legislative unification pursued by the FAR, whose body in charge of executing them is the Procurement Policy Office Federal (Office of Federal Procurement Policy - OFPP)<sup>7</sup>.
- On the other hand, there is also the Contracting Officer (CO)<sup>8</sup>, representing the Government before the individuals who sign the contract. There are times when you lean on a technical representative (Contracting Officer's Technical Representative). Every time he contract is complex, the Contracting Officer fulfills three different functions: (a) the Procuring Contracting Officer, who is mainly in charge of awarding the contract; (b) the Administrative Contracting Officer (ACO), who exercises the administration of the contract, which includes the negotiation of the modifications that are introduced during the execution and (c) the Termination Contracting Officer (TCO), whose function consists of: (i) revoke the contract for reasons of public interest (convenience) and (ii) terminate for default<sup>9</sup>.

### **3. GENERALITIES OF PUBLIC PROCUREMENT IN THE USA**

In most cases, countries enact procurement laws to regulate the acquisition of goods and services, for which the United States is not the exception, since it is an activity directly related to the existence of a country. The federal government of The United States is the largest consumer of goods and services in the world, spending trillions of dollars in that activity a year. Among those who spend the most is the Department of Defense, NASA, the Department of Homeland Security, and among the goods and services most purchased by the Government are office supplies and accessories, that constitute an important business market, as well as professional services of management and support, scientific research for development, construction contracts (construction), vehicles, aircraft and their components and, for this, it must always be counted with a good business record, working capital, presenting proposals,

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7 Cf. A.B. Bianchi. 'Theory of administrative contracts. Some critical reflections on dangerousness or uselessness of a general theory of the administrative contract (A perspective from administrative law of the United States) Second Part', *El Derecho Magazine*, 185-714, 1999.

8 It is an official who is part of the administration, suitable within the contracting process and who also is empowered through the government agency to which it belongs.

9 Cf. A.B. Bianchi. 'Theory of administrative contracts. Some critical reflections on dangerousness or uselessness of a general theory of the administrative contract (A perspective from administrative law of the United States) Second Part', *El Derecho Magazine*, 185-714, 1999.

investments, management and compliance by the FAR (Federal Acquisition Regulation) which is the Regulation Federal Acquisitions. This contemplates a purchasing process with the Federal Government, which is available on web pages such as:

- <https://www.acquisition.gov/far/loadmainer.html><sup>10</sup>.
- <https://www.acquisition.gov/agencysuppregs.asp><sup>11</sup>.

There is a difference between government contracts and commercial contracts, for example, for the completion of a contract, payment, contract specifications, audit etc In the web pages of the FAR and that were previously stated, contain indications on labor and ethical standards, intended for contractors government, for example equal opportunity, hours and wages, eligibility labor, code of business ethics<sup>12</sup>.

- Several aspects must be pointed out that clearly differentiate public procurement from private, among which are<sup>13</sup>:
  1. Procedures that promote publication, ensuring transparency in the contracting, in such a way that those who participate in the adjudication process have equal opportunities.
  2. Accounting regulations that are responsible for setting prices and payment.
  3. Procedures that facilitate the modification by the government, unilaterally of the contract during its execution.
  4. Techniques that allow the administrative supervision of the contract in the course of its execution, in order to ensure the reasonableness of products and their prices.
  5. Contractual regulations that provide tools that allow the termination of the contract in advance when the public interest requires it.
  6. Contractual regulations that establish parameters different from those used in the law private, regarding payment.
  7. Objectives of a social nature, which allow contracts to be awarded to small companies or with disadvantage and national companies, giving priority to constitutional principles that make part of a democratic state.
- It is important to mention that the main difference is in keeping the public interest about the individual<sup>14</sup>. There is no reason for the contractor's interests to be above the general welfare, because the public interest prevails. The public contract cannot be a source of unfair enrichment of the co-contractor.

<sup>10</sup> Last access November 2016.

<sup>11</sup> Last access November 2016.

<sup>12</sup> Cf. H. A. Mairal, 'The theory of the Administrative Contract and North American Law'. EDA, 01/00-525.

<sup>13</sup> Cf. A.B. Bianchi. 'Theory of administrative contracts. Some critical reflections on dangerousness or uselessness of a general theory of the administrative contract (A perspective from administrative law of the United States) First Part', El Derecho Magazine, 184-900, 1999.

<sup>14</sup> Cf. Pacific Architects and Engineers Inc v. United States, 203 Court of Claims 449;491 Federal Reporter, 2nd Series 734 (1974).

### **3.1. Contractor Selection**

The Competition in Contracting Act (CICA) governs the processes related to the selection of contractor. Determine two competitive methods, this is sealed bidding and competitive proposal or competitive negotiation, through which it seeks to promote competition full and open. The first deals with the presentation of the offer through envelope closed (sealed) and the second is a system of agreement between those who sign the contract by negotiation with the future co-contractor<sup>15</sup>. The most used is the sealed bidding<sup>16</sup> in those occasions in which four factors are given, which are:

1. That there is sufficient time to execute the procedure;
  2. That the adjudication has been made on factors related to the price;
  3. That it is not necessary to advance negotiations
- If any of the requirements has not been met, it is established that the second system. The main difference is that in the first the adjudication is made without need for negotiation, taking into account only the price offered and factors that relate to this. As for the second system, a negotiation begins between the bidders and the government, in order to reach a good price.
  - On the other hand, the Competition in Contracting Act (CICA)<sup>17</sup> establishes other exceptions to the employ procedures that can guarantee full and open competition between the which are the following<sup>18</sup>:
    1. That it be proven that there is only one provider of the required good or service;
    2. That there is urgency;
    3. Only awarded to a provider for the purpose of: (a) retaining their services or products in the event of a national emergency, (b) retain a broad content of specialized research or development to go to the support of an educational institution, or nonprofit, or federally funded research center, and (c) request the services of an expert within a dispute (judicial or administrative) or in a solution alternative of conflicts in which the Federal Government is part;

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15 Cf. M.M. Kate. 'Competition in Federal Contracting: An Overview of the Legal Requirements', Congressional Research Service. 2011. P. 3-4.

16 Cf. P. McAfee, 'Auctions and Bidding'. Journal of Economic Literature, Vol. 25, 1987, P.699-738.

17 Definition of Competition in Contracting Act (CICA): A policy established in 1984 to encourage competition for government contracts. The idea behind the policy is that the increased competition will result in improved savings to the government through more competitive pricing. The Act applies to all solicitations for bids issued after April 1, 1985. <http://www.investopedia.com/terms/c/competition-in-contracting-act.asp>

18 Competition in Contracting Act. United States Department of Labor. Office of the Assistant Secretary for Administration and Management. <https://www.dol.gov/oasam/regs/statutes/253.htm>.

4. That through an international treaty or agreement the use of a procedure is required not competitive;
  5. That by means of legislation, public contracting be with another government agency, with a certain supplier or with a certain brand;
  6. That national security is involved; When negotiating with the government, you should always inquire into the classification system of industry, which is used to categorize goods and services through a NAICS code (North American Industry Classifications Number) which is available on the website: <http://www.census.gov/cos/www/naics/><sup>19</sup>
- As far as federal regulation is concerned, the federalist system of government of the United States allows each State to issue its own regulation, independent of this, they can establish that each of the 50 states has its own internal contracting regulation, so then there are at least 50 different regimes and a federal code that governs the entire country <<Code of Federal Regulations>><sup>20</sup> which covers federal public procurement that is included in the FAR to which reference was made above, a document whose issuance is in charge of the Secretary of Defense in conjunction with the GSA <<General Service Administration>><sup>21</sup>, the administrator of NASA and as mentioned, the FAR

19 Last access November 2016

20 The CFR annual edition is the codification of the general and permanent rules published by the Office of the Federal Register (part of the National Archives and Records Administration) and the Government Publishing Office. Browse Code of Federal Regulations (Annual Edition). FDsys. US Government Publishing Office Federal Digital System.

21 The GSA is an entity of the executive branch whose function is to contract the goods, services and works required and commonly used by entities. The GSA purchases (1) common use goods and services through direct contracts or through the <<Federal Supply Schedule (FSS)>> [Federal Supply Schedules];(2) telecommunications services; and (3) offices. (Cf. Nash, Schooner and O'Brien 1998: 270-271)

The government procurement regime of the United States mainly provides for two types of modalities of selection: the <<Sealed Bid>> [Sealed Envelope] and the <<Negotiated Contract>> [Procedure Negotiated].

a) Sealed Envelope: In this type of process, they presented the proposals, these are open in public. The correct pro is awarded to the proposal that results in the most benefits to the organizing entity, considering the price as one of the evaluate on factors. Before the Publication of the <<Procurement Competition Law (CICA)>> [Procurement Competition Law], this type of process was the procurement methodology preferred Under the CICA, the Sealed Envelope is now one of the contracting modalities. (Cf. Nash, Goleta and O'Brien 1998: 460-461).

b) Negotiated Procedure: In this type of process, they presented the proposals, these are open in secret, so that no bidder can know the price or the other conditions proposed by the other participants From this moment on, the organizing entity first evaluates the technical capacity of each bidder, the technical merits of his proposal and all other evaluation factors to choose who will pass to the negotiation stage. For this reason, bidders who do not meet the requirements of the bases. This implies that the organizing entity asks those who have been pre-selected to improve of their proposals, beginning the negotiations that are manifested in oral and written discussions. this phase is called <<competitive range>> [competitive range]. Once this stage has been passed, the organizing entity requires submitting new proposals. These will be improved in any of the elements that integrate it. And so successively, the procedure continues until the organizing entity selects the one it considers better (Cf. Dromi 1999: 131-132).

is part of the CFR and it can be said that it is the main regulation of federal public contracting and, is executed by a body called the Office of Federal Procurement Policy (OFPP), office federal contracting policy.

- The people involved in contracting are key to its execution and act on behalf of delegation of the agencies to which they belong, for example: the Contracting Officer (CO), who is who represents the government before private contractors. The Contracting Officer is in charge of awarding the contract, as well as the Administrative Contracting Officer which includes tasks such as the negotiation of modifications in the execution of the contract, the Termination Contracting Officer whose function is to revoke the contract for non-compliance (default) and in this way protect the purposes of the contracting and the government interest in fulfilling its purposes and the principles of public procurement, which are the source that inspires the different regulations on public contracts.

### **3.2. Execution of the contract and modifications**

During the execution of a contract, there may be several modifications when the price is fixed, where the goals to be achieved by the contractor are increased or decreased. Is called *ius variandi*. During the negotiation with the government, the latter may change opinion, this being a right that you have, as well as the right to examine the job you want and even suspend it. This right originates from the fact that it is necessary to satisfy the new demands that are presented, and the government takes the risk of paying the price increase (equitable adjustments)<sup>22</sup> that produce the changes made. It is for this reason that the Most contracts contain so-called Change clauses that allow the government to unilaterally introduce changes in the conditions contractual, and it has also been allowed to request the services of another contractor to execute new works if the price offered by the latter was more convenient than that of the first contractor.

- In a general way and as a way of grouping the different change clauses regularly available in the contracts, the administrative regulation organized through the Federal Acquisition Regulations, has determined some model clauses that are the ones that are constantly used. Thus, two clauses have been elaborated, one for contracts of supply and another for construction contracts that determine both the manner in which be taken in exchange to implement the reforms as the limits of these. According to Cibinic Nash<sup>23</sup>, these reforms

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22 Cf. J.F. Shea Co. V. United States, 10 Cl. Ct. 620 (1986). Where a contract was bid in a lump sum, the equitable adjustment for substitution of work is computed by the following formula: (1) Adjusted contract price; (2) Less projected cost without changed conditions; (3) Plus actual cost under changed conditions; (4) Plus reasonable profit/overhead computed in accordance with governing regulations on difference between 2 and 3.

23 The Nash & Cibinic Report is the only monthly periodical that brings you the personal insights of some of the most experienced and knowledgeable individuals in government contracting. Features include: • Thought-provoking analysis of critical, current, and controversial federal procurement issues • An invitation to attend the Nash and Cibinic Report Roundtable Conference • An invitation to attend the Government Contracts Year-In-Review Conference.

promote four purposes: (i) offer flexibility to the contract performer such that it allows you to adapt to technological advances; (ii) approve the contractor a more efficient execution of the work; (iii) allow the contracting officer<sup>24</sup> to decide on additional work without having to sign a new contract and (iv) provide the contractor with the necessary legal means to address their claims.

- Regarding the way to establish the changes, generally the contracting officer carried out unilaterally, likewise, the new price will be agreed before the execution work, unless it was not possible due to urgency, where it must be determined a minimum price. It is not usual for contracts to determine clauses that only authorize those changes agreed bilaterally by the parties, but if the government exists it can impose such changes unilaterally.

Regarding whether it is possible to include modifications not expressly specified, Cibinic Nash, state that this is authorized only in the construction contract, since that these are permitted reforms. Really more than specific changes, they are qualities very extensive unforeseen changes that the contracting officer is empowered to order, so that despite not being able to make changes that exceed these qualities, the truth is that the discretion of that official seems to be important.

- The reforms in the contract conceive precisely adjustments in prices. originates then the so-called equitable adjustment of economic terms, which was determined by the Court of Claims as the corrective measures used to keep the contractor intact (whole) whenever the government modifies the contract. Likewise, the Armed Services Board of Contract Appeals (ASBCA)<sup>25</sup> specified the calculation of the equitable adjustment indicating that the measure of equitable adjustment is the difference that presented between the reasonable cost of execution without modifications or reforms and the Reasonable cost of execution with the modifications.

24 Career Development, Contracting Authority, and Responsibilities. 1.602-1 Authority. (a) Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings.

Contracting officers may bind the Government only to the extent of the authority delegated to them. Contracting officers shall receive from the appointing authority (see 1.603-1) clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel.

(b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met. [https://www.acquisition.gov/far/current/html/Subpart%201\\_6.html](https://www.acquisition.gov/far/current/html/Subpart%201_6.html) (ultimo acceso: noviembre 216)

25 Cf. The Armed Services Board of Contract Appeals (ASBCA) is a neutral, independent forum whose primary function is to hear and decide post-award contract disputes between government contractors and the Department of Defense and other government agencies with whom the ASBCA has entered into agreements to provide services. Armed Services Board of Contract Appeals. <http://www.wingovernmentcontracts.com/armedservices-board-of-contract-appeals.htm>



#### 4. ETHICS IN PUBLIC PROCUREMENT

In the different legal systems, the application of general principles of Law, in such a way that, they are principles every time that they compose the origins or bases of all ordering; are general by virtue of the fact that they <<transcend a concrete precept and do not are confused with singular or particular appreciations>>, and are rules of Law, since that configure provisions of a legal nature, in such a way that they are not <<simple criteria morals, good intentions or vague directives>><sup>26</sup>, and within the most relevant principles there is that of ethics.

- Ethics is part of one of the branches of philosophy that is responsible for studying the rules and treatises on human conduct. On the other hand, morality is defined as Belonging or relative to the actions of people, from the point of view of their acting in relation to the good or evil and depending on their individual and, above all, collective life<sup>27</sup>. Therefore, the Ethics and morals are terms that are apparently different, but that are related to each other, so it is essential to refer to both. For the treaty at hand, with respect to ethics in public contracting, Rodríguez Arana defines it as the <<science of performance of officials oriented to public service, to the service of citizens>>, and indicates that “in a word, the Ethics of the public function is the science of public service<sup>28</sup>. Those who work for the State are called in different ways, depending on the legal regimes that exist worldwide, in some cases as <<officials>>, <<employees>>, <<agents>> and even public <<servers>>, in such a way that it is done It is necessary to underline that this last term has achieved great reach in current times, since it emphasizes the notion of the service that is provided, and not so much in the development of the functions. That is why they are people who are committed exclusively by reason of the service of the public interest, being necessary to demonstrate a behavior of accordance with the grounds required to defend said interest, which is evidenced in the compliance with the general principles of law, priority in any legal system<sup>29</sup>.
- Those who are public servants have the duty not to lose sight of conduct in their act that is honest in the functions that have been entrusted to it, prioritizing the interest public over any other class of private interest. In this way, also externalize the appearance that you are acting honestly, evidencing integrity in his act. Indeed, the provision can now be provided to include in the legal system of conduct in the public function, the assumption referred to that will

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26 Cf. C.E. Delpiazzo, *Derecho Administrativo Uruguayo*, 1ª Edición, Ed. Porrúa, México, 2005, Pág. 12.

27 Real academia española. Consultado en: <http://lema.rae.es/drae/?val=moral>. (Consultado el 23/02/17)

28 Cf. J. Rodríguez, ‘Sobre ética pública en la Administración Pública’, *Anuario de Derecho Administrativo*, Tomo IX, 2002, P.59.

29 Cf. J. Rodríguez, J.A. Moreno, E. Jinesta, K. Navarro, *Derecho Internacional de las contrataciones administrativas*, 1ª Edición, Ed. Konrad Adenauer Stiftung, 2011, P. 29 y ss.

cause the violation of the normative precepts not only directly breaking the themselves, but also before any action in the exercise of public function that exteriorizes the appearance of violating current regulatory provisions, which requires that public servants evade the demonstration of a conduct that grants the image of be configuring an unethical act.

## 5. ETHICS AS A PRINCIPLE IN PUBLIC PROCUREMENT IN THE UNITED STATES OF AMERICA

One of the main challenges facing public procurement in many countries including the USA, is the fight against corruption in the adjudication and execution of public contracts. It is common that in exchange for a long list of gifts ranging from the delivery of money to sexual favors violates the principle of ethics. That's where it is principle, which should be implicit in said activity, must begin to be instituted as main and regulatory mechanism of contractual relations.

- In the United States, the Federal Bureau of Investigation (FBI) has cataloged the fight against public corruption as a matter of maximum priority (Top Criminal Priority) since it office has powers to investigate matters of public corruption, both at the federal level as a local, in the different branches of public power.

In today's life, there are many factors that influence people to stumble in their ethics and incur in corruption as far as public procurement is concerned, this is how the oscillating movements of the economies of the countries, the decline in the offer and remuneration jobs, which affect personal and family finances. They are certainly some of those factors<sup>30</sup>

- The majority of public servants who work in localities or states and the rest federal levels of government, are honest and dedicated, and try to get things done well on a daily basis, in their actions for the community and the State in general. Unfortunately, there is a small group of public servants who only deal with their private benefit. This type of corruption is what hits democracy hard, what What is the FBI's investigative priority? Regarding public procurement investigations, there are faults in the principle of ethics in various senses, since from the various phases provided by said contracting, can be derived acts of

30 An excerpt representative of FBI's Activities with respect to public corruption at the Federal State and local levels is provided below (U.S. Federal Bureau of Investigation). The U.S. Government Accountability Office (GAO) is an autonomous public entity that reports to Congress from United States. It is in charge of supervising the expenditure of public resources. Among the functions GAO are: conducting audits of federal government entities to determine if government spending public resources is efficient and effective; investigate when reports of illegal activities are made and illegal; report on the level of compliance with the objectives of government programs and policies; present for congressional consideration an analysis of the policies; issue decisions and opinions on the internal regulation of federal entities, as well as the challenges filed against the grants of good pro; etc.

corruption, so then from the planning stages (planning), requests for proposals, preparation of contractors' proposals, negotiations, awarding of the contract, execution of the contract, breaches of ethics, are an unfortunate reality.

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[https://www.acquisition.gov/far/current/html/Subpart%201\\_6.html](https://www.acquisition.gov/far/current/html/Subpart%201_6.html)

Real Academia Española. Consultado en: <http://lema.rae.es/drae/?val=moral>