



Colombia Compra Eficiente

# Guide of Corporate Issues in the Procurement Processes

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 GOBIERNO DE COLOMBIA



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<b>I. Introduction .....</b>	<b>3</b>
<b>II. Corporate purpose and legal representation of legal entities .....</b>	<b>3</b>
A. Corporate purpose .....	4
B. Legal representation .....	4
C. Powers .....	5
D. What must be verified by the State Entities about the legal representation of a legal Entity? .....	5
<b>III. Transfer of the experience of the legal entities .....</b>	<b>6</b>
<b>IV. About the Foreign Companies .....</b>	<b>7</b>
<b>V. Consortia and the Joint ventures .....</b>	<b>7</b>
A. Which are the essential elements of a Consortium or Joint venture? .....	8
B. Bids of consortia and joint ventures .....	9
<b>VI. Promises of a future company .....</b>	<b>10</b>
<b>VII. Merger, spin-off, liquidation and change in the control of companies .....</b>	<b>10</b>
<b>VIII. Business reorganization and judicial liquidation of legal entities .....</b>	<b>10</b>

## I Introduction

Colombia Compra Eficiente, the governing body of the Public Procurement System develops different support tools for the system's participants. Its purpose is also to spread the standards, rules, procedures, technologic media and best practices for the system.

Pursuant to those duties, it hereby issues this guide of Corporate Issues in Procurement Processes, in order to establish some general guidelines about issues related to legal entities that must be taken into account by the suppliers and the State Entities in the Procurement Processes.

The capitalized expressions utilized in this document must be construed according to the definitions of Decree 1082 of 2015 and are used in the singular or in the plural as the context requires.

The terms that have not been defined must be construed according to their natural and obvious meaning.

## II Corporate purpose and legal representation of legal entities

For the filing of offers or for the execution of any contract with the State Entities, the persons must have full capacity.

If the bidder or contractor is a company or a non – profit entity of those that are the subject matter of article 40 of Decree 2150 of 1995, the document to accredit the legal capacity is the certificate of existence and incumbency. This certificate does not have to be issued by the Commerce Chamber of the city in which the company has its domicile, because all the commerce chambers of the country can issue certificates of existence and incumbency, independent of where their domicile is<sup>1</sup>. This document contains the information about the two main elements to determine the capacity of the legal entity: the corporate purpose and the legal representation.

The act of creation or the by - laws of the non – profit entities must be registered in the commerce chamber of their domicile and the same must contain the purpose of the legal entity and the manner of administration thereof, stating the powers and authority indication of the persons in charge of the management and legal representation thereof<sup>2</sup>.

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1. Other types of legal entities have other documents to accredit their existence and legal representation, according to special provisions. For example, to accredit the existence and legal representation of higher education institutions, the State Entities must require the updated certificate of existence and incumbency issued by the Education Ministry.

2. Article 40 of Decree 2150 of 1995 i concordance with article 1 of Law 753 of 2002.

## A. Corporate purpose

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The Colombian regulation states that “The company’s capacity will be circumscribed to the development of its enterprise or activity established in its purpose. The acts directly related to it and those the purpose of which is to exercise the rights or to comply with the obligations, legally or contractually derived from the existence and activity of the company will be deemed as included in the corporate purpose”<sup>3</sup>.

The corporate purpose corresponds to: (i) the main corporate purpose, and (ii) the activities derived from or connected with the main purpose.

All the legal entities must establish in their by-laws a given corporate purpose, with the exception of the simplified shares’ companies<sup>4</sup>, which can have: (i) a given corporate purpose; or (ii) establish in their by-laws that they may carry out any licit commercial or civil activity.

The State Entities must verify that the corporate purpose of the of the legal entities allows them to perform the purpose of the contract, either because the activity has been established as an activity of the main corporate purpose or as a connected activity, or because, being a simplified shares’ company, they can carry out civil or commercial activities.

## B. Legal representation

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Even though there are governance bodies such as shareholders or members’ boards, or boards of directors, the legal entities act through one or more legal representatives (officers). The by-laws of the legal entities must establish the powers and the limitations of the legal representative.


In the case of commercial companies and the non - profit entities the subject matter of article 40 of Decree 2150 of 1995, the certificate of existence and incumbency issued by the commerce chamber includes the information of those who exercise the legal representation of the legal entities, the name and the number of the legal representative’s I. D. Card, as well as their powers and limitations according to what is established in that regard in the by-laws of the company or non-profit entity.

Regarding the powers and limitations of the legal representative, it must be taken into account that if no limitations are established, it is construed that they have all the powers required to exercise the legal representation and that when they exist, the by-laws define the manner in which the respective authorizations to act must be requested.

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3. Article 99 del Commerce Code.

4. Article 3 and item 5 of article 5 of Law 1258 of 2008.



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If the offer and the contract to be entered into exceed, by their nature, amount or activity, the powers of the legal representative, the legal entity cannot act unless the legal representative receives the respective special authorizations from the competent corporate body according to the by-laws. This is a remediable document in the Procurement Process<sup>5</sup> and therefore, said authorization can be dated after the date in which the offer was submitted, and this shall not be a cause of rejection.

To grant this authorization, the competent body must meet, give powers to the legal representative to submit the offer or to enter into the contract, and accredit the authorization by the relevant minutes<sup>6</sup>.

## **C. Powers**

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The legal entities can also appoint general or especial attorneys to submit offers or to enter into contracts with the State Entities.

If the power of attorney is a special one, the bidder must accredit before the State Entity the document with a personal presentation note. The attorney in fact can only represent the company in the terms and with the limitations imposed by the same power of attorney. The attorney in fact has the same limitations of the legal representative and if so required, it must have the authorizations of the corporate body that the by-laws of the legal entity demand.

The power of attorney can also be evidenced in the certificate of existence and incumbency and in that case, no additional power of attorney documents must be submitted. The powers of the attorney in fact including those to submit the offer and to sign the respective contract must be evidenced in the respective certificate.

## **D. What must be verified by the State Entities about the legal representation of a legal entity?**

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- i. The State Entities must request and check the certificate of existence and incumbency. The obligation of the State Entities in the Procurement Processes is to demand that the information contained in the certificate is updated and therefore, it is the responsibility of the bidder to submit in the process a certificate that contains the current information of the company or non-profit legal entity.

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5. For further information consult the “Manual to determine and verify the enabling requirements in the Procurement Processes” and Circular No. 13 del 13 of June of 2014 issued by Colombia Compra Eficiente.

6. . Article 189 Commerce Code.

- ii. To evidence that the certificate contains the name and I. D. number of the del legal representative or general attorney that presents the offer or signs the contract with State Entities.
- iii. The powers and limitations of the legal representative. If the legal representative does not have powers to submit the offer or to enter into the contract, the corporate body that has the power to do so according to the by-laws must do so. The bidder accredits the authorization through minutes, which must meet all the formalities established by the law<sup>7</sup> in the terms of letter b) explained above.
- iv. In the case of powers of attorney, the document must be issued by the legal representative with full powers. The power of attorney issued in a private document must have the formality of personal presentation. The powers of attorney can also be evidenced with the certificate of existence and incumbency.

### III Transfer of the experience of the legal entities

The experience of the legal entities is of a personal nature and it is, in principle, non-transferable. Therefore, it is not possible to transfer the experience from one bidder to the other in the case of spin-off or liquidation of a legal entity, or to have the experience divested by a legal entity in favor of another legal entity or natural person.

On the other hand, the newly created companies can accredit before the RUP the experience of their members, whether individuals or legal entities, as from the date of their creation and for a maximum term of three years<sup>8</sup>.

As a general rule, the bidder can only accredit the experience that it has obtained and not the experience of its parent company, of its subsidiaries or of members of the same business group. When, according to the sector study, it is necessary that the bidder accredits the experience of its parent company as in the cases of the franchise contracts, the State Entity must justify said circumstance in the prior studies and documents and also it must indicate in the bidding terms the manner to accredit the experience that does not appear in the RUP<sup>9</sup>.

7. Idem 6.

8. Article 2.2.1.1.1.5.2 of Decree 1082 of 2015.

9. Third part of item 6.1 del article 6 of Law 1150 of 2007.

## IV About the Foreign Companies

The Foreign Companies with no domicile or branch office in Colombia do not have the obligation to have RUP. However, they do have the obligation to prove that they meet the enabling requirements requested in the Procurement Processes by the State Entities.

For the presentation of the offer it will not be necessary to establish a branch office in Colombia as it is mandatory only if it is a successful bidder in Procurement Processes the purpose of which is the construction of works or the provision of services, because in these two cases it is construed that the foreign legal entity is carrying out permanent businesses in Colombia.

The foreign legal entities must present the documents to accredit their existence and incumbency taking their own legislation into account.

## V Consortia and the Joint ventures


The consortia and joint ventures are collaboration agreements<sup>10</sup>, in which a plural number of individuals or legal entities seek to consolidate efforts to file an offer to a State Entity, enter into a contract, perform a work or as job, supply a good or service to the State, and in general, for the development of any commercial activity for the State.

According to the law, the consortia and joint ventures have capacity to enter into contracts<sup>11</sup>, to assume obligations and to be subjects of rights; however, the existence of this contract does not imply the creation of a legal entity because its creation is accomplished by means of a private document that is entered into by the parties only for the purposes of the presentation of an offer in a Procurement Process and the subsequent execution and delivery of the contract if they are the successful bidders. This document must not be recorded with the Commerce chamber.

In both the consortia and the joint ventures, the members of the plural bidder are joint and severally liable for the execution of the contract, for all the administrative and judicial activities related to the Procurement Process, and in general, for all the contract's obligations.

10. State Council. Contentious - Administrative Chamber, Third Section - Subsection a. Issuing Judge: Hernán Andrade Rincón. Bogotá, D.C., November 29 of 2012. Filing Number: 11001-03-26-000-2010- 00051-00(39332) Claimant: Constructora Norberto Odebrecht S. A. and other; Defendant: Isagen S. A. Reference: Remedy of annulment of arbitration award (Ruling). Superintendence of Companies of Colombia. Official Letter 220-068562 dated on 03 June 2011. Url: [http://www.supersociedades.gov.co/ss/drvisapi.dll?mival=muestra&id\\_pag=31516&t=1](http://www.supersociedades.gov.co/ss/drvisapi.dll?mival=muestra&id_pag=31516&t=1); Financial Superintendence of Colombia. Opinion no. 2000022290-1. July 12 of 2000. Url: <http://www.superfinanciera.gov.co/normativa/doctrinas2000/consortia003.htm> 6.

11. Article 7 of Law 80 of 1993.



However, in the joint ventures the members of the plural bidder are individually answerable for the consequences of the default of the obligations, as well as for the sanctions that may be applicable because of the breach of contract.

In other words, the difference between a consortium and a joint venture refers to the manner in which the economic sanctions are applied in the case of default, because while in the first case everyone is answerable in a joint and several manner for the sanction imposed, in the joint venture each member is answerable according to their percentage share of performance of the contract.


## **A. Which are the essential elements of a Consortium or Joint venture?**

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The private document that creates a consortium or a joint venture must include, at least, the following essential elements:

- i. The identification of the members of the consortium or the joint venture.
- ii. The express indication of whether the collaboration is as consortium or joint venture.
- iii. The share percentage of the members of the consortium or joint venture. If it is a joint venture, the agreement must also include the activities that each member will carry out, or the activities for which each member will be answerable to the State Entity. If the joint venture agreement does not state which are the activities for which each member is responsible, then it is assumed that all the members are joint and severally answerable for the performance thereof in case of default.
- iv. The designation of the legal representative (s) of the consortium or joint venture, with their identification number.
- v. The term of the consortium or the joint venture, which cannot be of less than the term for the performance and the winding up of the contract.





The legal representative of each member of the consortium or joint venture must have the power to enter into the agreement and the state contract and to have the respective authorizations of the by-laws. If the approval of any body of the legal entity is needed, it is necessary to submit the minutes of authorization to enter into the collaboration agreement as well as to enter into the state contract.

Once the Procurement Process has been awarded, the parties only can amend or terminate the agreement with the written approval of the State Entity.

## **B. Offers by consortia and joint ventures**

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Besides the legal requirements, the State Entities must bear the following in mind:

- i. The members of the consortium or of the joint venture must attach their updated certificates of existence and incumbency, to verify that the person that executes into the consortium or of joint venture agreement have the authority to do so and to enter into the contract.
- ii. The legal representative of each one of the members of the consortium or joint venture must have the powers to enter into the agreement and the state contract and to have the relevant authorizations of the by-laws.
- iii. The term of the members of the plural bidder must be equal to or higher than the term of the consortium or joint venture.
- iv. The guarantees filed with the State Entity must have the plural bidder or all of its members as insured<sup>12</sup>. This guarantee must be established according to the provisions of the Procurement Processes guarantees' Guide.

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12. For further information please consult the "Procurement Processes guarantees' Guide".

## VI Promises of a future company

The bidders may appear at the Procurement Processes as a promise of a future company<sup>13</sup>. The provisions applicable to these promises are the same that are applicable to the consortia, taking into account that in this case, a company with legal capacity and with the characteristics thereof defined by the members of the bidder will be created. To be able to enter into the contract, the State Entity must verify the creation of the company.

## VII Merger, spin - off, liquidation and changes in the control of companies.

The State Entities can include contractual clauses making mandatory to communicate if during the contractual performance there is a merger or spin - off of the contractor legal entity, obligation that will be binding, notwithstanding the legal publicity procedures applicable to such processes.

Also, the State Entities must check the incidence of the changes of control of the companies throughout the performance of the contract and, if they deem it necessary, to stipulate clauses for the warning and the management of such events.

The State Entities may request additional securities to protect the performance of the contract in events of merger and spin - off through the procedure established by the law<sup>14</sup>.


## VIII Business reorganization and judicial liquidation of legal entities

The “purpose of the reorganization process is to preserve, through an agreement, viable enterprises and to normalize their commercial and credit relationships through their operational or administrative reorganization, or that of their, assets or liabilities”<sup>15</sup>. When in the presence of business reorganization processes:

13. Paragraph del article 7 of the Ley 80 of 1993.

14. Article 175 of the Commerce Code and article 6 of Law 222 of 1995.

15. Article 1 of Law 1116 of 2006.

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- i. The State Entities cannot declare the forfeiture, unless the process to declare it has been started prior to the reorganization process<sup>16</sup>.
  - ii. The State Entities cannot order the unilateral termination of any contract, including the commercial trust agreements and trust funds with purposes other than to serve as collateral, because the reorganization processes are not, per se, a breach of the contracts<sup>17</sup>.
  - iii. The contractor admitted to reorganization proceedings can pursue the renegotiation of the continuing – performance contracts, by mutual consent with the State Entity. If no agreement is reached, the contractor may ask the judge hearing the proceedings to authorize the termination of the contract.
  - iv. The State Entities must be party to the reorganization and judicial liquidation proceedings of their contractors, in their capacity as creditors. In these events, the guarantees can be enforced in respect of third party guarantors of the obligations of the state contract.
  - v. The reorganization processes suppose the establishment of guarantees, which are enforced if the liquidation of the legal entity is declared<sup>18</sup>.

The legal capacity of those involved in business reorganization proceedings is not affected, and, therefore, the legal entities that are admitted to this type of proceedings can take part in Procurement Processes and enter into contracts with State Entities.

However, the legal entities that are undergoing winding – up proceedings cannot take part in Procurement Processes or enter into withcon State Entities<sup>19</sup>.

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16. Article 21 of the Ley 1116 of 2006.

17. Articles 16 and 43 of the Ley 1116 of 2006.

18. Item 7 of article 50 of Law 1116 of 2006.

19. Article 50 of Law 1116 of 2006.