

CLARIFICATION OF THE “CLAIM ACTION” REGULATED IN THE GOVERNMENT PROCUREMENT ACT OF PANAMA, AS AMENDED RECENTLY

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NOT LONG AGO, THE ACT 153 OF 8 MAY 2020, AMENDING 2006 ACT 22 THAT REGULATES GOVERNMENT PROCUREMENT IN PANAMA, WAS ENACTED. THERE WERE SEVERAL ASPECTS THAT WERE MODIFIED.

IN THIS ARTICLE WE WILL ONLY REFER TO THE REFORM THAT CAUSES CONFUSION REGARDING A “CLAIM ACTION” THAT EXISTS IN THE GOVERNMENT PROCUREMENT PROCESS.



SOURCE: TELEMETRO

DEFINITION OF A CLAIM ACTION (“ACCIÓN DE RECLAMO”):

IN THE PANAMANIAN SYSTEM OF GOVERNMENT PROCUREMENT, IT IS A PETITION THAT INDIVIDUALS OR CORPORATIONS CAN BRING UP AGAINST ANY ACTION, ARBITRARY ACTS OR ILLEGAL OMISSIONS THAT OCCUR DURING THE SELECTION PROCESS OF CONTRACTORS AND BEFORE IT IS ADJUDICATED OR DECLARED VOID BY MEANS OF A RULING OR IF THE PROPOSALS ARE REFUSED. THIS ADMINISTRATIVE ORDER REQUEST MUST BE FILED BEFORE THE GENERAL DIRECTORATE OF PUBLIC CONTRACTS (DGCP).



POINTING OUT THE ISSUE AND ITS CLARIFICATION:

AFTER THE REFORM, WOULD IT BE NECESSARY IN EVERY CASE TO FILE A BOND IN ORDER TO HAVE THE RIGHT TO FILE A CLAIM ACTION?

BEFORE THE RECENT LEGAL REFORM, CLAIM ACTIONS WERE FILED WITHOUT THE NEED OF FILING A BOND, BUT THE REFORM INTRODUCED TO THE GLOSSARY FOUND IN SECTION 2, No. 57, THE FOLLOWING DEFINITION:

“A CLAIM ACTION BOND. GUARANTEE THAT MUST BE ATTACHED TO A CLAIM ACTION WITH THE OBJECTIVE TO PROTECT THE SATISFACTION OF DAMAGES AND PREJUDICES THAT MIGHT ARISE TO PUBLIC INTEREST.”



THE LANGUAGE OF THIS DEFINITION IS WIDE, AND IT SEEMS TO INDICATE THAT EVERY CLAIM ACTION REQUIRE TO FILE A BOND. NONETHELESS, THE SUBSEQUENT REGULATION, INTRODUCED BY THE SAME REFORM, ENABLES US TO REACH TO A DIFFERENT CONCLUSION.

INDEED, WE CAN FIND SECTIONS 116-A AND 143 FURTHER INTO IT, WHICH IN SUMMARY, LEAVES THE SITUATION LIKE THIS:

- A CLAIM ACTION WILL BE FILED BY ANY INTERESTED PERSON BEFORE THE OPENING PROPOSAL ACT OR THE PROPOSERS AFTER THE PROPOSALS HAVE BEEN PRESENTED.
- WHEN THERE IS A NEED TO PRESENT A CLAIM ACTION BOND, THIS WILL BE 10% OF THE REFERENTIAL PRICE AND IN CASE OF PROCESS FOR A “CONVENIO MARCO”, THERE MUST BE A FIXED AMOUNT IN THE PUBLIC DOCUMENT REGULATING THE PROCESS NO LESS THAN US\$500,000.00. THE DGCP WILL BE THE CUSTODIAN OF THE BONDS.
- IN SECTION 116-A THERE IS ANOTHER DEFINITION OF THE CLAIM ACTION, WHICH IS MORE RIGID. THIS DEFINITION SPECIFIES THAT “IT WILL BE APPLIED FROM THE SECOND VERIFICATION REPORT THAT THE COMMISSION ISSUES BY COMMAND FROM THE GENERAL DIRECTORATE OF PUBLIC CONTRACTS.”
- ACCORDING TO THE RIGID DEFINITION (AND IT IS ALSO CONFIRMED IN SECTION 143), THE BOND ONLY APPLIES IN THE CASE THAT THE

CLAIM IS FILED AGAINST THE REPORT OF THE VERIFYING OR ASSESSMENT COMMISSION A SECOND TIME. THIS IMPLIES THAT THE FIRST ACTION DOES NOT REQUIRE A BOND. IF THE DGCP ORDERS A CHANGE TO THE COMMISSION AND, THE COMMISSION DOES NOT FOLLOW THE ORDER CORRECTLY, THEN THE CLAIMANT CAN FILE A NEW CLAIM ACTION AND IT MUST BE PRESENTED WITH A BOND.



- ACCORDING TO THE ABOVE, CLAIM ACTIONS ARE NOT MEANT TO BE PRESENTED WITH BONDS NEITHER WHEN THE CLAIM ACTION IS FILED BY THE INTERESTED PARTIES AGAINST THE PUBLIC DOCUMENT REGULATING THE PROCESS, NOR ANY OTHER CLAIM ACTION DIFFERENT FROM THE SECOND TIME THAT A COMMISSION REPORT IS DISPUTED AND WHOSE CORRECTIONS WAS ORDERED BY THE DGCP.



THE ORIGIN OF THE FIRST CONFUSION RELIES ON THE FACT THAT THE LEGISLATOR FELL INTO A REDACTION MISTAKE IN THE REFORMING ACT, WHICH IS WHY THERE IS AN ORIGINAL WIDE DEFINITION THAT COVERED THE CLAIM ACTION BOND AND THEN, IN THE SAME ACT, THERE IS A NEW STRICT DEFINITION OF THE TERM.

THIS CONFUSION IS NOT SOLVED BY CHOOSING THE DEFINITION THAT WORKS THE BEST FOR YOU. IN FACT, ONLY ONE OF THESE DEFINITIONS IS VALID AND OUR JURIDICAL SYSTEM HAS A SOLUTION FOR THIS SORT OF INTERPRETATION PROBLEMS. WE NEED TO RELY ON A RULE INCLUDED IN THE CIVIL CODE, WHICH STATES THAT IN THE CASE THAT WITHIN AN ACT THERE ARE RULES THAT ARE INCOMPATIBLE AMONG THEM, THE SPECIAL RULE WOULD HAVE PREFERENCE AND, IF BOTH ARE EQUALLY SPECIAL, THEN THE RULE APPEARING LATER IN THE ACT WILL HAVE THE PREFERENCE.

IN THIS CASE, IN OUR OPINION, BOTH RULES ARE EQUALLY SPECIAL, WHICH ACCORDING TO THE IDEA EXPLAINED ABOVE, FAVOURS THE RULE APPEARING LATER. IN OTHER WORDS, WILL APPLY THE DEFINITION INCLUDED IN SECTION 116-A OF THE GOVERNMENT PROCUREMENT ACT, AS AMENDED, IN WHICH THE BOND WILL ONLY “APPLY FROM THE SECOND VERIFICATION REPORT THAT THE COMMISSION ISSUES BY COMMAND FROM THE GENERAL DIRECTORATE OF PUBLIC CONTRACTS”

HYPOTHETICAL EXAMPLES

LET US SUPPOSE THAT IN A PUBLIC BIDDING PROCESS, THE VERIFYING COMMISSION DETERMINES THAT A PROPONENT, ACCORDING TO THE PRESENTED DOCUMENTATION, HAS AN EXPERIENCE OF 3 YEARS IN THE PROPER MARKET FOR WHICH IT IS TRYING TO BE HIRED. SAID PROPONENT

DOES NOT AGREE AND FILES A CLAIM ACTION BEFORE THE DGCP ASKING THEM TO ORDER THE COMMISSION TO FURTHER ANALYSE THE PRESENTED DOCUMENTATION THAT THEY DID NOT REGARD AND THAT ALLEGEDLY WOULD ALLOW THEM TO REACH TO THE CONCLUSION THAT THE PROPONENT HAS 5 YEARS OF EXPERIENCE.



IN THE CLAIM ACTION STATED ABOVE THE PROPONENT DOES NOT HAVE TO FILE A BOND, UNLESS THE DGCP ORDERS THE COMMISSION TO REVISE THE DOCUMENTATIONS ONCE AGAIN, AND IT IS COMPLIED WITH, BUT THE NEW REPORT INDICATES THAT THE UNSATISFIED PROPONENT HAS 4 YEARS OF EXPERIENCE. SAID UNSATISFIED PROPONENT CAN FILE ANOTHER CLAIM INSISTING THAT THEY RECOGNIZE 5 YEARS OF EXPERIENCE. IN SAID CASE, IT WOULD BE NECESSARY TO FILE A BOND BECAUSE IT INVOLVES A SECOND CLAIM ACTION.

ON THE OTHER HAND, IF AN INTERESTED PARTY IN A PUBLIC BIDDING PROCESS WHOSE REGULATING DOCUMENT HAS ALREADY BEEN MADE PUBLIC, BUT SAID PERSON REGARDS THAT REGULATION IS BIASED FOR A BRAND THAT A PROVIDER IN SPECIAL CAN OFFER, IF IT ACTS WITHIN THE LEGAL FRAME, THEY CAN PRESENT A CLAIM ACTION BEFORE THE DGCP WITHOUT THE NEED OF FILING A BOND.

ANOTHER EXAMPLE WOULD BE A CASE WHERE A PREVIOUS MEETING WAS CALLED UPON, WHICH IS PUBLIC AND CAN PARTICIPATE EVERY INTERESTED PARTY. IT TURNS OUT THAT THE PUBLIC ENTITY CONDUCTED THE MEETING WITH CLOSED DOORS AND THEY ONLY ALLOWED THE ENTRANCE OF SOME INTERESTED PARTIES. THEN, AN INTERESTED PARTY TRIES TO GET INTO THE MEETING AND THE SECURITY PERSONNEL DOES NOT ALLOW IT. THERE ARE SEVERAL WITNESSES AND A SECURITY FILM THAT PROOF THE FACT. AN ACT

LIKE THIS WOULD BE ARBITRARY AND, BECAUSE IT HAPPENED BEFORE THE PRESENTATION OF PROPOSALS AND THE ADJUDICATION, THEN THE INTERESTED PARTY CAN FILE A CLAIM BEFORE THE DGCP.

IN THIS LAST CASE, THE CLAIM ACTION DOES NOT REQUIRE A BOND BECAUSE THEY DO NOT HAVE AS A GOAL A SECOND ASSESSMENT ISSUES BY THE VERIFYING COMMISSION UNDER THE DGCP'S ORDERS.

IT IS WORTHY TO ADD THAT, AS A FINAL COMMENTARY, THE REFORM SEEMS TO FORBID THAT SEVERAL CLAIM ACTIONS BE PRESENTED, WHICH IS WHY SECTION 143 ESTABLISHES THAT THE CLAIM ACTION MUST "CONTAIN EVERY ASPECT OR FACT THAT THEY WISH TO SETTLE ON BEHALF OF THE PETITIONER." THE MEANING OF THIS PHRASE DESERVES TO BE CLARIFIED BY A REGULATION OR BY ADMINISTRATIVE APPLICATION.



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