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PUBLIC PROCUREMENT REGIME

BY: CREMADES & CALVO-SOTELO
ABOGADOS

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In Colombia the regulatory framework for public procurement is fairly stable. Its purpose is to include best purchasing practices, providing technology access to selection processes, and measures required to prevent corruption. In order to identify the best propositions, for most of the selection processes, the Colombian legal scheme considers the following:

- Enabling requirements that allow to determine what are the best proposals in order to continue with the process.
- Specific requirements that can be classified in order to rate the proposals.

Who are the parties in a state contract?

- The contracting State entity.
- The contractor, who may be a natural person (national or foreigner), a legal person (national or foreign) or a combination of the above, under cooperation agreements

which in Colombia are called consortiums or joint ventures.

How are consortiums and joint ventures created?

Law 80 of 1993 takes into account the corporate reality, based on which two or more persons join efforts to participate together on a specific project, without this entailing to create a new legal person. Two mechanisms are explicitly recognized, whereby two or more people can jointly submit a proposal for the award, execution, and performance of an agreement, being jointly and severally liable for all obligations arising from both the proposal and the agreement.

All members will be affected by all acts, facts, and omissions. However, there are differences regarding the liability levels:

- Consortiums: All members are jointly and severally liable for breaches and damages brought to third parties.
- Joint ventures: The members are liable depending on their participation, no individual member is jointly or severally liable for the others' acts according to their participation.

Does the general state contracting regime apply to all state entities?

Even though state entities have to comply with Law 80 of 1993

and Law 1150 of 2007 in their contractual activities, the law excludes some of them from their application in what is known as the special state contracting regime. Under this special regime, state entities may apply different rules to their contractual activities, as contained in the norm that created the special regime and in their contracting manuals.

The special regime applies to some specific entities and sectors indicated by the law, such as public household utility services, the energy sector, the state social entities, telecommunications, the Central Bank, higher education, Ecopetrol, and others.



What does the state contracting regime say with regards to foreigners?

- State entities should provide national treatment to the goods and services of other states where there are already commercial agreements applicable to contracting processes, to the goods and services, for which there is national treatment for reciprocity, and to the services of the Andean Community of Nations (CAN).
- In Colombia, all selection processes are international to the extent that foreigners are allowed to participate directly, even though they do not have a branch office or an affiliate in the country.
- State entities must verify the evaluation requirements and the persons' representation in Colombian territory, regardless of being domiciled in the country or not, since those who do not have it should demonstrate that they have an attorney domiciled in the country.

- All public documents submitted by foreign natural or legal persons in the contracting processes should be duly apostilled or legalized, according to their country of origin. The documents must be translated by a Colombian licensed translator in the case that there are documents that need accreditation and are written in a language other than the Spanish language.

What are the inability and incompatibility regimes?

Inabilities are circumstances that prevent a person from executing a contract, for legal or constitutional reasons.

Incompatibilities are limitations related to the execution of an agreement that involves a specific entity.

These inabilities and incompatibilities include various types of prohibitions, applicable to both public servants and private persons. Their purpose is to provide transparency, objectivity, and fairness to public contracting.

Upon being limitations related to contracting with state entities, they should be explicitly defined by the law and should not be extensively interpreted.

What is the Unique Proponents Registry (RUP)?

This is the mechanism through which those interested in participating in the state contracting processes include in a public registry the information related to the company, to its financial aspects, and to its experience, so that the state entities will be able to verify the legal, financial, and organizational capacity and the experience of all proponents submitting proposals under a contracting process.

- All national or foreign natural or legal persons, domiciled in the country and wishing

to participate in state contracting processes and seeking a contract award should have a valid RUP.

- The RUP is processed through the Chamber of Commerce with jurisdiction in the proponent's main domicile.
- According to the law, participants should annually renew this registration before the fifth business day of April, otherwise they risk their registration is declared void.
- Foreign natural or legal persons with no domicile in the country are not required to have the RUP. However, they should submit their legal, financial, and organizational documents in order to meet requirements contained in the tender documents.



In which cases is the RUP registration not required?

- Direct contracts.
- Contracts for the provision of health services.
- Contracts whose values do not exceed 10% of the lower value of the public entity (lower value).
- The sale of state properties.
- Contracts for the acquisition of products from or to be used for agricultural purposes offered by legally established product pools.
- Contracts from industrial and commercial state entities and from mixed economy companies.
- Concession agreements of any type.
- For natural or legal persons not domiciled in the country.

What are the modalities for the selection of a contractor?

The purpose of all state contracting processes is identifying the most favorable offer. Accordingly, and in order to guarantee the principles of freedom, equality, transparency, free competition, and objective selection, in Colombia there are various types of selection processes:

- **Public tender:** A public process carried out by a state entity that allows all those being able to meet requirements related to their legal, organizational, financial capacity and their experience, and any other selection criteria, to present their respective offer and participate in the selection process in equal conditions.
- **Abbreviated selection:** An objective selection process used in cases in which—due to the characteristics of

the contractual object, the contracting circumstances, the value, or the destination of the goods, work, or service—simplified processes are available in order to guarantee the contractual selection process efficiency. It is only available in some specific cases.

- **Merit selection process:** Used for processes in which the professional capacities of those developing the project should have a higher weighting than the price of the services provided.
- **Direct contracting:** This type of process does not require a public call and contractors do not need to have RUPs. In that order, state entities can enter into contracts without the need for a competitive selection process, thereby saving time in the acquisition of goods and services. This modality is only applicable in some specific cases.
- **Minimum amount contracting:** This type of process can be undertaken when the value of the contract is equal or less than 10% of the lesser

amount of the contracting entity. This modality includes an expeditious and special procedure.

State contracts are personal, therefore once they have been celebrated, they cannot be transferred without a prior authorization from the contracting entity.

Is there a digital platform for monitoring the contractual processes?

All state entities must publish their contracting processes in the Electronic Public Contracting System (SECOP), so that everyone is informed and can participate, as well as make comments.

The SECOP I and the SECOP II currently exist. The former is the platform in which public entities publish information related to their selection processes, its purpose being to publish the information related to all state contracting processes. The latter is transactional and allows for online management of all contracting processes, the respective entities and the suppliers interacting electronically.



A Colombian state virtual shop can be found within the SECOP. It is an electronic transactional trade platform allowing the buyers to manage their contracting process transactions upon acquiring goods and services through Price Framework Agreements, goods and services under Demand Aggregation Contracts, and goods according to the Large Surfaces Minimum Value mechanism.

What are the elements of the state contract?

A state contract is a bilateral written act in which public resources are compromised. It is a law applicable to the contracting parties, consequently being the main document governing their contractual relationship. According to article 32 of Law 80 of 1993, state contracts are all obligation-generating legal acts performed by the entities mentioned in this document and considered in the private law or in special norms, or arising from the exercise of free will.

- **Term and execution time:**

Term means the total contractual term, which includes the execution and liquidation phases for the contracts requiring them. The execution time is the contractual execution time, which is part of the contractual term.

- **Increases:** Except for concessions and other public-private association forms, the norm indicates that state contracts will not contain value increases in excess of 50% of their initial value.

- **Guaranties:** Their purpose is covering any possible risk. In Colombia, these guaranties are required from the proponents and the company which is awarded the contract.

Proponents participating in a selection process should deliver a performance bond, in general its value being 10% of the proposal value. To cover possible risks, the proponents and the contractors may opt for any of the following: an insurance policy, a mercantile trust, or a bank letter of indemnity.

Natural or legal foreign persons not domiciled or not hav-

ing branch offices in the country will be able to deliver standby letters of credit issued abroad.

- **Exceptional powers:** Powers granted to the state entity in order for the latter to fulfill its duties in the best possible way, or prevent and control any possible damages, ensuring the continuity in the provision of the service.

These are required in the following cases:

- Contracts whose aim is to carry out an activity involving antitrust state activities.
- The provision of public services.
- The exploitation of, and concessions related to, state goods.
- Work contracts.

- **Fines:** Their purpose is to force the contractor to comply with its obligations by means of pecuniary sanctions in case of delays or partial breaches.

The penalty clause is a type of fine and a contractual regulation mechanism that forces the parties to comply with their contractual obligations, preventing, sanctioning, or indemnifying them as applicable. In state contracting, it relates to the valuation

of the damages brought to the defaulted contract.

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- **Payment terms:** An advance payment may be agreed upon, as well as partial payments, without the value exceeding 50% of the contract value.
- **Dispute settlement:** The general rule is that any controversies that are unable to be resolved by mutual negotiations between parties, will be resolved by the contentious administrative jurisdiction. The contracting parties may resort to arbitration, either national or international, which should be agreed on in the contract arbitration clause.
- **Settlement:** Once the contractual term has ended, in continuing performance agreements and others, where applicable, the

contract will be settled. The objective is to make a final balance and settle the parties' accounts. This will be done by mutual agreement, unilaterally or legally before a court of law.

How does the public-private associations (APP) regime work?

APP contracts are defined as private capital participation instruments consisting of an agreement between a state entity and a natural or legal person in private law for the provision of public goods and their respective services. It involves the withholding and the transfer of risks between the parties, as well as payment mechanisms related to the infrastructure and/or service availability and service level.

- The APP contracts are used when the state entities assign to a private investor, the design and construction of an infrastructure and associated services, or the construction, repair, improvement, or equipment, in addition to activities involving the operation and maintenance of the infrastructure required for the provision of public services.
- They are executed at the expense and risk of the concessionaire with a remuneration being considered. The concessionaire will be entitled to obtain resources at the expense of the project's economic exploitation, receive payments from public resources, or for any other remuneration.
- The maximum term is 30 years, including possible extensions. However, they may have longer terms provided that they have been previously approved by the National Economic and Social Policy Council (CONPES).
- An integral cost-benefit study is required before the project can be started, taking into account its economic, environmental, and social effects and with special emphasis on the objective selection principle.

According to the World Bank, Colombia is the third most competitive country in the world in terms of regulation for financing works of APP.

The Movistar Arena in Bogota was built using an APP.

