

POSSE
HERRERA
RUIZ 

LEGAL GUIDE
TO DO BUSINESS IN
COLOMBIA



◆ 2021 ◆



CONTENT

Introduction

Chapter No. 1	Protection to foreign investment.....7
Chapter No. 2	Foreign Exchange Regime.....23
Chapter No. 3	Corporate Regulations.....45
Chapter No. 4	Foreign Trade And Customs.....77
Chapter No. 5	Labor Regime.....101
Chapter No. 6	Immigration Regime.....127
Chapter No. 7	Colombian Tax Regime.....147
Chapter No. 8	Colombian Environmental Regime.....189
Chapter No. 9	Intellectual Property.....213
Chapter No. 10	Real Estate.....239
Chapter No. 11	Government Procurement.....253
Chapter No. 12	Accounting Regulations For Companies.....289



INTRODUCTION

Colombia is a democratic country, with a privileged and strategic location in Latin America. It is rich in natural resources and is at present time one of the main investment destinations in the region mainly because of its commercial opportunities and its legal stability despite of the tough scenario of the worldwide pandemic.

Colombia has one of the top progresses, not only economic but also cultural, in investment and development, compared to the rest of the region.

In the last decade, Colombia's GDP growth rate has exceeded the world average, and in recent years the country has shown great economic stability, mainly using sensible economic policies in connection

with challenging situations, which have managed to maintain low inflation levels. Even, the principal risk rating agencies have maintained Colombia in stable confidence indices.

Procolombia in association with Posse Herrera Ruiz have prepared this Legal Guide to do Business in Colombia (the "Guide") to provide foreign investors guidelines on the main legal aspects. The content of this document was prepared and updated in June 2021, based entirely on the current information and legislation.

Warning

The purpose of this document is purely informative. The Guide is not intended to provide legal advice. Therefore, those

using this Guide shall not be entitled to bring any claim or action against Posse Herrera Ruiz or ProColombia, their respective directors, officers, employees, agents, advisors or consultants arising from any expense or cost incurred into or for any commitment or promise made based on the information contained in this Guide. Neither shall they be entitled to indemnifications from Posse Herrera Ruiz nor ProColombia, for decisions made based on the contents or the information provided in this Guide.

We strongly advise that investors and in general readers who make use of the Guide, consult their own legal advisors and professional consultants regarding investment in Colombia.

On the figures on this Guide

The figures used on this Guide have been determined as follows: (i) the figures expressed in US dollars have been calculated using an exchange rate of COP 3.675 = USD 1; and (ii) for those based on the current minimum legal monthly wage (MLMW) in Colombia, the MLMW for the year 2021 is COP \$908.526 (approx. USD 247).

The foreign exchange rate changes daily with the supply and demand for currency and the MLMW is adjusted at the end of every calendar year (December) for the following year.

We hope that this Guide will be of great use for your investment in Colombia.



CHAPTER

◆ GOVERNMENT
PROCUREMENT

11



GOVERNMENT PROCUREMENT

Five things an investor should know about Government contracting in Colombia:

1. In Colombia, to achieve State's goals Government contracting requires objectivity in the selection process. This implies that public entities must always choose the most favorable offer for the public interest. Other constitutional principles applicable to Government contracting are: due process, free competition, economy, transparency and publicity in procedure and communications.

Additional applicable principles are equality, celerity and efficiency of procedure and responsibility and impartiality in the actions and decisions of the State.

2. Foreigners may participate in the selection processes of contractors conducted by governmental entities without restriction. Additionally, in certain cases, foreign bidders can participate under the same conditions as Colombian bidders; that is they can receive national treatment. According to the law, state entities must grant national treatment to: (i) bidders, goods and services coming from States with which Colombia has trade agreements, (ii) goods and services coming from States with which a trade agreement does not exist but regarding which the Government has granted certification of national treatment based on the standards of those States and (iii) the

services provided by bidders of the Andean Community.

When there are several trade agreements between State, international treatments in force are executed by Colombia. These international treatments contain rights and obligations regarding public procurement where there is a commitment of national treatment for bidders, goods and services of foreign origin.

For the Colombian Government to certify that Colombian bidders benefit from national treatment in point (ii) above, it will be necessary to revise and compare the regulations on Government contracting of both states.

The importance of national treatment lies in the fact that, in Colombia, a tie-breaking criterion between offers scored with exactly equal values is to prefer the offer of national goods and services over the offer of foreign goods and services.

3. All individuals and legal persons, whether Colombian or foreign and based in Colombia established through a branch in the country wishing to execute contracts with governmental entities must register in the bidder's registry (RUP) by its acronym in Spanish). However, foreign entities



without domicile or branch in Colombia are not obliged to have such registration. Likewise, there are scenarios in which the Unique Registry of Proponents (RUP) is not required, as is the case of selecting awardees of concession contracts.

4. The bidders and contractors must obtain a bid bond and a performance bond to guarantee compliance with the obligations of their respective contract once it is awarded, however the following are exempt from this requirement: Loan agreements, insurance contracts, and contracts for less than ten percent (10%) of the lower amount provided for each entity. In this case the entity shall determine the need to demand a bond according to the nature of the purpose of the agreement and the method of payment

5. In Colombia, private investors can submit private initiatives to develop public-private partnerships projects (APP by its acronym in Spanish), regardless of whether public resources are required to develop them. For projects from a private initiative, economic resource from the public entity cannot exceed thirty percent (30%) of the budget for the investment project¹. For these purposes, "public resources" are considered those coming from the national budget, the budget of local authorities, decentralized entities or other public funds such as the General Royalties System.

11.1. General aspects

In Colombia, government contracting legislation has been designed to achieve the State's purposes through the collaboration with nonpublic entities that, under certain agreements, get to carry on social functions and their obligations.

11.2. Scope of government contracting laws

Generally, all governmental entities are covered by the General Contracting Statute of Public Administration (Law 80/1993 and supplementary standards), however, there are some exceptions, such as financial entities, public home service companies, social companies for the State or mixed economy companies where the State has fifty percent (50%) or less shareholding interest are covered by a private contracting regime. In any case, the entities with a private contracting regime must govern their selection processes based on the principles of the administrative function (equality, morality, efficacy, economy, celerity, impartially and publicity), of public contracting and fiscal management. Likewise, entities with a private regime are subject to the regime of disqualifications and incompatibilities of the General Contracting Statute of the Public Administration.

11.3. Parties in government contracts

Government contracts are executed between the contracting entity and the

¹ In accordance with the amendment of article 38 of Law 1753 of 2015, in private – public partnership projects of private initiative requiring public services, the resources from the national budget, from local entities or other public funds cannot exceed thirty percent (30%) of the budget of the investment project. In case of road infrastructure projects such percentage cannot exceed twenty percent (20%) of the budget of the investment project.



contractor, whereby the latter may be an individual or a legal person (Colombian national or foreigner) a group of persons associated in legal structures like a joint venture or by a group of persons bound together by a contract known as “commitment to create a company”, in case of an award. All of these persons are called plural bidders.

National and foreign persons wishing to execute contracts with governmental entities must demonstrate their legal capacity to submit a bid according to the applicable legislation in their country of origin. They must also prove they have the experience and the technical and financial capacity to execute the activity that the contract would allocate: These requirements depend on each particular selection process. Interested parties must not have incurred into any of the legal grounds for impediment or conflict of interests limiting their capacity to contract with the State (for more information, refer to section 11.4 of this chapter).

Concerning plural bidders, a consortium is defined as two or more persons who jointly submit the same proposal to be awarded, execute and perform the contract. These individuals are jointly and severally liable for each and all obligations derived from the proposal and the contract (including the actions, facts and omissions that arise in development of the proposal or contract). A temporary union, on the other hand, is basically the same as a consortium except for the

fact that the penalties for breach of the obligations derived from the proposal and the contract will be imposed according to the interest in the execution of each of the members of the joint venture.

Other corporate alternatives to submitting offers to a state entity are: (i) The plural structure that promises the constitution of incorporating a future company, whereby the parties submit a document of intention to incorporate a company as soon as the contract is awarded; and (ii) the previous constitution of special purpose vehicles, created with the sole purpose of executing and performing the government contract. In these cases, the liability of the partners of a special purpose vehicle is the same as that of a consortium. The foregoing, except in the case of transport infrastructure contracts, in which the responsibility will correspond to that of the corporate type.

Finally non-profit entities are entitled to enter into contracts with the Colombian Government under the following conditions:

1. The agreement shall be directly related to public interest programs and activities provided by the National or Sectional Development Plan according to the authorities' capacity. The purposes of these programs shall be exclusively directed to promote rights, peace, education and artistic and cultural expressions, among others.



2. The agreement shall not involve a commutative relation whereby the public entity gives compensation, or directs instructions to the non-profit entity to comply with the contract.

3. That the goods or services required for the strategy and policy of the development plan's contract purpose, other than the offer made by private non-profit entities; or, if any, the contracting with non-profit private entities, represents an optimization of public funds in terms of efficiency, efficacy, economy and risk management.

In any case, the contractor shall prove suitability and experience in the development of those programs. According to Decree 092/2017, the non-profit entity is suitable when it is adequate and appropriate to develop the activities purpose of the contracting process and has experience in the purpose to contract. The state entity shall define the characteristics the non-profit entity must accredit in the selection process documents.

11.4. Grounds for impediment and incompatibilities

Impediments and incompatibilities have been defined as those requirements and limitations on the contractor that seek to avoid particular interests which interfere with public functions. impediments are those hindrances to contract with a state entity applied to a person who is

not a public servant. incompatibilities consist of prohibitions on making certain contracting by a person who holds or held public office. Grounds for impediment or incompatibilities are situations that by law limit the bidder's capacity to enter into contracts with the Colombian Government. Their purpose is to protect the principles of morality, transparency and equality in Government contracting.

Due to the fact that there are limitations or restrictions to execute contracts with the State, impediments and incompatibilities must be explicitly indicated in the law and cannot be broadly interpreted or applied to analogous situations.

Some of the impediments stated in the law are for: i) Whoever caused an expiration declaration, ii) whoever keeps from subscribing a state contract without just cause, iii) whoever has been condemned by a judge to the additional penalty of interdiction in rights and public functions or has been sanctioned with a destitution; iv) legal persons who have been declared administratively liable for transnational bribery; and v) public servants among others.

On the other hand, incompatibilities to sign public contracts arise for the following persons among others:

i) Whoever made part of the board of directors or the council of administration of the public entity or whoever has been a public servant



in the signing entity in a directive, consulting or executive positions in the prior year; and ii) whoever has a blood, affinity or civil relation up to a second degree with public servants in a directive, executive or consulting position in the public entity or with a member of the board of directors, the council of administration, or a person that exercises internal controls within the entity.

Likewise, supervening impediments or incompatibilities may occur. For more information, refer to the letter (e) of section 11.9 of this chapter.

11.5. Bidders Registry - Unique Proponents Registry (RUP)

Bidders registry is a mandatory and public registry for all national or foreign persons based in Colombia or branches of foreign companies interested in executing contracts with governmental entities, with the exceptions established by law.

The bidders' registry (RUP) in Spanish must be filed in the chamber of commerce of the main domicile of the interested party, which must verify the information filed in the form for registration, renewal or update such that the information provided matches the information contained in the documents required for such registration,

renewal or update according to the law (namely, certificates of existence, financial statements, certificates of the legal representative or tax auditor, among others). Once this information has been verified, the chambers of commerce shall proceed with the registration.

The RUP is the only document required as evidence of the qualifications and classification it certifies, since they have been previously verified by the corresponding chamber of commerce. The Chamber of Commerce shall verify the conditions set for the contractors such as: (i) experience, (ii) legal standing, (iii) financial capability, and (iv) organizational capability. These enabling requirements are not scored during the evaluation of the selection processes in which the contractors participate.

The renewal of the RUP shall be done annually on the fifth labor day of April at the latest. Otherwise, the effects of registration in the RUP will cease, which would imply that the proponent must register again.

Suppliers that have been incorporated in Colombia no more than three (3) years before may accredit their experience before the RUP based on the experience of their partners or shareholders, associates or founders.



The RUP is not required to execute contracts with governmental entities in the following situations:

- *In the event of direct contracting*
- *Contracts for less than 10% of the allocated budget of the particular entity (low-value contracts).*
- *Healthcare procurement contracts.*
- *Concession contracts of any kind.*
- *Contracts for the disposal of state assets.*
- *Contracts for agricultural products or products destined for agricultural production offered by legally established commodity exchanges.*
- *Acts and contracts directly involved in the commercial and industrial activities of state-owned industrial and commercial companies.*
- *Foreign natural persons not domiciled in Colombia or foreign legal persons without a branch in Colombia who wish to execute contracts with governmental entities.*

In the above mentioned situations, and for interested foreign parties, the relevant contracting governmental entities are responsible for verifying that the bidders meet the requirements.

11.6. Modalities of contractor selection

To guarantee the principles of equality, reciprocity, transparency and objective selection, different procedures have been established for the selection process, through which governmental entities ensure the selection of the best offer.

The selection procedures are: public tender, abbreviated selection process, selection based on qualifications, direct selection and low-value contracts.

(a) Public tender

Public tender is the procedure that applies as a general rule, unless the law provides expressly the application of a selection alternative. It is a tendering process that begins with a public invitation placed by the public entity calling all interested participants to submit their bids. The most favorable bid in terms of the goals and needs of the entity is chosen on the basis of the criteria and conditions set forth by the public entity in terms of the bid "pliego de condiciones."

The tender processes must adhere to the following process:



In public tender processes, a ten (10) labor days limit will be available for presenting observations and comments on the publication of the bid terms.



(b) Abbreviated selection process

Abbreviated selection process is a selection alternative which consists of a faster, more simplified contracting process than the public tender. The possibility of using the abbreviated selection as a procedure for public contracting depends on the characteristics of the purpose of the agreement, the contracting circumstances or the amount established for goods, works or services to contract. Specifically, the abbreviated selection can be applied in the following cases: (i) The procurement of goods and services which have uniform technical standards and are of common usage (e.g. office supplies); (ii) the procurement of products for agricultural use offered in legally constituted exchanges; (iii) low-value contracts; (iv) healthcare procurement contracts; (v) contracts for the disposition of state assets, except those referred to in Law 226/1995 (state participation in the capital of any company); (vi) contracts directly related to the activities of state-owned industrial and commercial companies (except public work, consulting, services, concession, trust vehicle and public trust contracts); (vii) procurement of goods and services necessary for defense and national security; (viii) when a public tender has been opened but is not awarded due to lack of qualified bidders; and (ix) contracts with entities responsible for programs for the protection of vulnerable populations. In reference to contracting in service of the

acquisition or supply of goods and services of uniform technical characteristics and common use, state entities shall include the lowest offered price as the only assessment factor.

In abbreviated selection processes, a five (5) labor days limit will be available for presenting observations and comments on the publication of the bid terms.

(c) Selection based on qualifications

The selection based on qualifications is a procedure for the selection of consultants and architectural projects, following the stages laid down by law and considering that the contractor has to carry out an intellectual task. In this procedure, the state entity shall indicate how it will score (i) the experience of the interested party and the work team and (ii) the academic formation as well as the technical and scientific publications of the work team. On the other hand, the state entity shall review the economic offer and verify that it is included in the estimated value contained in the prior studies and the budget assigned for the contract.

Decree 1082 of 2015, the selection based on qualifications can be carried in an open procedure or in a prequalified procedure.

There will be five (5) business days during the merits selection process to submit observations to the conditions proposal.



(d) Direct contracting

Direct contracting is a selection mechanism, by virtue of which public entities can enter into contracts without the need to previously carry out an open selection contest. Therefore, its application is limited to certain grounds stated in the law, such as:

- Loans.
- Urgent need.
- Provision of professional and support services for the implementation or execution of artistic works that can only be entrusted to certain individuals.
- Goods and services for the defense sector, the National Intelligence Department (DNI) and the National Protection Unit the acquisition of which is confidential.
- Contracts for the development of scientific and technological activities.
- When there is no plurality of bidders in the market. This means, when there is only one person that can provide the good or service because it is a holder of industrial property rights or copyrights, or because it is an exclusive distributor in the national territory (a situation that must be evidenced in the prior study supporting the contracting).
- Lease or purchase of the real estate.

11.6.1. Low-value contracts

Low-value contracts are awarded by means of fast procedures which can be carried out when the value of the contract is equivalent to or less than ten percent

(10%) of the entity's budget², regardless of its purpose.

This type of selection modality underwent changes with the enactment of Law 2069 of 2020, called the Entrepreneurship Law, as it establishes that the possibility is opened for the National Government to regulate the procedure and the possibility for public entities to carry out such acquisitions of the minimum amount to medium and small companies - MIPYMES.

Regarding relevant points of the contractor selection processes, it should also be noted that Law 2069 of 2020 establishes a series of tie-breaking criteria different from those of the initial regime of Decree 1082 of 2015, which, given its application, will serve to choose the best offer favorable to the entity's criteria. The new tiebreaker criteria promoted by Law 2069 of 2020 are:

- The possibility is opened so that, through regulations of the National Government, the procedure of minimum quantity is regulated and the possibility for public entities to carry out such acquisitions of minimum quantity to SMEs.
- The possibility of opening contracting processes limited to SMEs is extended, not only to public entities of Law 80 of 1993, but to any public entity regardless of its contracting regime, the autonomous assets constituted by state entities and individuals that execute public resources. As such, these actors must (i) identify potential SMEs that may

²The amount of the lower quantity of the state entity will be updated according to the fiscal term in which the selection process will be done, according to the rules established in the second article of Law 1150/2007



be providers from the analysis of the sector, encourage their participation; (ii) Promote the division of the contracting process into lots or segments that facilitate the participation of SMEs in the Process; (iii) Send information to the National Public Procurement Agency - Colombia Compra Eficiente-, on the fulfillment and results of the adoption of the measures established in this provision during the immediately preceding year; among other.

- It is clarified that in processes limited to SMEs, it is not mandatory to make the selection under the selection modalities of Law 1150 of 2007.
- The definition of differential criteria and additional scores, as defined by the National Government, in favor of (i) SMEs in public contracting processes, (ii) entrepreneurship and women companies in competitive processes of public entities subject or not to the General Statute of Public Procurement.
- A system of indicators will be created in order to annually evaluate the effectiveness of the inclusion of SMEs in the public procurement market.

Finally, it is important to note that Law 1882 of 2018 urges the National Government to adopt standard documents for the requests of proposals in the different State contracting processes. In this regard, on Dec. 5, 2019, Decree number 342 of 2019 was issued including the standard documents for public tenders regarding transport infrastructure. Additionally, Colombia Compra Eficiente has made available two other standard documents of requests for proposals (standard documents for supply contracts and

consulting contracts) recommending its use. Eventhough we are dealing with standard documents, potential bidders may comment on the draft of the request for proposals as of the date of their publication.

In addition to the previous regulations, the Standard Document Guides issued by Colombia Compra Eficiente on June 3, 2020, were established, in which the criteria for the use of standard documents in minimum quantity selection processes and in abbreviated work selections were established for transport infrastructure. Subsequently, on March 23, 2021, said entity issued the Guide for the understanding and implementation of the Type Documents for the tender for transport infrastructure works. It establishes the general conditions of the type documents for this type of contracting, the criteria for preparing the offer, the qualifying requirements and their verification, the evaluation criteria and scoring, the risk scheme, and the specificities of the minutes and the criteria of the contract.

11.7. Publication of the contracting process through electronic means

Government entities must publish on the website el SECOP ("Sistema Electrónico de Contratación Pública") and/or www.contratos.gov.co all the information required by law regarding the different selection processes they are conducting³. This is required in order to inform the general public so that it can comment on

³Except for those who are subject to legal reserve.



it or participate in the bidding process.

The following platforms are components of the SECOP, managed by Colombia Compra Eficiente:

(e) SECOP I: platform in which the entities that contract charged to public funds publish the process documents. It is a tool exclusively for publicity purposes.

(f) SECOP II: a transactional platform to manage online all contracting processes, with accounts for entities and providers and seen publically for any third party interested in the public contracting processes.

(g) Online Store of the Colombian State: transactional ecommerce platform through which the buying entities perform transactions in contracting processes to acquire (i) goods and services through price framework agreements, (ii) goods and services covered by demand aggregation contracts and (iii) goods in the modality of low-value in large surfaces.

The state entities must publish the information of their contracting processes in any of the electronic platforms of SECOP according to the nature of the information that is to be published.

All public entities that still use SECOP will also have to publish through it all documentation related to process and bidding administrative acts within the following three (3) days of its enactment.

The information recorded by the Entities in SECOP II and on the Online Store of

the Colombian State will be available in real time since the actions of the contracting process occur electronically through those transactional platforms. Since April 1, 2020, the use of SECOP II is mandatory for some State Entities in accordance with External Circulars 2 of 2019 and 3 of 2020.

11.8. Annual Procurement Plan

It is mandatory for state entities to prepare an Annual Procurement Plan (PAA for its acronym in Spanish) with the list of goods, works and services it intends to purchase during the year. The PAA is a tool to: (i) facilitate that state entities identify, record, schedule and disclose their needs for goods, works and services; and (ii) design contracting strategies based on demand aggregation that allow an increase in the efficiency of the contracting process.

In the PAA the entity must indicate (a) the goods, works and services it has fully identified as necessary, and (b) the specific product that satisfies the needs identified, in which case it must include the description of the need and the possible codes of goods and services that cover said need. In the scenario (a) above, the state entity must identify those goods, works and services using the Goods and Services Classifier. They must also indicate the estimated value of the contract, the type of resources with which the state entity will pay for the good, work or service, the modality of contractor selection and the approximate start date of the selection process.

This PAA must be published in the webpage of the entity and in the SECOP. It must be prepared according



to the guidelines and form provided by Colombia Compra Eficiente in its "Guide to Prepare the Annual Procurement Plan". This tool provides information and greater publicity to the purchases that are to be made by each entity annually.

11.9. Contents and formalization of the government contract

The government contract is subscribed taking as a model the sample model published by the entity during the selection process, and it is made of the terms of the bid and amendments thereto, the preliminary studies, the risk allocation matrix, the proposal submitted by the awarded bidder, as well as all other documents issued during the bidder selection process, and the technical annexes that are particular to every contract. Thus, government contracts consist of a group of documents that regulate the contractual relationship.

The Government contracts are formalized when there is an agreement on the subject and consideration and when it is prepared in writing. In this sense, the modifications made to the existing contract must be done with the same solemnity required for the initial contract, meaning in writing.

(a) Contract additions

The law on Government contracting establishes some specific requirements on any modifications or additions made to government contracts:

- **Limits:** in general, contracts executed by state entities may not be added in more than fifty percent

(50%) of their initial value, expressed in minimum legal monthly salaries in force.

- **Publicity:** the modifications or additions must be published in SECOP II to ensure the general publicity of the act.

• **Certificate of budget availability:** whenever an addition to the contract requires an additional budget, it will be necessary for the state entity to issue a certificate of budget availability before making the modification.

- **Extensions and modifications to APP contracts:** The APP contracts have a special regimen for extensions, according to which the extensions may be granted for matters that directly relate to the purpose of the contract, but only after the first three (3) years of the term and before termination of the first three fourths (3/4) of the initial duration of the contract. On the other hand, when the APP is of private initiative, the extension of the term of the contract together with the additional funds granted may not exceed twenty percent (20%) of the initial value of the contract.

(b) Guarantees

Whoever submits a bid for a selection process must obtain a bid bond for a value which is usually set at 10% of the value of the offer. This value, however, may be lower in processes involving large sums (exceeding one million (1,000,000) minimum legal monthly salaries in force). Additionally, those awarded the contract are required to submit a performance bond to cover any failure to comply with the



obligations set forth in the contract. The performance bond must offer ample coverage.

When contracting with the Government, contractors can submit or obtain different kinds of guarantees as risk coverage or multiple ones such as: (i) an insurance contract contained in a policy which has been issued by an insurance company legally authorized to operate in Colombia; (ii) a bank bond and (iii) a stand-alone trust. In the case of insurance policies related to public contracts and intended to protect public funds, these policies must not expire based on the lack of payment of the premium or by unilateral revocation.

Additionally, in contracting processes, foreign natural or legal persons without domicile or branch in Colombia may grant, as guarantees, standby letters of credit issued abroad.

On the other hand, the risks that the performance bond must cover are those that derive from the breach of contract, the proper handling of the advance in contracts that establish the delivery of advances, the payment of salaries and social benefits and the stability and quality of the work or contracted services; in this regard, the state entity must specify the warranties required in every stage of the contract or in each contract period taking into account the contractor's obligations at each stage of the contract.

It will not require bid bonds in loan agreements, insurance agreements and in agreements whose value is less than ten percent (10%) of the lower amount provided for each entity, in which case the entity will determine the need to demand it, according to the nature of the purpose of the contract and method of payment.

(c) Extraordinary powers

Extraordinary clauses are faculties of the state entities as contracting parties that can be used to protect the general interest. These powers are used to ensure the immediate and continuous provision of the services in question.

These clauses include the power to (i) interpret the contract unilaterally, (ii) modify the contract unilaterally, (iii) terminate the contract unilaterally, and (iv) declare the "lapsing" of the contract if there is a breach of contract that may result in the paralysis of the rendering of the public service. Likewise, exceptional powers are (i) submission to national laws, and (ii) the mandatory handover of the assets of public use for their exploitation.

The law establishes the contracts where it is mandatory to establish exceptional clauses in: (i) Contracts to perform an activity that constitutes a state monopoly; (ii) the provision of public utilities; (iii) the exploitation and concession of state assets; and (iv) public work contracts. If the aforementioned faculties are

⁴In accordance with the provisions of article 6 of the Law 2014 of 2019, this term of six (6) months expires on June 30, 2020.



not expressly agreed upon when mandatory, then they are understood to be part of the agreement by law. Supply agreements and service agreements might contain extraordinary clauses, in all other contracts it is forbidden to include exceptional power clauses.

(d) Fines and penalty clause

In the fulfillment of the duty that public entities have to control and supervise the performance of government contracts, these entities may impose the fines agreed on in the contracts in order to demand from the contractor compliance with the agreed obligations. Likewise, in case of breach of the contractor, public entities have the legal capacity to execute the penalty clause, as agreed on in the corresponding contract.

(e) Assignment of government contracts

Government contracts are awarded according to the contractor's qualifications. Therefore, once they have been executed, they cannot be assigned without the prior written authorization of the contracting entity. In the event of a contractor being affected by an impediment

or incompatibility during the course of the contract, the contractor must assign the contract, with prior written authorization of the contracting entity, and if not feasible, then the contractor must withdraw from the contract.

If a member of a consortium or temporary union has an impediment or incompatibility, it must assign its part in the consortium or temporary union with the prior written authorization of the contracting entity. In no event may the assignment take place between members of the consortium or temporal union.

For the contracting entity to approve the assignment of the contract, the assignee must comply with all the requirements set forth in the Request for Proposal (RFP) of the awarded contract.

Additionally, in the event that anyone is affected by an impediment during the course of the contract due to its responsibility for the commission of crimes against the Public Administration, or when it has been administratively sanctioned for acts of corruption to the contractor, the process mentioned above will not apply. In this case, the State

⁵Colombia Compra Eficiente: ¿cuál es la diferencia entre el anticipo y el pago anticipado?. Concept dated June 2016.

⁶The National Agency for Public Procurement - Colombia Compra Eficiente - has issued a guide for the management of the advances through a "Trust" Agreement, defining rules for suppliers and public entities in this sort of trusts and for the management of the advances in the "patrimonio autónomo" https://www.colombiacompra.gov.co/sites/default/files/manuales/20140708_guia_para_el_manejo_de_anticipos_mediante_contrato_de_fiducia_mercantil_irrevocable.pdf



entity will order, through a reasoned administrative act, the unilateral assignment, without any compensation to the impeded contractor. In the event of an assignment, the contracting entity will be responsible for determining the assignee of the contract. G

Decree 1358 of 2020 regulates literal j of numeral 1 of article 8 of Law 80 of 1993, modified by article 2 of Law 2014 of 2019 and adds Decree 1069 of 2015, the Only Regulatory Law of the Justice Sector and Right, this Decree clarifies that the term of inability to contract with the State for transnational bribery behaviors committed by legal persons and administratively sanctioned is a maximum of 20 years, while this term for judicial declarations of responsibility against natural persons and subsequent contamination to legal persons would be indefinite.

(f) Payment method

In government contracts, governmental entities can agree to make an advance payment (anticipo) or down payments (pago anticipado) but such advances may not exceed fifty percent (50%) of the contract's value. Accordingly, Colombia Compra Eficiente has distinguished the advance payments from down payments: "an advance payment is a deposit or advance on the agreement price intended to leverage compliance with its purpose, so that the resources transferred in that way are included in the equity of the contractor only to the extent its amortization is caused by the performance of the scheduled activities

of the agreement. The down payment is an effective payment of the price so that the resources are incorporated to the equity of the contractor from their disbursement"

In accordance with article 91 of Law 1474/2011 (Anti-Corruption and Bribery Code), for construction agreements, concessions, health, and other arrangements determined by public tender, the contractor must create an irrevocable commercial trust agreement for the management of the resources it receives by way of advance payment. That is, provided the agreements are not of minor and minimum amount. This is to ensure that such resources are exclusively applied to the performance of the corresponding agreement⁴.

Other rules applicable to the management of advance payments are the following:

- The initial terms of the bid have to determine if there will be advance payments, and if so, indicate its value, considering the revenues that could be generated;
- The initial terms of the bid have to include the terms and conditions for the administration of the advances.
- Examples of this are restricting payments to the suppliers of the prior authorization by the supervisor or the controller, and only if it were previously stipulated in a plan, which means, they are also imposing the obligation to make and have such a plan;
- The guarantees have to include the good management and appropriate

⁴ The National Agency for Public Procurement- Colombia Compra Eficiente- has issued a guide for the management of the advances through a "Trust" Agreement, defining rules for suppliers and public entities in this sort of trusts and for the management of the advances in the "patrimonio autónomo" https://www.colombiacompra.gov.co/sites/default/files/manuales/20140708_guia_para_el_manejo_de_anticipos_mediante_contrato_de_fiducia_mercantil_irrevocable.pdf



investment of the advances and must be valid up to the termination of the agreement or until its amortization.

(g) Conflict resolution

Government entities and contractors must seek to resolve disputes arising from their contracts in a flexible, fast and direct manner by using conflict resolution mechanisms. These mechanisms are things such as conciliation, amicable settlements, transaction and arbitration, whether national or international.

In all cases, the arbitrators or mediators are not competent to decide on the illegality of the administrative acts issued in performance of the extraordinary powers explained in letter (c) of section 11.9 above.

In the event that the parties concerned have not agreed on arbitration, or in cases provided by law, the parties shall resort to the contentious-administrative jurisdiction. This jurisdiction is hierarchically organized with the Council of State being the highest body of the contentious-administrative. The Council of the State is followed by the administrative courts acting as courts of appeal, and also more generally, as a second instance of decisions issued by administrative judges, who are the first instance courts.

(h) Final accounts for government contracts

Continuing-performance government agreements, agreements by which performance or compliance extends in

time and the other agreements requiring so, shall be subject to final accounts. Final accounts are a proceeding by which once the agreement is concluded, the parties offset accounts regarding their reciprocal obligations. In this stage, the parties shall agree on the applicable adjustments, reviews and recognitions, as well as putting an end to the rights and obligations that derive from the contractual source.

In the minutes of final accounts, the covenants, conciliations and settlements set in place to end the filed controversies and restore the concerned parties to good standing shall be recorded. The extension of the guarantees to endorse the obligations remaining in effect after the termination of the agreement may be required.

The government agreements have a term for their settlement that may be for up to four (4) months. If after such a period, the contractor and the entity do not reach an agreement to submit final accounts for the said agreement, the latter shall have a term of two (2) months within which they may unilaterally submit final accounts for the agreement. Finally, if such term expires without having submitted final accounts for the agreement, the parties shall have a term of two (2) years to be able to do so by mutual agreement, or otherwise the entity shall do so unilaterally. This term corresponds to the possibility of filing legal actions against the contract.

Contracts for professional services or support services do not need to submit final accounts.



11.10. Types of government contracts

All agreements entered into by a public entity are government agreements. Government entities may enter all agreements permitted by law, including the agreements provided in the Civil Code or the Code of Commerce.

In addition, and given that Colombian regulations do not restrict the contractual types in Government contracting, government entities may also enter into atypical or unnamed agreements. This is based on the principle of autonomy of will of the parties, provided that they are framed by the respect for the law and the Constitution.

Thus, the Colombian law provides certain particularities for some government contracts have been created as a result of the diversity of needs of public entities with the aim of achieving the goals of the State. Some examples are listed below.

(a) Public Construction contract

Construction contract is that entered into by governmental entities for the construction, maintenance, installation and the performance of any other material works, regardless of the execution and payment modalities.

(b) Consultancy contract

Consultancy contracts are executed by governmental entities to engage

studies related to the execution of investment projects, diagnostic studies, structuring, prefeasibility or feasibility studies for specific programs or projects, as well as to engage technical assistance for coordination, control and supervision. Consultancy contracts also include auditing and advisory; management of works or projects; direction, programming and implementation of designs, blueprints, preprojects and projects. The obligations of a consultancy contract are characteristic of an intellectual nature.

(c) Service contract

This contract is executed to carry out activities related to the administration or operation of governmental entities. The contractor in this type of contract must always be an individual in situations where such activities may not be carried out by payroll personnel or personnel requiring specialized knowledge.

According to the Constitutional Court, in ruling C-154/1997, "the contracting of natural persons for independent service provision, only operates when for compliance with the government purposes the contracting entity does not have the payroll personnel ensuring the professional, technical or scientific knowledge required or the specialized knowledge demanded" This type of agreements shall not generate a labor relationship or fringe benefits demonstrating a subordinated



and dependent personal activity and shall be entered into for the strictly necessary term.

(d) Concession contract

Concession contracts are contracts executed with the purpose of granting a person (concessionaire) the total or partial rendering, operation, exploitation, organization or management of public service. Or the construction, exploitation or total or partial conservation of a work or good, intended for public use or service.

Through these agreements all necessary activities for the adequate rendering or operation of the work or service are also granted, on account and risk of the concessionaire and under the supervision and control of the granting entity, in exchange for specific remuneration⁵.

Concession contracts have been addressed under the project finance schemes known as "project finance"⁶ as follows:

- BOT (build, operate and transfer)

Under this model, the company finances, builds and operates the project which generates the income that covers the operational and investment costs. On a date previously agreed on by the parties, the company

transfers (returns) all rights of the asset to the State.

- BOMT (build, operate, maintain and transfer)

Under this model, the company finances, builds and operates the project which generates the income that covers the operational and investment costs. It maintains the project for a specified length of time and on a date previously agreed on by the parties, transfers (returns) all the rights to the State.

- BOO (build, own and operate)

Under this model, the contractor is contractually bound to build, own, and operate the assets, with the corresponding financing of the works this must be done in compliance with the specifications as required by the regulator. In this case, the useful life of the project refers to the time that is required to pay off the debt and pay the contractors. The main difference between BOO and BOT is that "the assets will always remain property of the private entity."⁷

- BOOT (build, own, operate and transfer)

Under this model, the contractor is bound to build, own, operate and transfer the assets. It is responsible for obtaining the corresponding financing for the project. The difference between BOOT and BOT is that the

⁵ Article 32, Law 80/1993

⁶ Legal letters EPM Magazine, Vol 12, No. 1, March 2007.

⁷ Ibid.



contractor owns the assets during the term of operation.

- BOOMT (build, own, operate, maintain and transfer)

Under this model, the contractor is bound to build, own, operate and maintain the project for a period of time in order to transfer the assets, and to finance the project. This period of time will have been previously agreed on by the parties,

- BLT (build, lease and transfer)

This type of concession has the same features as BOT, but the financing is made through a leasing contract.

Public private partnerships are a contracting modality that can be developed, through concession contracts. In fact, concessions mentioned in numeral 4 of article 32 of Law 80/1993 are comprised within the scheme of public private partnerships.⁸ See section 11.11 below for more information.

(e) Trust vehicles and public trust agreements

Are contracts executed between governmental entities and trust companies authorized by the Financial Superintendence of Colombia to manage the funds of contracts executed by public entities with third parties. The public trust agreement is a kind of "encargo fiduciario" as far as public funds cannot

be transferred nor constitute a stand-alone trust fund of the relevant entity, notwithstanding the responsibility of the entity that orders the expense.

According to article 41 of Law 80/1993, for purposes of developing processes which secure assets and investments, stand-alone trust funds can be constituted with entities subjected to the supervision of the Finance Superintendence of Colombia, as well as when they are intended for the payment of labor liabilities.

11.11. Public-Private Partnership Regulations - PPP

(a) Definition

A PPP has been defined as follows: "Public – private partnerships are mechanisms to attract private capital that materializes in a contract that binds a state entity and an individual or legal entity for the supply of public goods and related services, which implies risk retention and risk allocation among the parties and payment methods according to the availability and the level of service of the infrastructure and/or service."⁹

PPP¹⁰ regulations explicitly establish that the purpose of PPPs is either the design and construction of infrastructure and its related services, or it is the construction, repair, improvement and equipment, activities that must involve



the operation and maintenance of that infrastructure.

(b) Characteristics

- PPPs are all contracts in which the entities entrust to a private investor the design and construction of infrastructure and their associated services, provided that the amount of the investment is over 6,000 times the current minimum legal monthly wage (MLMW), (approx. USD 1,560,000 for 2021).

Pursuant to the law, the maximum term of these contracts is thirty (30) years, including extensions. Notwithstanding the foregoing, the term may be extended for more than thirty (30) years when necessary. This is according to the results of structuring the respective project, and provided that the National Council for Economic and Social Policy (CONPES in Spanish) approves such extension.

- The National Planning Department has the Single Registry of Public Private Associations (RUAPP) www.dnp.gov.co in which all the PPP initiatives that are being carried out and the state in which they are found are registered.

- The right to collect resources for the financial exploitation of the project, and to receive disbursements or compensations from public resources in public-private association projects

will be a condition for the availability of infrastructure. It will also be a condition for compliance with levels of service and quality standards in the different functional units or stages of the project. This is also true for any other requirements determined by the rules of the government entity's rules.

- In agreements to carryout public-private partnership projects the right to retribution can be agreed on by functional units, with previous approval from the Ministry or head body of the sector or whomever acts as such at a regional level, provided that (i) the project is fully structured and (ii) it has been structured considering that the execution of the infrastructure functional units could have been done and contracted independently and autonomously. Compensation is a condition of the availability of the infrastructure and compliance with service levels and quality standards established for the corresponding functional units.

In PPPs of public initiative, the additions may not exceed twenty percent (20%) of the value of the contract originally agreed. In these contracts, the extensions in time shall be valued by the competent state entity. Requests for additions of resources and the value of the extensions in time added, may not exceed twenty percent (20%) of the value of the contract originally agreed.

⁸ Article 2 of Law 1508 of 2012.

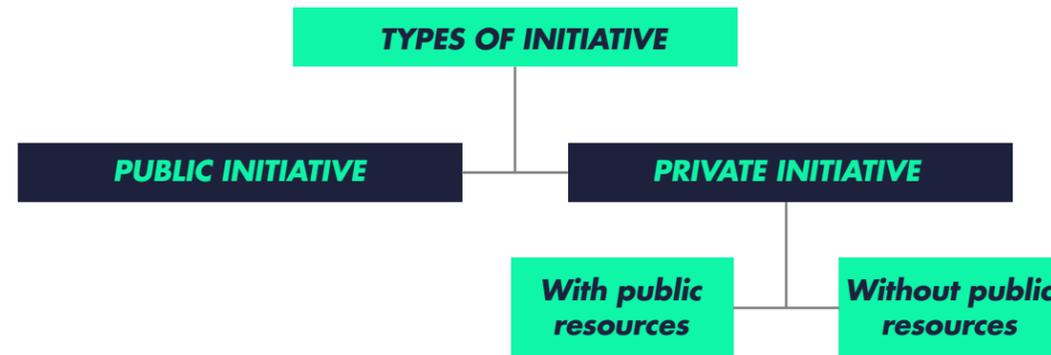
⁹ Article 1 of Law 1508 of 2012

¹⁰ The regulatory framework of PPPs is mainly composed of Law 1508 of 2012, Law 1882 of 2018 and its regulatory decrees; especially the Decree 1082 of 2015 "Sole Regulatory Decree of the Administrative Sector of National Planning", which compiles the regulations; Decree 100 of 2017; and Resolution DNP-1464 of 2016.



Finally, within the framework of private initiative PPPs without public resources cannot be modified to imply a disbursement

of this type of resources and may only be extended up to twenty percent (20%) of the initial term.



(c) Public initiative private public partnerships

To structure and implement a public initiative PPP, the state entity must carry out a cost-benefit analysis of the project, taking into consideration its economic, social and environmental impact for the population that is directly affected. Entities must pay special attention to the documents of this analysis and to the structural design of the project considering the ones with a technical, socioeconomic, environmental, real estate, financial legal character as well as risk definition, classification, calculation and allocation by means of the preparation of the risk matrix for the project.

The state entities will verify compliance with the requirements of legal capacity, financial capacity or financing and the experience on investment or structuring of projects, to determine which offeror may continue in the selection process.

The private partner will then be selected by means of a public tender that can either have or not have prequalification. For the prequalification system, a list of the prequalified parties shall be comprised through a public call, establishing a limited group of offerors to participate in the selection process.

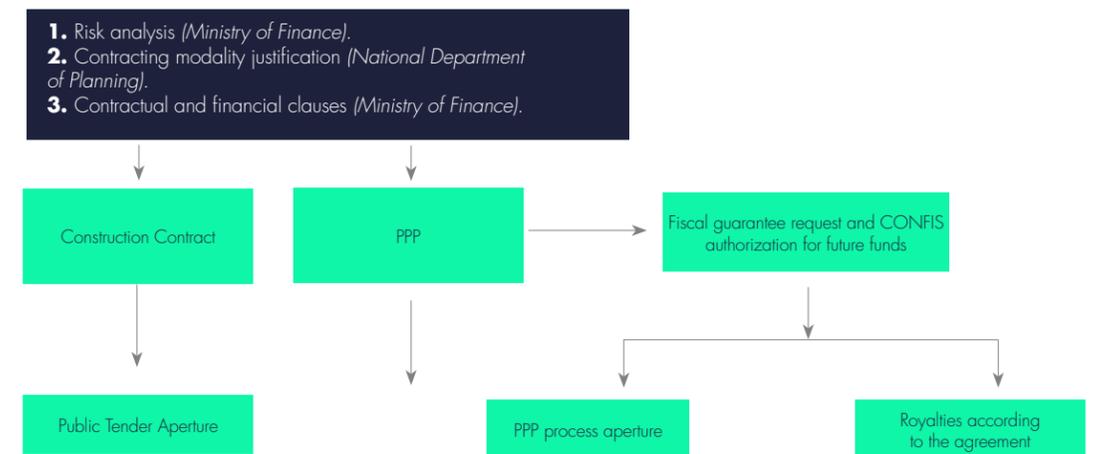
The most favorable offer will be that which, taking into account the technical and economic factors of selection and the accurate and detailed weighing thereof, (to be located in the terms and conditions or their equivalents) represents the best offer or a better cost-benefit analysis for the state entity. In order to select the most favorable offer, the entities may consider the service levels and quality standards, the present value of the expected revenue, the lower state contributions or greater contribution to the State, as the case may be, the compensations offered by the offeror except in case of regulated compensations or rates



to be collected from the users, among others, according to the nature of the agreement.

(d) Private initiatives of PPP

Step by step of a public initiative PPP



Source: National Planning Department. Public Private Associations –APP - in Infrastructure in Colombia. January 2021.

i. General considerations

Private initiatives refer to the fact that the originator of the idea or intention to carry out a project is of someone other than the State, who must carry out all the studies required, as indicated above. There are two types of private initiatives, namely those that require public funding and those that are privately funded.

Private initiative PPP projects, whether involving public funding or not, require that the Originator has the capacity to structure them, assuming all the implied costs and submit them to the entity for their evaluation and approval. The submission of the project is confidential. The structuring process consists of two stages:

- Prefeasibility: The Originator must make a complete and adequate description of the project indicating the minimum design in the prefeasibility stage as well as construction, operation, maintenance, organization and exploitation of such. It must also contain the scope of the project, demand studies in the prefeasibility stage, project specifications, their estimated cost and financial source.

Within the maximum term of three (3) months counted from the reception date of the project in prefeasibility stage or from the reception of the additional information requested by the competent state entity, it shall send to the originator of the proposal a communication indicating if the proposal, when analyzed, is interesting

for the competent entity based on its accordance with the sector policies as well as the prioritization of projects to be developed and that the said proposal contains the elements that would allow one to infer that the proposal can be feasible.

The competent state entity may reject the initiative or it may grant its favorable opinion for the originator of the proposal to continue with the structuring of the project and thereby initiate the feasibility stage. Said concept does not imply the recognition of any right to the originator or its approval, and does not generate an acceptance commitment of the project or obligation of any nature for the State.

- Feasibility: The Originator shall provide documentary evidence of its legal and financial capacity or of its financing potential, its experience in investment or structuring of projects or to develop the project, the value of the project's structuring and minutes to the agreement to be executed which includes, among other things, the risk allocation proposal. In this stage, it shall be certified that the information delivered is accurate and that the proposal contains all available information on the project. This certification shall be submitted through an affidavit.

The initiative for the realization of the project shall comprise the financial model detailing and formulating the value of the project, a detail description of the stages and length, a justification for the contract length,

a risk assessment of the project, environmental, economic and social impact studies and studies of technical feasibility, economic, environmental, real estate, financial and juridical status of the project.

According to Law 1882/2018, the originators in the project structuring of APP of private initiative or for the provision of its associated services shall assume at their own account and risk all the costs of the structuring, including the cost for its review and/or evaluation in the prefeasibility and feasibility stages, as applicable. In any case, the addition of the evaluation costs of the project (including the value of the fees of professionals required for the evaluation, the costs of visits to the project and other direct or indirect evaluation costs) may not exceed zero point two percent (0.2%) of the CAPEX value of the relevant project in prefeasibility or feasibility stage, as applicable.

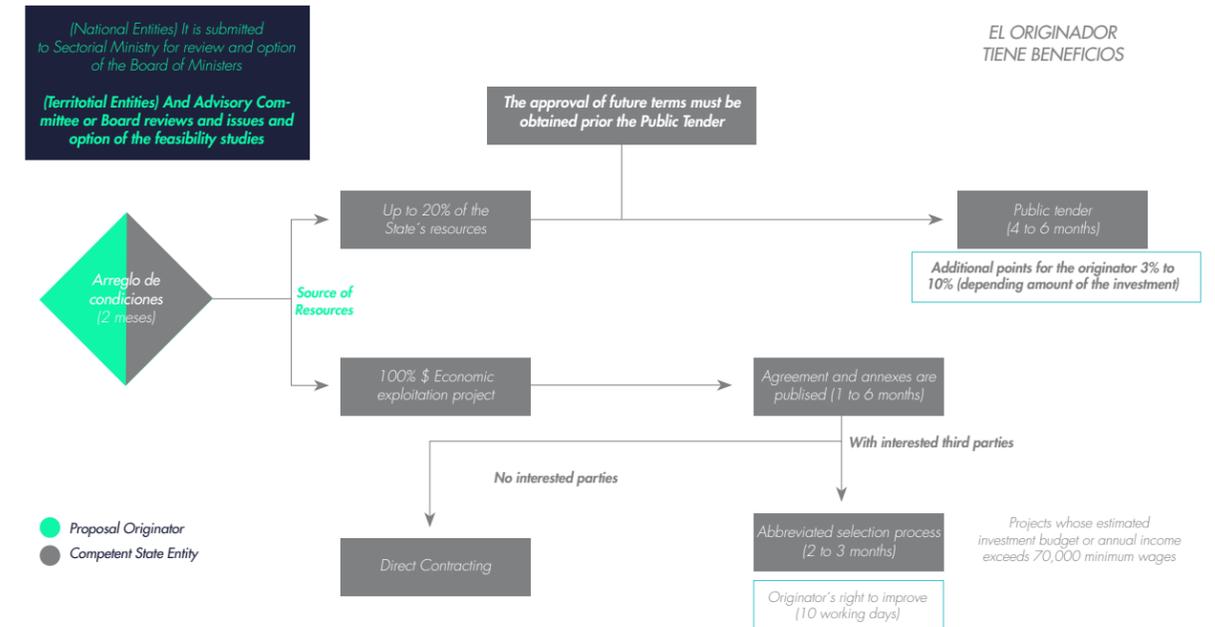
ii. Private initiative PPP with public funds

1. Public Contributions

Law 1508 expressly sets forth that the retribution of the concessionaire mainly derives from two sources: (i) from the right to the collection of resources for the economic exploitation of the project; and/or (ii) from the disbursement of public resources. The disbursement of public resources are those expenditures made from the National Treasury resulting from the General Budget of the Nation, from the budget of territorial entities, decentralized entities or from other public funds¹¹.

¹¹ Article 2.2.2.1.3.1 of Decree 1082 of 2015.

Step by step of a private initiative PPP



Source: National Planning Department, Private Public Partnerships – PPP - In Infrastructure in Colombia, January, 2019.

The law sets forth that these disbursements in the Private Initiative PPP cannot exceed thirty percent (30%) of the estimated investment budget of the project. For purposes of this limit, the resources generated by the economic exploitation of the project are not considered disbursements of public resources. Likewise, contributions in kind can be made by the state entities without those contributions being accounted for the limit indicated above.

In any case, the entity to which the proposal is submitted must have available assets (if the contribution is in kind), the necessary funds or the authorization to commit such funds, in order to carry out the project proposed in the initiative.

2. Selection Process

Once the Prefeasibility and Feasibility stages have been completed, and provided that the initiative has been deemed viable, the state entity must open a selection process through the public tender modality for interested third parties to submit offers to develop the project.

The Originator shall obtain bonus points during the selection process, ranging between three percent (3%) and ten percent (10%), depending on the size and complexity of the project, to compensate its prior activity.

If, as a result of the public tender process, the Originator is not chosen,



it shall have the right to be reimbursed with the costs of the structuring studies previously approved by the public entity.

iii. Private-initiative PPP without public funds

Once the Prefeasibility and Feasibility stages have been completed, and provided that the initiative has been deemed viable, in order to make the initiative public, the documents supporting the structuring of the project must be published on the SECOP website for a minimum of one month and a maximum of six months.

32

If during the time these documents are on the website, nobody expresses an interest in developing the project, aside from the Originator, then the state entity shall proceed to directly award the agreement to the originator.

However, if a third party expresses an interest in executing the project on the same basis that it shall not require public funding, it shall manifest it and guarantee the submission of an initiative by demonstrating its legal and financial or potential financing capacity. The experience in investment or structuring of projects to develop the project agreed.

The guarantee may consist in an insurance policy, bank guarantee at first demand, security commercial trust,

escrow cash account and in general any means authorized by law with an initial term of one (1) year that shall be extended until the subscription of the agreement.

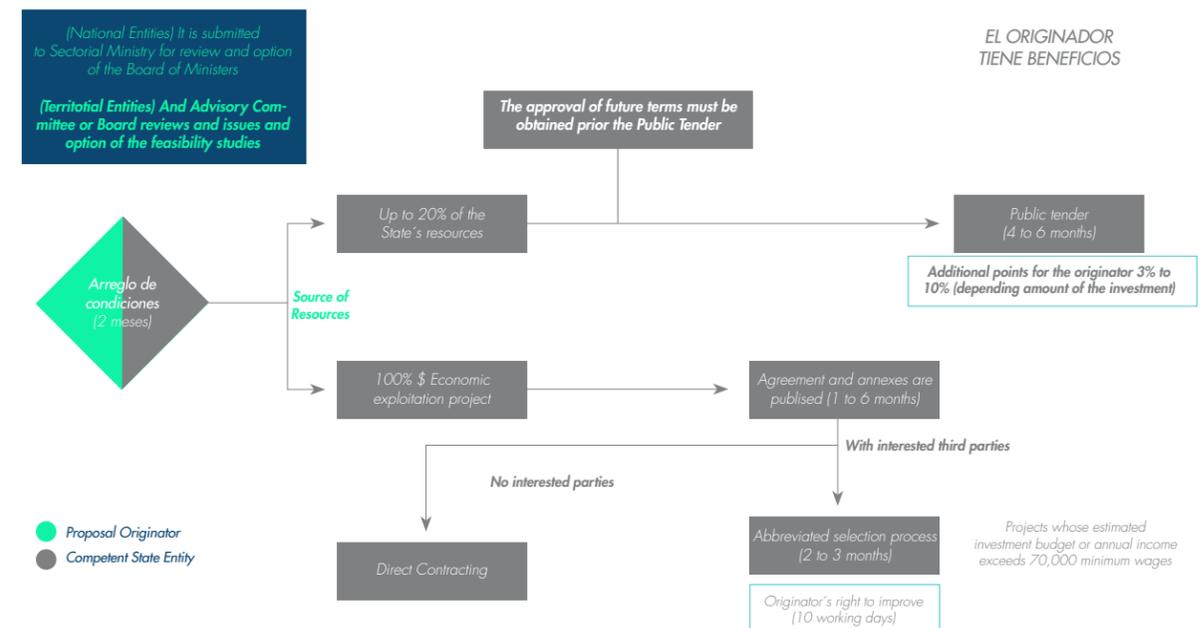
In the event that there are interested third parties, the entity must open an abbreviated selection process for a low-value contract with prequalification, which includes the Originator and all other interested parties that have submitted a guarantee.

If as a result of the evaluation the originator is not in the first position of eligibility and provided it has obtained at least a score equal to, or greater than eighty percent (80%) of the score obtained by the best ranked proposal, it shall have the option to improve its offer in the opportunity established in the terms and conditions for a maximum term of ten (10) business days counted from the publication of the final evaluation report of the proposals. In case the originator improves its proposal, the entity shall inform other offerors so they can make the observations they deem necessary, exclusively related to the improvement of the proposal by the originator, if applicable, in the opportunity established in the terms and conditions and for a maximum term of five (5) business days.



Step by Step of a Private Initiative PPP

Concept (3 months)
Evaluation of the project
(6 months, extendable by 3 more months)
Agreement of the conditions (2 months)



33

Source: National Planning Department, Private Public Partnerships – PPP - In Infrastructure in Colombia, January, 2021.



11.12. Residential utilities

The household utilities companies are not subject, in their contractual activity, to the General Contracting Statute of the Public Administration. The incorporation and the acts of all the utilities companies, as well as those required for the administration and the exercising of the rights of all the persons that are partners, as not provided in Law 142/1994, shall be exclusively governed by the private law rules. Due to the importance of this industry, and the extensive development that it has had in the past 20 years in Colombia, the most relevant aspects of such regulations are explained below.

(a) General aspects

SPDs are subject to the special laws issued in that sense in 1994¹², and the specific regulation issued for each by the Relevant Regulation Commissions. The SPD can be provided directly or indirectly by the State, by organized communities or by private entities. In any case, the State exercises through different bodies that make part of its structure, the functions of regulation, control and supervision to ensure the continuity and quality in the rendering of each SPD to the population.

Law 142/1994 classifies as household public utilities the following¹³: (i) water; (ii) sewage; (iii) waste management; (iv) electricity; and (v) gas distribution. SPD are deemed essential.

The electricity public utility is subject to specific regulatory provisions contained in Law 143/1994, based on the general assumptions of Law 142/1994, but only refers to the public utility mentioned above. As provided in Law 143/1994, the electricity public utility (and the industry itself) is divided into activities of generation, transmission, distribution and marketing of electricity, which in general, may be developed by private parties freely and on their own initiative, subject to the requirements and possible restrictions applicable to each. In particular, it is important to mention the existence of certain general restrictions to vertical and horizontal integration of activities in the electricity sector, the purpose of which is the protection of competition and the rights of users of the relevant public utility. To mention an example, the activity of transmission of electricity (which in essence constitute the transportation thereof and the operation of the relevant assets) cannot be combined with any other activity in the chain, except in the case of public utility companies that on the date of entry into force of Law 142/1994 were already exercising those activities in an integrated way, with other activities in the electricity sector.

The applicable contracting regulation for the companies that develop activities of generation, transmission, distribution and commercialization of electric energy will be that applicable to private agreements, notwithstanding the Commission of Regulation of

¹² Law 142 of 1994 and Law 143 of 1994.

¹³ Commuted basic public telephone service and mobile local telephone service in the rural sector made part of the list of household public utilities included in Law 142/1994, but with the issue of law 1341/2009 they became regulated under a special regulation, only very specific aspects of its activity being regulated by the law of public utilities.



Energy and Gas (CREG in Spanish) can demand the inclusion of specific clauses to some of the agreements executed by the companies, in line with the assumptions and purposes intended by the regulation on the matter.

(b) General principles of residential public utilities

The provision of SPD is regulated by a series of principles that govern the performance of this activity such as economic freedom, equality, continuity, regularity, efficiency and freedom of entry to the market.

Some of the most important aspects of such principles are:

- Economic freedom implies that duly incorporated and organized public services companies do not require any permit to develop their activities in Colombia.
- In the context of economic freedom, public service companies may declare an asset to be of public utility or social interest to obtain its expropriation or the imposition of rights of way or easements.
- The principle of equality in SPD is reflected in the concept of "rate neutrality," according to which every consumer has the right to have the same rate treatment as the others if the characteristics of the services are the same.
- The provision of public utilities cannot be interrupted except in circumstances

of force majeure or unforeseeable circumstances, or due to technical or economic nature so demanding.

Passing on to users the costs of managerial inefficiencies is absolutely forbidden.

- Any national or foreign person has the right to organize and operate companies that include in their corporate purpose the provision of SPD in Colombia, as long as the Constitution and the law are respected.

(c) Applicable legislation

The legal regime applicable to acts and contracts involving providers of SPD is that of private law. This means that Government contracting law and the regulations on Government contracting processes do not apply to residential public utilities.

The National Agency for Public Procurement, "Colombia Compra Eficiente", established conditions for publicity of the contractual activity of the industrial and commercial companies of the State, in order to fulfill its objective as the governing body of systems of purchase and public contracting. Companies of mixed economy and companies of public utilities that in their commercial activity are in situation of competition.

According to External Circular No. 20 of August 27, 2015, these entities "may use their own information systems for the purpose of making public the contractual activity, when they are allow



to undergo the contracting process online, in addition to allowing suppliers and the general public to have timely, permanent and uninterrupted access to information. Their contractual activity and the information of the contractual activity must comply with the deadlines and requirements of the applicable regulation regarding contracting and access to information, with obey to reserved information and documents pursuant to applicable regulations". In order for public procurement information to be available to the general public, "Colombia Compra Eficiente"- and the entities designated above that have their own information systems, must have a hyperlink that communicates to the SECOP.

(d) Authorized providers of public utilities

Persons authorized to provide public utilities in Colombia are: (i) companies incorporated as public utilities companies (ESP in Spanish), (ii) natural or legal persons that produce

by themselves, or as a consequence of or in addition to, their main activity, the goods and services purpose of the public utilities companies, (iii) the municipalities when they directly assume, through their central administration, the rendering of public utilities, (iv) the industrial and commercial companies of the state and (v) producers of marginal services. Note that ESPs are stock companies (this is, sociedades anonimas or sociedades por acciones simplificadas) incorporated to provide public utilities or complementary activities whose capital contributions may belong to national and/or foreign investors.

11.13. Investment opportunities in Colombia

Colombia has a set of investment opportunities related to different infrastructure sectors. These sectors require huge investments in order to comply with the development plans. For 2021, the investments required in different sectors were the ones detailed below.



Transportation

ITEM	REQUIRED INVESTMENT COP ¹⁴
Road network intervention (19,500 kms.)	182 billion (USD 50,617,843,624.24 approx)
Construction of 31 airports	16 billion (USD 4,449,920,318.61 approx)
Rail network rehabilitation (1,800 kms.)	10 billion (USD 2,781,200,199.13 approx)
Total	208 billion (USD 57,848,964,141.99 approx)

River transportation

ITEM	REQUIRED INVESTMENT COP
Amazon basin (4 projects)	5,4 billions (USD 1,501,848,107.53 approx.)
Orinoco basin (4 projects)	2,5 billions (USD 695,300,049.78 approx.)
Atrato basin (1 project)	76.354 millions (USD 21,235,576.00 approx.)
Magdalena basin (3 projects)	407.914 millions (USD 113,449,049.80 approx.)
Pacifico basin (1 project)	346.007 millions (USD 96,231,473.73 approx.)
Total	8,8 billions (USD 2,447,456,175.24 approx.)

Information and communication technologies

ITEM	REQUIRED INVESTMENT COP
7,000 additional communication towers	1 billion (USD 278,120,019.91 approx)
Total	1 billion (USD 278,120,019.91 approx)

¹⁴ Estimated values in 2021 figures.



Public utilities

ITEM	REQUIRED INVESTMENT COP
<i>Electricity- Transmission and distribution investment</i>	4,3 billions (USD 1,195,916,085.63 approx.)
<i>Aqueduct- universal coverage and construction of potable water treatment plant.</i>	29,2 billions (USD 8,121,104,581.47 approx.)
<i>Basic sanitation- Construction of PTAR in the country's watersheds and universal aqueduct coverage.</i>	14,2 billions (USD 3,949,304,282.77 approx.)
<i>Sanitation utility- solid residuals treatment.</i>	3,3 billions (USD 917,796,065.71 approx.)
Total	\$51 billions (USD 14,184,121,015.58 approx.)

Housing

ITEM	REQUIRED INVESTMENT COP
<i>Familiar subsidies for social interest housing (410,000 subsidies)</i>	7,7 billions (USD 2,141,524,153.33 approx.)
<i>Credits for social interest housing closure (138,000 credits)</i>	17,3 billions (USD 4,811,476,344.50 approx.)
<i>Credits for house purchase</i>	12,5 billions (USD 3,476,500,248.92 approx.)
<i>Saving contribution of 240,000 home for financial closure</i>	53 billions (USD 14,740,361,055.41 approx.)
Total	90,5 billions (USD 25,169,861,802.16 approx.)



Education

ITEM	REQUIRED INVESTMENT COP
<i>51 thousand educational infrastructure classrooms</i>	7,2 billions (USD 2,002,464,143.38 approx.)
Total	7,2 billions (USD 2,002,464,143.38 approx.)

Regulatory Framework

NORM	SUBJECT
<i>Civil Code</i>	Regime applicable to private parties.
<i>Code of Commerce</i>	Regime applicable to private parties.
<i>Law 80 of 1993</i>	Government contracting law.
<i>Law 142 of 1994</i>	Public utilities law.
<i>Law 143 of 1994</i>	Regime for the interconnection, generation, transmission, distribution and trading of electric energy.
<i>Law 1150 of 2007</i>	Amends Law 80 and forms part of the contracting statute.
<i>Law 1508 of 2012</i>	Public-private partnerships
<i>Law 1474 of 2011</i>	Anti-corruption statute.
<i>Law-Decree 019 of 2012</i>	Reducing of processes.



NORM	SUBJECT
<i>Decree 1082 of 2015</i>	Regulatory Decree of administrative sector of national planning.
<i>Law 1712 of 2014</i>	Transparency and Right to access to the public information of the Nation Law.
<i>Decree 1082 of 2015</i>	Decree that unifies and regulates the Administrative Sector of National Planning
Decree 103 of 2015	Partially regulates law 1712 of 2014 regarding management of public information.
<i>Decree 092 of 2017</i>	Regulates contractual provision regarding nonprofit entities, following article 355 of the Constitution.
<i>Law 1882 of 2018</i>	By which provisions are added, modified and issued to strengthen public contracting in Colombia, the infrastructure law and other provisions are issued.
<i>Decree 342 of 2019</i>	By which Section 6 of Subsection 1 of Chapter 2 of Title 1 of Part 2 of Book 2 of Decree 1082 of 2015, Single Regulatory Decree of the National Planning Administrative Sector is added.
<i>Law 2014 of 2019</i>	By means of which the sanctions for those convicted of corruption and crimes against the Public Administration are regulated, as well as the unilateral administrative assignment of the contract for acts of corruption and other provisions are issued.
<i>Law 2069 of 2020</i>	By which entrepreneurship in Colombia is promoted.





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Services / Areas of practice

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- Competition, consumer protection and data protection
- Compliance and internal investigations
- Corporate law
- Dispute resolution
- Environmental law
- Financial law and capital markets
- Infrastructure and public law
- Insurance
- Intellectual property
- International trade
- Labour and immigration
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- Energy and natural resources
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