The impact of competitive tendering on the execution of public con- tracts and concession contracts

Colombia

0. Preliminary remarks: the law applicable to (disputes regarding) the execution of public and concession contracts

Colombia has a public contracts' system that is the result of a long history of influences and national experience. Colombia, as a result of Spanish colonisation, is a country that could be classified as belonging to the Civil Law tradition. Not long after the declaration of independence (one could even argue before that) the legal system started to be influenced by the French Legal system. This explains, for instance, the existence of a Conseil D'Etat and, most importantly for the purposes of this report, the introduction of Administrative Contracts as a legal construct. This legal construct has been adapted throughout the years to become a, so to speak, properly Colombian institution.

In 1991 the current Constitution of the Country was adopted. The Constitution orders the Congress to issue a General Statute of Contracting of the Public Administration. Therefore, from a sources of law perspective the rules on Public and Concession Contracts must be in an Act issued by the Congress.

The General Statute of Contracting of the Public Administration (the Statute hereafter) was originally adopted by Act 80 1993. This law has been amended several times, amongst other, by Act 1150 2007, Act 1474 2011, Act 1882 2018. It is also relevant to mention Act 1508 2012 on Public Private Partnerships, since concession contracts falling within its scope are considered to be "within the schemes of Public Private Partnerships", according to Article 2 of that Act. These Acts are further regulated by Decree 1082 2015.

Act 80 1993 continues to be the main Act on Public Contract Matters. Article 1 defines the "object" of the Act stating that it "establishes the rules and principles that govern the contracts of State Entities". Article 2 defines State Entities by listing the Nation (legal person in Colombia), sub-central authorities (Departments and municipalities), as well as de-centralised bodies, including enterprises with more than 50% of public share (unless they are in competition according to Article 14 Act 1150 2007). Legislative and judicial branches and independent bodies are also listed in Article 2-1-b.

Thus, in principle, whether the Statute applies or not depends on the body carrying out the contracting. Nonetheless, the Statute and other Acts provide for exceptions, and bodies that may be in principle within the Scope of the Statute are not. This is the case, for instance, of public enterprises in competition (Article 14 Act 1150 2007), utilities companies (Article 30 and ss Act 142 1994), and public bodies part to the health sector (Article 195-C Act 100 1993). The legal regime of these bodies is not homogeneous. However, as a rule, it is private law tamed by the Principles of the Administrative Function (which include publicity, efficiency, equality amongst other). It is also relevant to mention that authorities within the scope of the Statute are exempted for certain contract, such as emergency procurement to face catastrophes (see Article 66 of Act 1523 2012)

Contracts covered by the Statute are governed by civil and commercial rules (mainly part to the Civil and Commercial Code) except for matters regulated in the Statute (Article 13 Act 80). Therefore, the "Administrative" regulations of the Statute are complemented by private law rules.

The Statute deals mainly with capacity to contract, suspensions and debarments, exceptional clauses (unilateral modification, interpretation and termination, as well as "caducidad" a sanction), economic equilibrium of the contract, award procedures, null and void contracts, and principles of the contracting activity. Consequently, rules on interpretation of the contract and contract management are mainly governed by private law.

It is important to mention at this point that the exceptional clauses apply to works, public services, exploitation or concession of public goods. In these contracts, powers are included/implied and cannot be renounced. In supplies and services contracts, they may be included, and the authority must do so in the contract. They are forbidden in other contracts such as those concluded with international organisations, contracts between administrations, donation, leasing, amongst other.

It is important to mention that Colombia has a specialized jurisdiction for all disputes, including contract ones, where one of the parties is a public body. Therefore, a jurisdiction headed by the *Consejo de Estado* is judge to all public contracts. It is also judge of contracts governed by private law, as long as one party is owned, at least in 50% of its shares, by a public body.

Parties may request the nullity of the pre-contractual decisions, including the award, via the remedy of "nullity and reinstatement" (*nulidad y restablecimiento*). This is true for contracts within the Scope of the Statute since Judges understand that no administrative act may be issued by authorities whose contracts are governed by private law. In those contracts control is done via pre-contract liability under the remedy of direct reparation (*reparación directa*). In this point, it must be stated that there is no standstill period in Colombia unlike, for example, the EU. Moreover, there is a special remedy called contractual controversies (*controversias contractuales*) mainly for disputes arising out during the execution stage. This remedy allows judges to adopt all decisions that consider appropriate in the context of the contract. They may, for instance, declare the contract null and void, a breach of contract, order the reinstatement of the economic equilibrium, grant damages, etc.

Act 1508 2012 has a specific legal regime for PPP contracts. It contains special pre-contractual and performances rules for contracts concluded under such scheme. Everything not regulated for by the Act will be governed, successively, by the Statute and private law. In Colombia a PPP is a scheme to attract private capital to public ends. It is restricted to infrastructure projects, both social and productive infrastructure. This brings the scheme closer to the British PFIs. Moreover, a PPP may be concluded via several type of contracts. In practice they are "materialised" mainly through concession contracts. The PPP Act establishes, amongst other, certain pre-contractual special provisions, a special procedure for PPPs arising out of private initiative, forbids certain kind of modifications during certain moments of the contract, includes different methods of payments, etc.

As a conclusion to this section, it may be said that rules special to public contracts are mainly focused on the pre-contractual stage, and "legal density" is considerably lower during the performance stage. This means that private law is the main body of law that governs the execution of public contracts. This, needless to say it, has important exceptions such as the rules limiting modifications, and the special powers endowed to public authorities.

Case study 4: parties hold differing meanings as to the interpretation of an ambiguous term in the contract

4.1. Description of the case study

Contracting authority A undertakes a tendering procedure. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that A and B hold differing meanings as to the interpretation of an ambiguous term in the contract.

A dispute arises between A and B on the question whether the contract is to be performed by the parties in accordance with A's interpretation. If so, the result would be that B will suffer financial loss. In the event that the contract is to be performed according to B's interpretation, this would be detrimental to A.

4.2 General contract law: overview of the law on interpretation of contracts

The Statute, as mentioned in the preliminary remarks section, endows authorities with exceptional clauses in certain contracts.

1. If the contract is within the Scope of the Statute and the power arises from the law or was included in the contract, the first manner to resolve the dispute is via the power of unilateral interpretation by the authority. The power allows authorities to interpret the contract when no agreement could be reached, if the difference may give rise to the paralysation or creates a serious effect on the public service that is satisfied by the contract. Thus, the authority that drafted the contract is the first one in deciding, via an enforceable administrative decision, the sense that a contract clause shall have.

This power is granted because the authority is deemed to be acting pursuing public interests. Nonetheless, its use may give rise to compensation to contractors via claims for economic equilibrium of the contract. Thus, the power is granted to guarantee performance and the meeting of public needs but equated by economic compensation in order not to harm the contractor, who is defined as a collaborator of the administration in meeting those needs. Also, the contractor could challenge the administrative decision trying to obtain damages or reverse the decision if still possible.

2. In contracts where the power of unilateral modification cannot be used. Whether due to the type of contract (lease, or it was not included in supplies or services, etc) or as a consequence of the fact that there is no risk of paralysation or effects on the public service, the regular rules on interpretation apply. This means that the judge of the specialised administrative jurisdiction will decide based on the general rules on interpretation.

Article 28 Act 80 1993 says that the interpretation of rules on public contracts, relating to the award procedures and contract clauses, must consider the ends and principles of the Statute, as well as good faith, equality, and the equilibrium between rights and obligations. No more special rules exist to interpret public contracts. Consequently, authorities and judges must consult private law rules on contract interpretation.

In turn, Articles 1618 and ss of the Civil Code establish the rules on contract interpretation. The first rule, in Article 1618, reads that "clearly known the intention of the contracting parties, it will be privileged over the literal content of the words". Moreover, these articles also include rules such as

the "preference of the sense with effect" also known as the utile effect of clauses, that orders to privilege the interpretation that has effect over the ones that do not; interpretation according to the nature of the contract, which orders to interpret a clause in the framework of the type of contract that was concluded; the systematic interpretation of the contract, that mandates to interpret each clause in the sense that is more convenient to the contract as a whole, or by the practical application given to the clause by the parties; it also includes the rule according to which, if none of the former rules could be applied, the clause must be interpreted against the party that drafted them. This last rule, which applies only as a last resort formula of interpretation, implies that clauses are always interpreted against authorities who, as a rule, draft the contracts.

4.3 Application of general contract law to the case study

As mentioned, if the contract is one where the power to unilaterally interpret the contract exists, the contract must be performed in accordance with the authorities' interpretation. However, this may give rise to compensation if it breaks the economic balance against the contractor.

Judges assess whether a modification or interpretation alters the economic balance by reference to the tender submitted by the contractor (cost-structure) and, sometimes, it has even considered other tenders submitted during the award procedure.

The contractor, as said, could also challenge the decision that adopts a given interpretation. This may be used, for instance, if the contractor may demonstrate that the use of the power was not needed because no public service was at risk.

The author of this report is not aware of a generalised use of the power to unilaterally interpret the contract in practice.

For contracts where the power does not exist, or the grounds for using it are not met, the judge is the "natural" authority to settle the dispute (arbitration and other Alternative Dispute Resolution Mechanism exist as well).

Before the judge, the parties submit their own interpretation and, generally, use arguments based on the Articles of the Civil Code that were described above.

For the purposes of this project, it is considered important to highlight that during the award procedure authorities publish the specifications and a draft of the contract. During the award procedure tenderers or potential tenderers may comment and ask questions on the content of the specifications and the contract draft. It is very common for both contractors and authorities to use the interpretation given at that point by the authority as a way of support their own interpretation.

Judges do not accept the authorities' interpretation during the award procedure as a binding one. Nonetheless, it is considered important, it is submitted, since all tenderers submitted their proposal based on the common understanding that that will be the interpretation during performance. In that manner, an argument may be made in the sense that an impact of the competitive tendering may be perceived in this topic.

Unlike other jurisdictions, like Spain, the rule of interpretation-against-drafter is only a last resort method. Consequently, there are cases in which it is applied in practice, but generally the difference may be resolved before recurring to such rule.

Case study 5: Contract does not provide for a particular matter and may need supplementation with an additional term

5.1. Description of the case study

Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that the explicit terms of the contract do not provide for a particular matter.

A dispute arises between A and B on the question what should be the content of the additional term to be implied in the contract in order to deal with the matter not provided for in the contract.

5.2 General contract law: overview of the law on unilateral modification of contracts

As mentioned, unilateral powers, such as the power to unilaterally modify the contract exist in Colombia. Nonetheless, they exist only in certain contracts and may be used only under certain grounds. The author of this reports in practice has perceived a more regular use of this power, when compared to the power to unilaterally interpret the contract.

If the contract is one where these powers exist, the authority may use this power to avoid the paralysation or serious affectation of the public services that is being met with the contract. Article 16 of Act 80 1993 foresees that this power only may be used if the parties cannot reach an agreement.

5.3 Application of general contract law to the case study

As mentioned, alongside the power to unilaterally modify the contract, authorities are also endowed with the power to unilaterally modify the contract. However, such a power only exists for the contracts mentioned in the section on preliminary remarks and for the grounds mentioned in section 5.2.

If both requirements are met, it is submitted that authorities may unilaterally include the necessary modification, i.e., the addition or supplementation. Nonetheless, contractors will be entitled to receiving an economic compensation under economic equilibrium claims.

Moreover, it is important to point out that if the modifications alter the value of the contract in 20% or more of the original value of the contract, the contractor may “renounce” to continue executing the contract.

On the other hand, for all contracts where the power does not exist or the grounds for using it are not met, it is hard to guess the particular solution that will be given by judges. It is submitted that there is no general principle to deal with this situation, but there may be a case-by-case approach. This means that it depends on the “missing term”, the type of contract, the type of obligation, etc.

It is considered that things such as whether it is a per-item contract, or a global-priced contract may be regarded. The type of obligation such as results or means may be part to the judge analysis as well. Factual circumstances, such as whether there is an unforeseeable event that gave rise to the need of an additional term are also important. Nonetheless, once again, it is submitted that all legal and surrounding circumstance will be considered by judges in deciding these disputes.

Case study 6: Contracting authority invokes an allegedly unfair contract clause

6.1. Description of the case study

Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. Subsequently, A concludes a contract with B. In the course of the performance of the contract, A decides to invoke a particular contract clause. The consequences of this are, however, detrimental to B.

B argues that A cannot invoke the contract clause for reason that the clause is unfair. A dispute arises between A and B on the question whether A can invoke the contract clause.

6.2 General contract law: overview of the law on null and void clauses

In Colombia the Civil Code, inspired by the French Civil Code, reads that "every contract legally concluded is law to the contracting parties, and cannot be invalidated except by their consent or by legal causes".

Thus, only if the parties decide to modify the contract, or the judge declares a clause to be null and void, parties may invoke all contract clauses, even if detrimental to the other party. This statement does not consider the occurrence of unforeseen circumstances that may give rise to the application of the theory of l'imprevision in public law, or the supervening excessive burdensome doctrine (*excesiva onerosidad sobreviniente*) in private law.

The judge may declare a contract, or a clause, to be null and void, amongst other, in the following events: the consent was given in a vitiated manner (error, fraud, or force), illicit object, (civil code rules), as well as when the contractor was suspended or debarred, it was concluded against legal or constitutional prohibitions, it was concluded with deviation or abuse of power, or when the administrative acts in which it was founded were declared null as well (article 44 Act 80 1883).

6.3 Application of general contract law to the case study

A contractor may attempt to articulate its claims via an allegation of nullity of the clause that is invoked against it. However, if the clause is not null and void, unless both parties agree not to use it or invoke it, an authority may invoke it even if detrimental to the other party. In other words, a mere "detriment" to the contractor's interest of a clause, not null and void, is not enough to undermine its legal force.

This, in my opinion, does not respond to the interface between the competitive tendering and the performance of the contract, but simply to the understanding of contract law in Colombia. Judges may be willing to enforce a clause even if detrimental to one party's interest provided that is not null and void.

It is important to highlight that this answer is given only provided that no interpretation dispute exist and under the assumption that no unforeseen circumstance varied the contract performance.

In this matter, I consider important calling attention to *Liberty insurance company against IDU*[1] in which the *Consejo de Estado* decided on a dispute relating to a claim by the contractor in the sense that the authority modified the terms of the contract. This, it claimed, was so when comparing the draft uploaded with the specification and the contract signed by the parties. The contractor argued that it did not read the contract and signed thinking it was the same contract as publicised with the specifications during the award procedure. It also argued that the "*new version*" made the contract more onerous to be performed. The *Consejo de Estado* ruled that not reading the contract was no excuse for undermining the legal force of a contract and ruled out that there were significant differences that made the contract more difficult to be performed. This, in my view, demonstrates the willingness to enforce clauses even if "*detrimental*" to the contractor.

[1] Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Tercera, Subsección B, judgement of 28 April, 2021, exp. 52085.