

A photograph of a multi-story building under renovation. Scaffolding is erected around the facade, and four construction workers in orange safety vests are visible at different levels. The building has ornate architectural details and large windows. The sky is clear and blue.

INFRASTRUCTURE AREA BULLETIN

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POSSE | HERRERA | RUIZ

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BULLETIN:

INFRASTRUCTURE area

1. New Business Opportunities

La Dorada Chiriguaná Public Works.

The ANI published on April 3 the final specifications of the public works project of the La Dorada - Chiriguaná corridor, which will guarantee the operation of the railway corridor for 12 months, in such a way that it is compatible with the current structuring process and award of the railway concession on the same route. Interested parties may submit their offer until May 12.

IP Gustavo Rojas Pinilla Airport in San Andrés

This project, which is included within those called 5G, and which is a Private-Initiative PPP, seeks to intervene and modernize the existing infrastructure, thus reaching the domestic and international standards recommended by the International Civil Aviation Organization (ICAO), the Airport Design Reference Manual of the International Air Transport Association (IATA) as well as the Colombian Aeronautical Regulations (RAC).

The project originator is the Consorcio Infraestructura Colombia Grupo APPS SP Ingenieros and has a CAPEX of \$0.29 trillion COP (\$64 million USD approximately). Currently, the feasibility of the project is being studied by the competent authorities and it is expected to be approved in June 2023.

2. Projects of interest

IP P Caño Alegre – Water Route.

This Private Initiative that continues under review of its Feasibility Stage by the ANI, whose originator is the Ruta del Agua Plural Structure, made up by MHC, Concreto S.A., Castro Tcherassi S.A. – Procopal S.A. The purpose of the Project is to intervene more than 135 kilometers of road, connecting eastern Antioquia with the center of the country. It is expected that the selection process for expression of interest from third parties will open in May.

IP Rafael Núñez Airport– Cartagena. .

It is currently in the process of public call for expression of interest by the ANI; the respective expressions of interest are expected to be received, according to the schedule, on May 19 of this year.



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Bogotá metro - Line 2.

The flagship project of the city's government, which will seek to connect the east and west of the city with an underground train, received the counter-guarantee from the Nation at the beginning of April, which will, in turn, allow it to obtain the necessary credits for financing of the project. It is expected that, with this progress, the Metro de Bogotá Company will begin the contracting process by the month of May 2023.

13th Street Trunk Road

The project is divided into four bidding processes. The first and second processes that correspond to sections 1, 2 and 3 have already been awarded. On the other hand, the third process that corresponds to sections 3 and 4 was declared deserted since no offers were received. Finally, for the process for section 5, an abbreviated selection process is expected to be opened in the month of May, once the land availability to execute it is achieved.

Seventh Avenue Green Corridor

The intervention project proposed to modernize, redistribute traffic and impact the mobility of one of the main road corridors of the capital continues its course. Despite delays in the opening of the bidding process, due to different objections from the public and some entities, the Urban Development Institute proposes the opening of the bidding process in May 2023, which will have investments of more than 2.5 trillion pesos, which will seek to remodel transportation and the experience of around 22 kilometers of roads.

3. Legal issues of interest

Concept C-926 of 2022 Colombia Compra Eficiente - Score for disability

In a recent pronouncement, Colombia Compra Eficiente studied, among other issues, the granting of additional points for people with disabilities and their accreditation through format 8 of the standard documents.

In the first instance, it indicated that Statutory Law 1618 of 2013 ordered the national government to issue a regulation tending to determine the granting of additional points to companies whose plant had disabled personnel, which was materialized through Decree 392 of 2018, regulating the duty of state entities to grant it in the public bidding and merit contest processes. The foregoing, in the sense of awarding 1% of the total points established to the bidder who submit the list of workers with disabilities, in accordance with two requirements, namely: (1) certification of the total number of workers enrolled on the closing date, issued by the natural person, legal representative or external auditor of the legal person, making clear that, in the case of plural structures, this requirement must be accredited by the member who contributes more than 40% of the experience; and (2) certificate issued by the Ministry of Labor certifying the minimum number of people with disabilities.



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However, Colombia Compra Eficiente specified that since the aforementioned requirements apply to merit contests and public tenders, then they also apply to tenders for public transport infrastructure works that are handled with Model Documents, which provide for the accreditation of the minimum number of people with disabilities through: (1) "Form 8 - Enrollment of people with disabilities" in which the total number of workers enrolled is certified, signed by the natural person, legal representative or fiscal auditor of the legal entity; and (2) the certificate issued by the Ministry of Labor that accredits the minimum number of people with disabilities in the plant. Therefore, for this type of process, the way of accrediting the first requirement provided for in Decree 392 was standardized.

The Concept indicates that the required documents constitute a legal proof fee to demonstrate the capacity alleged and, consequently, to be able to become the bidder that has earned the score, so that it is up to him to present them in due form along with their respective supports. Therefore, entities must refrain from requesting documents additional to those determined by the legislator. However, the Contracting Agency pointed out that, in the event that there are differences between the documents with which the requirement is accredited, the entity has the power to request clarifications, power that it can exercise from the moment of closing and even before of the award.

Ruling 62400 of 2023 Council of State – Waiver of claims at the time of signing contractual modifications

In a judgment dated January 26, 2023, Subsection B of the Third Section of the Administrative Litigation Chamber of the Council of State, within the framework of file 62,400, studied a claim for contractual disputes that revolved around the discussion on the occurrence of an economic imbalance affecting the plaintiff contractor on the occasion of different situations that led to increased transportation, labor and machinery costs for the execution of the contract; as well as the longer permanence due to the time of suspension of the contract and the definition of the liquidation of the contract.

When carrying out the analysis of what happened, the aforementioned Court concluded that there was no doubt that in all the suspension proceedings, in the extensions and in the additions to the contract, the contractor expressly and in a free and autonomous manner, to file a judicial or extrajudicial claim on account of higher costs (this being a freely available right or interest).

The foregoing – the Council of State pointed out – constituted a conscious and voluntary determination (since there was no evidence to the contrary in the file) that led to the impossibility of the plaintiff to seek acknowledgement of financial damages derived from the facts that originated the aforementioned suspensions and extensions. In this way, the Chamber specified that the waiver to file a claim, whether judicial or extrajudicial, contained in the aforementioned contractual documents, has a binding effect, and therefore there was no reason to invalidate the will of the parties. The foregoing, also taking into account that article 5 of Law 80 of 1993 expressly prohibited the contracting entities from conditioning the additions or extensions of the contracts to the waiver of filing claims for such issues..

Concept C-907 de 2023 Colombia Compra Eficiente – Document

Concept C-907 of January 5, 2023 of the Colombia Compra Eficiente Agency indicated that Law 1882 of 2018, in particular, is the close precedent of the issuance of standard documents with mandatory scope, since based on it, the obligation for all entities subject to the General Contracting Statute of the Public Administration (EGCAP) to apply the standard documents adopted by the national government was determined, under the following criteria :

- The adoption of the standard documents was a duty of the National Government;
- The standard documents had to be related to public works processes, auditing for public works, auditing for study and design consultancy; and consultancy in engineering for works;
- They were mandatory for all entities subject to EGCAP;
- They would indicate the general conditions of the qualifying requirements, as well as the technical and economic factors of choice, as appropriate for each selection modality;
- The National Government had the power to adopt standard documents in other contracts or selection processes; and
- The standard documents would be adopted by categories according to the amount of the contract.

However, later, in Law 2022 of 2020, the power to adopt the standard documents was directly assigned to the National Agency for Public Procurement - Colombia Compra Eficiente.

Thus, according to this, the standard documents adopted are mandatory for state entities whose contracts are governed by the EGCAP, which carry out contracting processes through the modality established by the standard documents for each sector and taking into account the scope of application determined in the experience matrix of each standard document.

Finally, it pointed out that the standard documents are made up of a main document called "Standard Specifications" or "Base Document" that constitutes their backbone, which is accompanied by the following documents :

- Annexes: which include the particular aspects of the work, without it being possible to include aspects contrary to the standard documents.
- Formats: which are documents that the bidder must complete and that are part of his offer.
- Matrixes: these are documents that the entity must include within the Process Documents according to the sector in which the public work is carried out.
- Official Budget Form: which contains three forms, namely: one in which the Entity structures the Official Budget of the Procurement Process; another, in which the bidder prepares the economic proposal; and the third, in which the contractor, at the start of the execution, submits the analysis of the unit prices to the auditor of the Contract.



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Concept C-865 of 2022 Colombia Compra Eficiente - Differential enabling requirements for women's ventures and companies

Concept C-865 of 2022, Colombia Compra Eficiente outlined that Law 2069, whereby entrepreneurship is promoted in the country, was enacted in 2020. The purpose of this law is to establish a regulatory framework that promotes entrepreneurship, growth, consolidation and sustainability of companies with the aim of increasing social wellbeing and generating equity.

Thus, under said framework, and particularly with regard to women's ventures and companies, said law provided for differential criteria (which include differential requirements and additional scores) for women's ventures and companies in the public procurement system, contained in article 32 thereof.

In this way, and in accordance with the law, said criteria are applicable to the processes of public bidding, abbreviated selection of minor amount and merit contest, ruling out the other selection modalities of article 2 of Law 1150 of 2007; without prejudice to extending to all competitive procedures carried out by state entities not subject to Law 80 of 1993.

Thus, the aforementioned article 32 was developed by Decree 1860 of 2021, whereby the possibility of differential qualifying requirements was established, to encourage women's ventures and companies, less rigorous than those of other bidders. In this way, for the purposes of the qualifying requirements provided for in the specifications, they may be less demanding for women-owned enterprises and companies, namely the following: i) experience time, ii) number of contracts for accreditation of experience, iii) financial capacity indicators, iv) organizational capacity indices and v) value of the offer's bid bond.

In addition, in relation to the score, said regulatory body provides for the granting of an additional score of up to zero point twenty-five percent (0.25%) of the total value of the points established in the specifications or equivalent document, to the proponents who prove to be a women's or company.

Concept C – 080 of 2022 Colombia Compra Eficiente – Special Regime Entities and considerations on their contracting manuals

Regarding March 17, 2022, the Public Procurement Agency referred to a matter widely dealt with by the jurisprudence and literature, thus reiterating certain important considerations regarding the so-called special regime entities. However, the Concept, after reiterating that such a regime assumes that the entities subject to it are not subject to the contractual procedures provided in the public procurement regulations, and that they are governed by private law, proceeds to highlight some considerations on the element of application of civil and commercial regulations in such entities to their processes, which are worth reviewing.


The first is that, even though the legal regime applicable to the contractual procedures of special regime entities is that of private law, they are not oblivious to observing and applying some criteria developed in public law regulations. Thus, and as provided by Law 1150 of 2007, special regime entities are subject to fiscal control, insofar as the resources that they manage are public resources.

Additionally, and more important for the purposes of this review, is that special regime entities must apply in their contractual procedures the guiding principles of state contracting, described in Law 80 of 1993. Colombia Compra Eficiente conceptualizes that the ideal way that such entities meet this objective is through the issuance of their own contracting manuals incorporating such principles.

Thus, in accordance with the principles of transparency and economy, provided for in article 23 of the Public Contracting Statute, the contracting manuals must clearly establish criteria that allow citizens to know: What are the selection procedures of the entity? What are the criteria to apply one or the other? What stages should be applied to the processes? What are the evaluation and tie-breaking criteria? etc. In this regard, the foregoing recognizes that special regime entities continue to be directly affected by public law considerations, which permeate their procedures, and assign the responsibility to their governing bodies to reconcile public and private law.

Regarding this matter is concerned, they close the concept by making a fundamental clarification, consisting of the fact that the contracting manuals are administrative acts, a unilateral manifestation that has a vocation of permanence in time, deploying its effects indefinitely towards the future that is not exhausted with a single application. Because of this, the rules established in such manuals are mandatory for these entities, and since it is an administrative act, the attributes of these legal concepts apply to it, that is: 1. they are presumed to be lawful, 2. the singular non-repealability rule applies to it, since it is binding for the entity itself and its officials cannot ignore it at their whim.

For these reasons, the necessary legal obligation to issue and abide by the considerations of the manuals is concluded, but, in addition, its legal nature that displays several implications on its observance and enforceability.



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This newsletter is informative. It cannot be construed as legal advice nor does it represent the firm's position on the issues discussed.

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