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Legal Briefing | Latin America

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Types of contracts with the state of Ecuador

1. INTRODUCTION:

As in most Latin American countries, individuals who enter into contracts with the State of Ecuador are subject to administrative law, a division of public law influenced by Europe's mainland. This legal system requires strict submission to the law for any action carried out by public officers; this is known as the principle of legality. Greater focus is placed on this principle when public funds under contracts are managed. Consequently, any action subject to public law and that is not consistent with the procedures established in the law are deemed to be unlawful.

Though acting on a supplementary basis, civil law institutions are an important element for contract application or interpretation.

For regular contracts with the public sector, internal regulations require the identification of the natural persons who own the shares in the companies, except when the company is listed on the stock exchange. Furthermore, in this type of contract, companies incorporated in Ecuador must prove they have at least 3 years of existence when the referential budget of the contract exceeds US\$500,000.00

Unconscionable clauses siding with the State must be included in all contracts that the State executes for safeguarding its interests. The key clauses stipulate the State's right to unilaterally terminate the contract in advance, the State's right to unilaterally impose fines, the contractor's obligation to submit guaranties, and so on.

Provided below is a brief description of the four main types of contracts with the State of Ecuador, including dispute resolution and examples.

2. TYPES OF CONTRACTS IN ECUADOR

a. Typical contracts for the procurement of goods and services, execution of works, and

consultancy.

- Description:

The purpose of these contracts is to satisfy social and institutional needs. The contracts are executed by public-sector entities, including all municipalities and state/private companies with public funds representing more than 50% of their capital stock. In general, participants or bidders may be individuals or legal persons, whether national or foreign.

- Award:

In the case of a bidding process, the awarding process includes two filters:

1. First, only tenders meeting the technical specifications are selected;
2. Out of those tenders, the one with the lowest prices is chosen.

For selecting the lowest-priced tender, the Law provides certain alternatives depending on the contract price and type; i.e., one option is called “inverse auction,” which implies that the tenders complying with the technical specifications will participate in a virtual price bidding. The winner is the tender with the lowest-priced tender.

- Dispute Resolution

- When the pre-contractual bases establish the possibility of stipulating national or regional arbitration, the arbitration must be approved by the Ecuadorian Attorney General to be valid.
- Otherwise, the local justice system must be used for litigating with the public entity.

- Examples:

- Bridge- or road-building contracts with the Ministry of Transportation and Public Works.
- Machinery (goods) purchased by municipalities for road maintenance.
- Consultancy contracts for hydroelectric project designs.

b. Investment Contracts

- Description:

- The purpose of this type of contract is to encourage new and productive investments, whether national or foreign, in activities carried out by the country’s private sector. In turn, the State guarantees the ownership rights and tax stability established in the contract.
- These contracts are not part of the classic state contracts. But as they are signed with the State for economic activities in the private sector, the State assumes direct obligations contained in a contract.

- Incentives:

- Deduction of certain expenses.
- Benefits and exemptions from foreign trade taxes, inter alia.

Investment contracts apply to two prioritized sectors:

1. For generating added value; i.e., petrochemicals, metallurgy, energy, tourism, biotechnology and applied software, and pharmaceuticals, among others.
2. For replacing imports; i.e., basic chemicals, pesticides, agricultural products, among others.

- **Award:**

These contracts are not subjected to a bidding process, but rather interested parties must state their intention and comply with legal requirements. The investment contract is negotiated and signed.

- **Example:**

Investment by an international company for producing an acid for detergent production.

- **Dispute Resolution**

- National or international arbitration must be stipulated for this type of contract.

c. Concession Contracts

- **Description:**

The private sector's participation in strategic sectors and public services can be delegated by contract under a restricted system. Only in exceptional cases when the State cannot directly carry out activities may these contracts be performed by the private sector.

- **Award:**

The election of the concessionaire is subject to a public tendering process and to the conditions of a contract prepared in advance that will govern in the pre-contractual and contractual stages. The winning bid is the one that complies with the specifications and is the lowest priced.

- **Examples:**

- Radio spectrum contracts by cellular telephony companies.
- Petroleum-sector field exploration and production contracts.
- Concession contracts for road maintenance and toll collection.

d. Public-Private Partnerships

- **Description:**

- A partnership (under a contract) between one or more public-sector entities and a private manager. In return, the private manager receives incentives similar to those granted under investment contracts. One of the primary purposes of this type of contract is to promote productive financing, domestic investment, and foreign investment in the provision of goods, works, or services by the Central Government and Decentralized Autonomous Governments.

- The private manager and public-sector entities may participate together in trusts or state/private companies. The delegation contract must include the terms and conditions.

- A private party may propose and present public projects.

- **Award:**

The private manager is selected through a public bidding process. The delegating entity draws up the administrative, technical, and economic-financial bases, defines the contractual terms and conditions that will govern the contract, and establishes the procedure and relationship between the delegating entity and the delegate.

- **Examples:**

- Infrastructure, urban development, and real estate projects.
- Port and airport projects.
- Partnerships for public services: electricity, roadways, and so on.
- Partnerships for the operation and maintenance of public works, construction, and commercialization of real estate projects, social housing, and urban development works.

- Dispute Resolution

- National or international arbitration can be stipulated for this type of contract.
- Otherwise, the local justice system must be used for litigating with the public entity.

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