Received: Jan. 20, 2019
Accepted: Mar. 28, 2019

PENSAMIENTO AMERICANO

Cientific magazine

The administration of risks in hiring for rendering professional services in Colombia according to Law 1150 of 2007*

La administración de los riesgos en la contratación por prestación de servicios profesionales en Colombia según la Ley 1150 de 2007

A administração dos riscos na contratação por prestação de serviços profissionais na Colômbia, segundo a lei 1150 de 2007

DOI: https://doi.org/10.21803/pensam.v12i24.309

Leidy Viviana López Bedoya
https://orcid.org/ORCID: 0000-0003-2955-5707

Katherene Lorena Guerrero Morales
https://orcid.org/ 0000-0002-2624-675X

Abstract

This article describes the figure of previous studies as a preliminary stage for state contracting processes from a doctrinal and jurisprudential perspective that provides a characterization that serves as a reference to understand its importance in contracting for the provision of professional services. Analyze the implications of the administration of risks in hiring for rendering professional services in Colombia according to Law 1150 of 2007. Through a documentary tracking, we seek to solve the problem posed by means of the bibliographic identification of sources of doctrinal, normative and jurisprudent nature around the subject matter of the study; approach that is carried out from a qualitative approach of a descriptive type, with a non-experimental study design. It is possible to show that the contracts for the provision of professional services in Colombia that are governed by Law 1150 of 2007 do not have an adequate risk management, due to the lack of foresight in their estimation, classification and assignment in the pre-contractual stage of the previous studies. State contracting for the rendering of professional services must be governed by the principles of efficiency and transparency, which must be of permanent application, even from the same pre-contractual stage.

Keywords: risk management, hiring, rendering of professional services, estimation, classification and assignment of risks, pre-contractual stage, transparency.

Resumen

En este artículo se describe la figura de los estudios previos como etapa preliminar para los procesos de contratación estatal desde una óptica doctrinal y jurisprudencial que procure una caracterización que sirva de referente para comprender su importancia en la contratación por prestación de servicios profesionales. Debe analizarse las implicaciones de la administración de los riesgos en la contratación por prestación de servicios profesionales en Colombia según la Ley 1150 de 2007. A través de un rastreo documental se busca resolver el problema planteado mediante la identificación bibliográfica de fuentes de carácter doctrinal, normativo y jurisprudencia en torno al tema objeto de estudio; abordaje que se realiza desde un enfoque cualitativo de tipo descriptivo, con un diseño de estudio no experimental. Se logra evidenciar que los contratos

How to cite this article?

López, L. & Guerrero, K. (2019). The administration of risks in hiring for rendering professional services in Colombia according to Law 1150 of 2007. *Pensamiento Americano*, 12(24), 54-68.
DOI: https://doi.org/10.21803/pensam.v12i24.309

* Original article derived from the research project "THE MANAGEMENT OF RISKS IN THE CONTRACTING FOR THE PROVISION OF PROFESSIONAL SERVICES IN COLOMBIA ACCORDING TO LAW 1150 OF 2007" carried out between the years 2018-2019 as a project to qualify for the master's degree in State Contracting of the University of Medellin.

de prestación de servicios profesionales en Colombia que se rigen bajo la Ley 1150 de 2007 no poseen una adecuada administración de los riesgos, debido a la falta de previsión en su estimación, tipificación y asignación en la etapa precontractual de los estudios previos. La contratación estatal por prestación de servicios profesionales debe estar regida por los principios de eficiencia y transparencia, los cuales deben ser de permanente aplicación, aun desde la misma etapa precontractual.

Palabras Claves: administración de los riesgos, contratación, prestación de servicios profesionales, estimación, tipificación y asignación de los riesgos, etapa precontractual, transparencia.

Resumo

Neste artigo se descreve a figura dos estudos prévios como etapa preliminar para os processos de contratação estatal desde uma ótica doutrinal e jurisprudencial que procure uma caracterização que sirva como referente para compreender a sua importância na contratação por prestação de serviços profissionais. Deve-se analisar as implicações da administração dos riscos à contratação por prestação de serviços profissionais na Colômbia, segundo a lei 1150 de 2007. Mediante um rastreamento documental, busca-se resolver o problema posto diante da identificação bibliográfica de fontes de caráter doutrinal, normativo e a jurisprudência sobre o tema objeto de estudo; a abordagem realizada foi baseada em um enfoque qualitativo, de tipo descritiva, e não experimental. Evidenciou-se que os contratos de prestação de serviços profissionais na Colômbia regidos pela lei 1150 de 2007 não possuem uma adequada administração dos riscos devido à falta de previsão na estimativa, tipificação e designação na etapa pré-contratual dos estudos prévios. A contratação estatal por prestação de serviços profissionais deve estar regida pelos princípios de eficiência e transparência, os quais devem ser de aplicação permanente, desde a mesma etapa pré-contratual.

Palavras-chave: : administração dos riscos, contratação, prestação de serviços profissionais, estimativa, tipificação e designação dos riscos, etapa pré-contratual, transparência.

Profile

Specialist in State Contracting from the Universidad Medellín; Master's degree in State Contracting from the University of Medellín.
E-mail: leidy.abogada@outlook.com. leidy.abogada@outlook.com

Leidy Viviana López Bedoya
Lawyer

Profile

Specialist in State Contracting and Administrative Law from the University of Medellín; Master's degree in State Contracting from the University of Medellín.
E-mail: katherin46.32@hotmail.com.

Katherene Lorena Guerrero Morales
Lawyer

Introduction

In Colombia, the legislator has had the purpose of harmonizing the demands of the dynamics of how the state apparatus works, and for this it has made use of different legal instruments, which have been appropriate for the interests of the State, based on legal and legitimate foundations. for its interpretation and application within the framework of state contracting.

Precisely, as stated by the Constitutional Court through Sentence C-154 of 1997, when referring to the concept of autonomy of the will of the State to contract, it is referring to a function that is expressly regulated in the law, which means that the contracting must adhere to the existing legal provisions on the matter in order to achieve the purposes of the State.

This search is determined, to a great extent, by the scope of the autonomy of the administrative will, which, according to the Constitutional Court, is limited by the rules of public law; and add:

> The decision to contract or not to do so is not an absolutely free option but depends on the needs of the service; in the same way, the decision of who to contract must correspond to an objective selection process of the contractor, in all the events foreseen in the law; Nor can they understand the exercise of permanent public functions, so that the legal relationship with the contractor is totally different from the one that arises from the provision of services derived from the employment relationship and from the elements of the employment contract. . The stipulations on the price, the term and the general conditions of the contract cannot be agreed in a capricious way since they must adjust to the nature and purpose of the contract and those that are most convenient for the state entity (Constitutional Court, Full Chamber, C- 154 of 1997).

In Colombia, the regulatory provisions on state contracting establish the obligation to carry out a study of the different risks to avoid that these processes are paralyzed and that claims occur during the execution of the contract, aspects that are based on articles 3, 4, 15, 17 (numeral 2) and 159 of Law 1150 of 2007, article 17 of Decree 1510 of 2013, article 2.2.1.1.1.6.3. of Decree 1082 of 2015 and Decrees 4170 of 2011 and 2157 of 2017. However, the Colombian legislator does not explicitly address the different methodological rules for their distribution, which means that the provisions remain under the authority of the parties, making it necessary to establish them, a situation that implies a high probability of affecting the conditions of the contract.

In this regard, the application of methodologies for the estimation, classification and allocation of risks in state contracting processes in Colombia implies the application of a series of principles and factors that start from the preservation of the commutativity of the contract and lead to the emergence, on the part of the State, of abnormal risks; For this reason, it is necessary to take into account what is stated in article 4 of Law 1150 of 2007, which establishes that the State Entity must "include the estimation, classification and assignment of the foreseeable risks involved in the contracting", in the specifications and in their previous studies or its equivalent, which allow

(i) provide a higher level of certainty and knowledge for making decisions related to the Procurement Process, (ii) improve contingency planning of the Contracting Process,

(iii) increase the degree of trust between the parties of the Contracting Process, (iv) reduce the possibility of litigation; among others; This makes it necessary to carry out balanced risk negotiation processes, develop new agreements through the renegotiation of contracts; make arithmetic compensation for the risks assumed, as well as the transferable risks that exceed the estimated consequences.

In view of the above, it is necessary to structure a Risk management system taking into account, among others, the following aspects: (a) the events that prevent the award and signing of the contract as a result of the Contracting Process; (b) the events that alter the performance of the contract; (c) the economic balance of the contract; (d) the effectiveness of the Contracting Process, that is, that the State Entity can satisfy the need that motivated the Contracting Process; and (e) the reputation and legitimacy of the State Entity in charge of providing the good or service.

The issue of the provision of services has generated important judicial debates, especially in the framework of administrative contracting, and this is due to the fact that even today there are certain vicissitudes that do not allow a clear characterization of this contractual figure to be established, since by its nature and characteristics, there is a tendency to contract with the minimum of demands in the pre-contractual stage of the previous studies.

State of the art

When carrying out an identification of the different studies and publications that have been developed around the topic proposed here, some studies carried out on the topic could be identified in various databases of indexed journals and in catalogs of various libraries in the city of Medellín. of the estimation, classification and assignment of the foreseeable risks involved in administrative contracting in Colombia, which are set out below, following a chronological order.

For Fonseca (2002), the issue of risks in state contracting in public works has become a controversial issue around which different positions have been established: on the one hand, there are those who state that the State has the power to maintain the economic equilibrium for the duration of the contract, and on the other hand there are those who advocate the reduction of the maintenance of economic equilibrium. Faced with these positions, this author proposes a formula to destroy the risks based on a structured interpretation of Law 80 of 1993 and other complementary regulatory provisions and adds that all risks cannot be transferred to the contractor and, therefore, not there is a mechanism that allows determining the value of the risks within the contract price; therefore, if the economic equilibrium is broken, the contractor must be guaranteed remuneration for his work. Fandiño (2011), on the other hand, points out that the General Contracting Statute in Colombia allows studies to be carried out to assess the risks of a contract and thus avoid that these are paralyzed or claims are presented during its execution process; However, said statute, says the author, did not take into account the establishment of methodological rules, leaving the issue of risk distribution in the hands of the contracting entity and the contracting entity, which clearly affects the economy of the contract.

Therefore, it insists on the need for clear me-

thodological rules to be established in Colombia for the distribution of risks, especially in construction and road infrastructure contracts, but there must also be guidelines that allow determining abnormal risks that allow negotiate in a balanced way the risks that seek the renegotiation of the contracts and that allow an arithmetic compensation when the transferable risks exceed the estimated consequences; These rules would avoid the imposition of onerous charges for any of the parties to the contract.

Sánchez (2011), without having as a main reference the issue of risks in state contracting, addresses the different elements that are part of the contractor selection processes, for this reason he invites state entities and contractors to make the topic risk is relegated to the background, since by selecting suitable contractors, risks inherent in choosing an unsuitable contractor would be avoided. The author adds that an inadequate planning of the selection process gives rise to a greater presence of future risks, characterized by litigation processes initiated by either party.

De Vega (2012), states in his article on the distribution of risks in the state contract in Colombia that a risk of a contractual nature is any random event that affects the execution of a contract, which generates an impact on its result, both in terms of matter of costs as in the income; That is why there is an obligation that in every state contract the contractual risks are typified, quantified and assigned, but at the same time that the non-contractual risks are determined, since not all uncertainty is a contract risk; thus, business risks, failure to comply with one of the parties and the protections contemplated in the compliance policies can be determined as contractual risks. In state contracting, it is necessary to consider that the equivalence of benefits, contrary to what can happen in civil law, as prescribed by article 1498 of said codification, where one of the parties considers as equivalent to what the Another party is obliged to give or do, assuming an uncertain profit or loss contingency is an equivalence in an objective or material sense. Thus, the state contract cannot be subject, since public and general interests are involved, to uncertain contingencies, since it is not possible to know what the economic destiny of the parties to the contractual relationship will be.

Quiñones (2013) seeks to verify the application of the estimation, classification and assignment of foreseeable risks, based on the study of the Conditions of Public Companies of Medellín (EPM) and the National Highway Institute (INVIAS), through the analysis of the antecedents of Law 1150 of 2007, jurisprudence and doctrine, clearly differentiating it from unforeseeable risks. It is taught how the application of foreseeable risks in the contractual stage in its initial stage presented drawbacks, given the excesses in the prerogatives of state entities, but such obstacles have been overcoming, to approach the end of them to achieve a better contractual equation that avoids future controversies.

Ospina (2017), evidences and evaluates the effectiveness of state entities in the allocation of risks in public procurement, considering the classification, estimation and mainly the allocation, in accordance with the provisions of article 4 of Law 1150 of 2007 and Conpes 3714 of 2011, which refers to foreseeable risks in public procurement in Colombia. For the author, the different state entities are not complying with an adequate distribution of risks in the specifications and there is no effective application of Conpes 3714, hence there is no correct application of the foreseeable risks in public procurement of the country.

Cardona and Ortiz (2017), when referring to the risks derived from public infrastructure projects, especially those of a road nature, point out that in this type of contracts there is a high degree of uncertainty, due to the characteristics, scope and magnitude of this class of works, which are generally affected by different risks, both in the structuring of contracts and in their execution and maintenance; That is why the Colombian legislator issued Law 1508 of 2012 and the different Conpes documents on risk estimation, through which a regulatory framework was established for the structuring of Public Private Associations (PPP), seeking that the different parts of a contract take risks according to your ability and role. The authors add that the determination of risks in fourth-generation road PPP schemes must not be presented over costs, much less time-consuming, and transparency and trust should always be advocated in such a way that with this, the structuring and financing of this type of public-private initiatives is increased and consolidated.

Finally, Cadena and Almeciga (2018) present an investigation that consists of developing a model that allows evaluating the existing technical risk regarding non-compliance in the execution of a public work, finding the probability of completion within the budget initially estimated in the formulation of the project. engineering.

Risks in state contracting of professional services in Colombia

State contracting is one of the most valuable tools that public entities have to fulfill their constitutional and legal purposes. Given this circumstance, it is necessary to identify the limitations to the actions of the administration, as a contracting entity and, in order to fulfill this task, it is legislated on state contracting, to avoid corruption and violation of the principle of legality with capricious and arbitrary actions by the administration; Hence, prior measures are established that imply planning and peremptory nature of the contractual object.

Law 1150 of 2007, substantially modified Law 80 of 1993, on state contracting; One of the changes that it introduced was the consecration in its article 4 of the foreseeable risks of the contract, which must be part of the previous stage of contracting and enjoy a special audience, for their classification, estimation and assignment; To regulate the matter, the national government has issued different provisions; In this sense, Decree 734 of 2012 stands out, in which article 2.1.2. reference was made to the determination of foreseeable risks in the following terms:

> For the purposes provided for in article 4 of Law 1150 of 2007, risks involved in contracting are understood to be all those circumstances that, if they arise during the development and execution of the contract, have the potential to alter the economic balance of the contract, but which Given their predictability, they are regulated within the framework of the conditions initially agreed in the contracts and are thus excluded from the concept.
>
> The unpredictability referred to in article 27 of Law 80 of 1993. The risk will be foreseeable to the extent that it is identifiable and quantifiable under normal conditions (...) (Presidency of the Republic, Decree 734 of 2012, art. 2.1. two.).

This provision was later repealed by Decree 1510 of 2013, in which article 39 establishes the conditions for the development of bidding hearings.

At the tender selection stage, the following are mandatory hearings: a) risk allocation, and b) award. If at the request of an interested party it is necessary to hold a hearing to specify the content and scope of the specifications, this issue will be dealt with in the risk allocation hearing (Presidency of the Republic, Decree 1510 of 2013, article 39).

In accordance with the regulations in question, when the hearing to assign risks is held, the state entity is in charge of analyzing them and assigning the respective risks.

For its part, the contract for the provision of professional services, in accordance with the provisions of paragraph 3 of article 32 of Law 80 of 1993, refers to a public contract entered into with the State for the development of an activity related to the operation of a state entity, which is held with a natural person, when the contracted activity requires specialized knowledge or cannot be carried out with plant personnel.

The principle of objective selection in the hiring that is carried out in the hiring for the provision of professional services in Colombia is presented as the main instrument of efficiency and transparency in contracting. Article 5 of Law 1150 of 2007 defines it as follows:

> The selection in which the choice is made to the most favorable offer to the entity and the purposes it seeks is objective, without taking into consideration factors of affection or interest and, in general, any kind of subjective motivation (Congress of the Republic, Law 1150 of 2007, art. 5).

However, its consecration is not new, since article 29 of Law 80 of 1993, which was repealed by article 5 of Law 1150 of 2007, referred to it. However, the virtue of the reform in this aspect has to do with the reformulation that Law 1150 makes of this principle, in the sense of overcoming the existing confusion in Law 80 between the conditions related to the proponent and those referring to the offer, which did not give objective elements to assign greater importance to one or the other when selecting the contractor.

> In this way, it was optional for the entity to give a score to circumstances related to the proposer, which, in the worst case, allowed the directing of the processes towards a specific proposer or towards a group of them, with evident damage to the transparency that should preside over the process. Even if legal permission was not used in that way, the entity could still end up acquiring the worst or most expensive product, simply because it was concentrating on evaluating the "best bidder." What the administration acquires is [sic] goods, works or services and not proponents (Suárez, 2006, p. 61).

This situation wanted to be corrected by Law 1150 of 2007, in whose statement of reasons and regarding the principle of objective selection it was said:

> The cornerstone of the project's commitment to achieving the concurrent objectives of efficiency and transparency is found in the reformulation of the content of the duty of objective selection so that the evaluation of the offers concentrates on technical and economic aspects. , so that the bidder's conditions (administrative, operational, financial capacity and experience) are not subject to evaluation, but rather to verification of compliance; that is, they become qualification requirements to participate in the process ("pass, no pass") and consequently the evaluation of the offers concentrates on the technical and economic

aspects (Benavides, 2009, p. 31).

Thus, the aforementioned article 5 of Law 1150 of 2007 establishes that for the realization of this principle "the selection and qualification factors established by the entities in the specifications or their equivalents" must take into consideration the following specific criteria:

> 1. The legal capacity and the conditions of experience, financial and organizational capacity of the bidders will be subject to verification of compliance as qualifying requirements for participation in the selection process and will not award a score, with the exception of the provisions of paragraph 4 of this article. (...).
>
> 2. The most favorable offer will be the one that, taking into account the technical and economic factors of choice and the precise and detailed weighting thereof, contained in the specifications or their equivalents, turns out to be the most advantageous for the entity, without Favorability is constituted by factors other than those contained in said documents. (...).
>
> 3. Without prejudice to the provisions of paragraph 1 of this article, in the specifications for contracts whose object is the acquisition or supply of goods and services with uniform technical characteristics and common use, state entities will include as the only evaluation factor the lowest price offered. 4. In the processes for the selection of consultants, qualification factors will be used to assess the technical aspects of the offer or project. In accordance with the conditions indicated in the regulations, specific experience criteria of the bidder and the work team may be used in the field in question.
>
> In no case may the price be included as a factor of choice for the selection of consultants (...) (Congress of the Republic, Law 1150 of 2007, art. 5).

Exposed the antecedents that gave rise to Law 1150 of 2007, and more specifically to article 4, which established that "the specifications or their equivalents must include the estimation, classification and assignment of the foreseeable risks involved in the administrative contracting" , this matter is developed, according to Quiñones (2013), in order to establish the characteristics of the classification, assignment and estimation of the foreseeable risks involved in this type of contracting. It is highlighted that it is necessary to classify economic, social or political, operational, financial, regulatory, natural, environmental and technological risks in all types of administrative contracts. With respect to the estimation, the quantitative and qualitative stand out. In the same way, allusion is made to the assignment: to whom it should be assigned, the economic, social, operational, financial, regulatory, nature, environmental and technological risk.

According to Becerra (2008), with the assignment of contractual risks, even in the contracting of professional services, these are distributed, according to the capacity that each of the parties has for their management, control, administration and mitigation, which must be clearly stated in the specifications, including the foreseeable risks in the contractual equation, in such a way that a specific treatment is allowed to them, eliminating any possibility of alleging any alteration to the contractual balance.

Luengas (2015) highlights that risk management corresponds to a process that starts

from the establishment of the context in which the contractual process will be carried out to identify, classify, evaluate and qualify the risks, assigning the treatment that should be given. to each risk and assigning its management responsibilities.

According to Granillo (1990), risk should be assigned to the party with the greatest capacity to assume it.

> It must be taken into account that the equivalence of benefits, unlike what can occur in civil law in light of the provisions of article 1498 of said statute, where one of the parties considers as equivalent to what the other party is obliged to give or do, assuming an uncertain contingency of profit or loss, is an equivalence in an objective or material sense (p. 3).

An obligation is constituted for the state entity to incorporate the assignment of risks into the specifications, indicating which of the contractual subjects has to bear it in whole or in part.

The National Planning Department (DNP), through Document Conpes 3714 of 2011, considered that for the exercise of the allocation of foreseeable risks, and taking into account Decree 432 of 2001 for risk policy, it is recommended to take into account count five main aspects. First, the type and modality of the contract, since this is important to determine the level of transfer of responsibility to the contractor; second, the proportionality of the transfer of risks, which must be equal to the amount of information available in order to mitigate the risk; third, that the allocation of foreseeable risks is made according to the capacity of the contractor; fourth, that risk matrices are not made without classification, estimation or quantification; and fifth, that there are no clauses that restrict the economic balance of the contractor.

Document Conpes 3714 of 2011 also identifies the different types of risks that may arise from a contractual process for the provision of professional services, such as: economic risks, social or political risks, operational risks, financial risks, regulatory risks, technological risks, and inclusive, nature and environmental risks. It is also pointed out in the same Conpes that the previous allocation recommendations are presented in an enunciative manner and do not exempt the State from reviewing the contractual processes for the provision of services; Therefore, the selected party has the possibility of reducing the type of vulnerability to risks and proposing strategies to reduce the impact of possible damages generated by the occurrence of a risk.

Conpes Document 3714 of 2011, stipulates in this regard that different kinds of response can be raised against the same risk. First, the document refers to avoiding risk; In this way, the party that assumes the risk takes the measures that make it possible to consistently and systematically avoid or eliminate the risk, either by eliminating the origin of the risk or avoiding participating in contracts in which there may be a presence of risk.

For its part, the response related to prevention consists of taking measures that lead to reducing the probability of the risk occurring. Although the risks in hiring professional services are lower than in a work contract, this does not mean that the respective risk assessment should not be done.

Regarding transferring or sharing the risk, this implies that it is transferred to the party that can best handle it (at the lowest cost), in such a way as to ensure the contractual relationships between guarantors and policyholders, a process in which the activity

they carry out is essential. banks and insurers on risk guarantees, risk assessment and how to insure them.

Risk can also be retained, that is, taking the risk when it occurs, commonly in cases where the value of the risk is less than the cost of managing it.

Risk can also be accepted when the probability of a loss is so minimal that it is close to zero, a situation that is quite common in hiring professional services. Risks that cannot be avoided or transferred should be retained as a general rule.

Finally, it is important to mention that the risk can be mitigated, which consists of taking measures that lead to reduce the impact in the face of the risk contingency.

Now, regarding the formulation of previous studies in the contracting processes for the provision of professional services in Colombia, it is worth noting that this is an activity that implies taking into account fifteen concrete steps:.

> Identify the generalities of the contract.
>
> Describe the need to be met by the hiring process.
>
> Set the scope of the object.
>
> Determine the activities to be developed in accordance with the object to be hired. Define the obligations of the contractor. Indicate the required personnel.
>
> Establish an execution schedule.
>
> Assess the contractual selection modality and legal bases that support your choice. Calculate the economic determination of the contract.
>
> Establish experience and suitability.
>
> List the legal requirements.
>
> Analyze and estimate the risks of hiring.
>
> Formulate the guarantees.
>
> Point out the exceptional clauses.
>
> Propose trade agreements and international treaties (if applicable) (Ospina, 2017, p. 51).

These steps are structured in a risk matrix, in which it is possible to identify the class, source, stage and description of the risk, as well as the consequence of the occurrence of the risky event, the probability, the impact, the assessment, the category and the who is assigned the risk; It also includes the treatment and controls implemented, the impact after the treatment, whether or not it affects the execution of the opposite, the person responsible for the implementation of the treatment and the monitoring and review.

The activities to be developed for the fulfillment of the object of the contractual process are all those framed within the specific obligations of the contractor, tending to maintain the corresponding information to supply to the control bodies and other entities that require the information of the contracts entered into with the respective dependency of the territorial entity.

In this type of contract, the following general obligations arise:

> Comply with the provisions of Laws 1150 of 2007 and 1562 of 2012 and Decree 723 of 2013, regarding the obligation of con-

tractors to be affiliated with the Comprehensive Social Security System (health, pension, and Occupational and parafiscal Risks.

Comply with Chapter 5 Article 18 of Decree No. 0723 of 2013, regulating Law 1562 of 2012, in relation to the obligation of the contractor to obtain the certification of the respective preoccupational examination once the contract is legalized.

Once the contract is legalized, the contractor must register in the Public Employment Information and Management System–SIGEP- the information on your resume (article 227 Decree Law 019 of January 10 2012).

Comply with the recommendations indicated by the Contract Supervisor.

Prepare the reports that are requested by the Supervisor.

Attend the different meetings that are scheduled and where required for knowledge of municipal management or for matters related to the contract.

Know and apply the methods and procedures of internal control and quality management system of the contracting public entity.

documentation and assets that are entrusted to it by reason of its service, keeping the legal reserve in the information that requires it (Quiñones, 2013, p. 14).

For its part, in accordance with the provisions of article 4 of Law 1150 of 2007, document Conpes 3714 of 2011, in accordance with paragraph 6 of article 20 of Decree 1510 of 2013, and the manual for risk identification and coverage In the contracting processes of the National Colombia Buy Efficient Agency, every territorial entity that makes contracts for the provision of professional services must consider the establishment of the different foreseeable risks involved in the contracting for each process.

The contractual risk is specifically referred to the relationship between the parties that derives from the state contract, therefore, with the foreseeable risks it is sought to identify the real situations that may affect the execution of a contract, the difficulties that may arise and the costs arising, therefore, the parties foresee the possibility of their occurrence, integrating them into the contract from the specifications and making them clear through the respective public hearing for the establishment of the foreseeable risks, therefore to the normal obligations of the contract, those derived from the classification, estimation and assignment of risks to each party, assumed by virtue of the legal mandate and the autonomy of the will, are added.

In the theory of unforeseen circumstances, supervening, extraordinary, unforeseen or unforeseen circumstances appear that alter the contractual equation and that appear after the conclusion of the contract for the provision of professional services, but seriously alter its content, requiring a review of the contract. contract for extraordinary circumstances, in accordance with article 868 of the Colombian Commercial Code. In a 2003 decision, the Colombian State Council alludes to the theory of unforeseenness in the following terms:

> The unforeseen theory occurs when extraordinary situations, beyond the control of the parties, unforeseeable and subsequent to the conclusion of the con-

> tract, alter the financial equation of the same in an abnormal and serious way, without making its execution impossible. Therefore, its application is appropriate when the following conditions are met: the existence of an event exogenous to the parties that occurs after the conclusion of the contract. _ That it was not reasonably foreseeable by the contracting parties at the time of the conclusion of the contract. Regarding the first requirement, it should be specified that it is not possible to apply the unforeseen theory when the fact comes from the contracting entity, since this is one of the conditions that allow differentiating this figure from the fact of the prince, which, as indicated, is attributable to the entity. As for the alteration of the economy of the contract, it is of the essence of the unforeseen that it is extraordinary and abnormal. It assumes that the consequences of the unforeseen circumstance exceed, in importance, everything that the contracting parties have been able to reasonably foresee (...) (Council of State, Third Section. File 14577, 2003).

With all of the above, then the great difference between the foreseeable risks and the theory of unforeseen is evidenced, their names are indicative of the difference in figures, thus the former are part of the risks of the contract and the latter are exogenous.

From the formulation of the principle of objective selection that a territorial entity must make, it must bear in mind four criteria to determine in the proposal that it will accept for the conclusion of any contract for the provision of professional services.

The first relates to the requirement of the minimum enabling conditions for a proponent to participate in the selection processes to contract with the respective territorial entity or state agency and which consist of the personal, financial and professional qualities according to which it can be inferred who will comply with the contract. These conditions, as indicated, are enabling to participate in the selection process, but do not assign scores to the bidders in that process, with the exception of cases in which the object of the contract is consulting, where the conditions of the proposer are decisive for the quality of the offer.

This determination of the qualifying qualities to participate in the selection process is known under the formulation of the so-called "pass, no pass" principle, in accordance with which the registration of bidders aims to verify whether or not they meet the conditions. to contract with the State. The effectiveness of this purpose is specified through the Unique Registry of Proponents, which constitutes the main tool for entities to verify compliance with the conditions referred to in paragraph 1 of article 5 of Law 1150 of 2007 and whose administration corresponds to the Chambers of Commerce.

The second criterion consists of the formulation according to which offers and non-bidders are selected. The state entity must assess in each offer the technical and economic aspects that make it more favorable to the interests of the entity, in accordance with the provisions of each tender specifications. For this reason, the issue of the price of the offer becomes a determining factor, without forgetting the minimum quality conditions.

In the third aspect, the issue of the lower price of the offer is not only decisive, but constitutes the only aspect to be evaluated when it comes to hiring professional services with uniform technical conditions, in which the qualities of the object of the contract are

defined according to clearly and unequivocally in the tender specifications. Finally, the fourth criterion, unlike the common line that guides the previous ones, which is the convenience of the lower price, provides that when it comes to consulting contracts, the particular conditions of the offer and of the offeror will determine their selection. and never the price, regarding which consideration for the evaluation of the offer mediates an express interdiction.

CONCLUSIONS

State contracting is one of the most valuable tools that public entities have to fulfill their constitutional and legal purposes. In view of this circumstance, the characteristics of the actions of the administration were identified, as a contracting entity, and in order to fulfill this task, it is legislated on the matter of state contracting, to avoid corruption and violation of the principle of legality with capricious and arbitrary actions, on the part of the administration, hence prior measures to estimate, classify and assign risks are established that imply planning and peremptory nature of the contractual object, as well as the way to mitigate it, which includes identifying the person or persons in charge of implementing the mitigation treatment. , the start and end date of the mitigation process, and the monitoring and review activities.

Efficiency and transparency are presented as two sides of the same coin in the current dynamics of state contracting for the provision of professional services. As noted, these two aspects represent the most important objectives of Law 1150 of 2007 and, therefore, of the contracting that must be carried out by any territorial entity, to the point of being part of its title and presenting the one –efficiency– as the condition for the achievement of the other –transparency. In this way, only if the contractual process is more efficient, then it can be more transparent; In this way, the agility and simplicity of the processes will be what will support the rectitude in the management of the public resources involved.

In summary, the main effects of risk management in contracting for the provision of professional services in Colombia according to Law 1150 of 2007 lie in the limitations of the lack of planning of this type of contractual modalities, which generates early termination of contracts, expiration of contracts, expiration of quality guarantees and non-performance of contractual objects, due to the absence of a judicious risk management process, especially foreseeable.

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