Are changes in public construction or concession contracts permitted or desirable under Colombian law?

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This article examines the possibility of amending public contracts – particularly construction and concession contracts – which have been the subject of a competitive bid process under the legislation and case law of Colombia.

Introduction

Many questions arise whenever contracting parties request substantial changes during a public sector contract's performance. These include:

- Have the rights of unsuccessful bidders been violated?
- Have the principles governing public bidding processes been violated?
- What happens when a substantial change is requested as the answer to innovative and convenient new designs?
- Should the State maintain the initial designs set out in the bid despite knowing that those proposed by the private contractor are better, in order to protect the principles governing public bidding processes?

On top of these questions is the ability of the State to unilaterally modify public contracts in specific situations. Is this ability contradictory with the above-mentioned questions? Is the relationship between public and private parties unbalanced?

Unfortunately, publicised cases from the past, along with some private parties' tendency to request modifications to bid documents to redress the effects of a competitive financial offer, seem to have resulted in the current behaviour of public entities tending not to accept substantial modifications to construction and concession contracts, irrespective of the nature and consequences of such requested amendments.

The intangibility theory: its evolution and consequences

The intangibility theory (the Theory) was conceived by Colombia's highest administrative court, the Council of State (Consejo de Estado (SC)), to safeguard the bidding process, as the procedure determined by applicable law to be followed by the State in order to contract with private parties. In turn, the Theory's application aims to ensure the protection of the public contract as well.

The Theory was designed to guarantee the contents of the documents governing the bidding process and the contract to be entered into as part of such documents (the Bidding Documents). It was also designed

to help choose the bidder that offers the best conditions for the State and the public interest. As a result, the principles governing public contracting law play an important role in structuring this Theory.

Nonetheless, amendments to Bidding Documents are only permitted under Colombian contracting law:

(i) before the date set forth to submit the proposals; and

(ii) provided that such amendments are duly disclosed to the general public (meaning the other bidders).

Considering that the contract to be entered into forms part of the Bidding Documents, an issue arises as to the question of the possibility of making amendments to such Bidding Documents, particularly the contract, once the bidding process is over, and whether this means that the rights of unsuccessful bidders have been violated.

The Bidding Documents (also referred to as Terms of Reference) have been defined by the SC as 'the rules of law governing the bidding process in the selection of private contractors; they set up the content and scope of the contract; they are the so-called law of the public contract' (Ruling No 10399 of 3 February 2000).

This definition takes us back to 1975, when the SC analysed the special nature of the terms of reference in the bidding process. The court emphasised the necessity to draft them in a comprehensive, clear and complete manner. The decision went as far as interpreting that changes in those documents will have a serious impact in both the bidding process and the public contract's performance. This ruling, in what may be interpreted as the starting step of the Theory's application, also dismissed the idea of any possible mistakes or omissions within the technical documentation of the bidding process (Ruling No 1503 of 16 January 1975).

Later, in 1984, the SC explained that the State was entitled to reject any bidder's proposals that did not fulfil the conditions set forth in the Bidding Documents. However, if such terms were indeed complied with, the State had an obligation to make an evaluation of these proposals, and then award the contract to the most favourable one. The Theory, as explained in this decision, aims to guarantee a proper qualification of the bidders' proposals, but only on the proviso that the bidders' proposals completely fulfil the Terms of Reference (Ruling No 2418 of 29 March 1984).

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In decisions adopted in 1986 and 1989, the SC upheld the above-mentioned jurisprudence of 1984. Moreover, it added to the Theory that its importance goes as far as to prevent the legal insecurity and chaos that would be generated if amendments were permitted after the bidding process was completed. The SC said at the time that 'the interests of public and private contractor parties would not be protected' (Opinion No 79 of 27 November 1986 and Decision 3712 of 6 April 1989).

Since the beginning of its judicial analysis, the Theory intended (as proclaimed by its creators and its followers) to defend the rights of bidders and the interests of the State (ie, for the State, the successful performance of public contracts accomplishing the needs of the public with the best economic conditions and, for bidders, offering them judicial and economic guarantees, avoiding unfavourable and unfair treatment).

In 1992, the Theory, as developed by the SC, evolved and reached a position where making amendments to the Terms of Reference and therefore to the contracts, was construed as being in clear contradiction of the superior interests of the community. According to such ruling:

'even if the terms of reference are an administrative act which revocation or amendment is subject to general procedures, once the State gives out an invitation to

participate in the bidding process, such terms cannot be modified. If the process is closed, no amendment is permitted and doing so will generate its nullity' (Ruling No 6353 of 27 March 1992).

Since the Colombian General Public Contracting Law (Law 80, 1993) was enacted, contracting law principles are construed as the rules of law governing the bidding process itself and the Terms of Reference. The Theory was then embellished by those principles, especially:

(i) transparency: as it is associated with a public and impartial contracting process;
(ii) equality: as it implies that the contracting process offers the same opportunities, rights and responsibilities to prospective contractors; and
(iii) objective selection: as it ensures that the contract will be awarded to the most favourable proposal.

The SC and the legal doctrine have emphasised the necessity to guarantee these principles in any contracting process.

In 1997, an important road concession contract was awarded to a private contracting party. This award was only the beginning of an expensive and lengthy ten-year dispute between the State and the private contractor. The legal case started three months after the award. The private contractor asked for a change in the road designs as specified in both the bidding process and the concession contract. It argued that the design given by the contracting entity was not the most appropriate for the construction of the road. The concessionaire's amending proposal was based on technical and economical aspects that tried to demonstrate the weaknesses of the design provided by the State during the bidding process. The concessionaire, however, did not demonstrate any mistakes in the given road designs.

The concessionaire's proposed design was not accepted, on the grounds that it would radically change the Terms of Reference. The reason for such denial was based on the intangibility of the Terms of Reference, as an essential element to the concession contract. Also, there was the fear that, if the proposal were to be accepted, unsuccessful bidders may have thought that the principles governing contracting law were breached, and they could have won the bidding process if it had included such changes from day one. Such an interpretation could lead to possible disputes. In the end, the road was not constructed and the project fell apart.

Despite its commitment to the Theory, the SC decided in 1995 that the imposition of improper limits towards the implementation of additional quantities of work and increasing the scope of works in public contracts might endanger the community's public interest, which needs to prevail at all times. If Terms of Reference have mistakes, parties must modify the contract in order to make it feasible, or else the community would suffer the consequences. Hence, the SC said that 'It is against public interest and contracting law objectives, to force the community to bear a useless and ineffective construction, when the parties have noticed its design defects, since the beginning of the contract's performance.' (Ruling No 7625 of 6 September 1995.)

Finally, the SC allowed the possibility to amend concession contracts, by reason of the community's welfare, as it is a higher value than consistency with the bid documents and needs to be secured. The rights of the unsuccessful bidders were not going to be contravened, the SC said, as bidding processes guarantee an equal access to them (Ruling No 7625 of 6 September 1995).

Despite the above, in 1998 the SC overruled the prior case law, holding that the parties could not modify a contract granted by means of a bidding process. The Court explained that allowing a modification would endanger the principles governing contracting law, as well as the rights of the unsuccessful bidders. In the same ruling, a dissenting opinion was delivered. Justice Osorio explained:

'If the parties come to an agreement, it is possible to amend a contract even though it was awarded by means of a bidding process. The rights of unsuccessful bidders are not necessary breached every time a change is made. If the nature and essence of the awarded contract are preserved, the State is entitled to enter into further agreements with the private contractor in order to amend some of its clauses. This ability differs also from the extraordinary power that is given to the State, to unilaterally amend public contracts.' (Opinion No 1151 of 14 December 1998.)

Justice Osorio's position began to show a more flexible rationale underpinning the Theory. Even still, it was not until 2002, in respect of arguments of additional quantities of works in public contracts, that the SC permitted the State to modify the designs and technical studies intended for the contract's performance. Such modification is possible, the SC said, when the Terms of Reference have defects or are insufficient to fulfil the contract's purpose:

'If necessary, to amend mistakes in the design, and look for alternative technical solutions

in order to achieve the contract's original and intended purpose, the Government is entitled and has the legal duty to make adequate those designs and studies. Doing otherwise would jeopardize the project.' (Opinion No 1439 of 18 July 2002.)

This opinion explains that even though the contractor must execute the contract according to its clauses and the Terms of Reference, once a technical mistake is discovered during the contract's performance, the State must take all steps required to find a solution. It was determined that if there were mistakes in the Terms of Reference, they could be corrected. However, the questions relating to how to make those amendments, the person qualified to establish that the mistakes truly existed and that the amendments are required in order to repair those mistakes, were not answered. In addition, the opinion explained that if new improved technology appeared during the contract's performance, it was possible to make an amendment (Opinion No 1439 of 18 July 2002).

In 1994, a road concession was awarded but during the first year of the contract's performance the concessionaire alleged that the Terms of Reference had defects. For that reason, in 1996, the scope of work was amended and the road's design changed. The amendment resulted from an agreement between the parties. After analysing the evidence, an arbitral tribunal called by the concessionaire determined that the mistakes did in fact exist and that changes were required in order to succeed in reaching the objectives of the intended project. Nonetheless, the tribunal decided that the public contractor was responsible for those mistakes, so it had to indemnify the private party. The parties confronted each other on three occasions at different arbitral tribunals (See *Concesionaria Vial de los Andes SA, Coviandes SA v Instituto Nacional de Vías, Invías*. Awards of 7 May 2001; 29 July 2004 and 25 August 2004).

A recent decision of the SC relating to the Theory decided that the public contracts could not be modified pursuant to the principles governing contracting law. However, an exception was provided:

'It is possible that after the contract awarding, some supervening situations make necessary the modification of contract clauses, which would be contrary to those determined in the terms of reference. In these events, parties are entitled to modify the content of the public contract, but only if it is proved that the supervening situations exist and that they were not caused for the parties' negligent actions or omissions. The modification should not transgress public contracting principles or the parties' rights.'

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Consequently, there is the possibility to change the scope of work in public construction or concession contracts, but only if it is necessary for the successful achievement of the contract's purpose. The jurisprudence and the legal doctrine have given alternatives to make amendments possible, such as:

(i) to protect the public interest; and
(ii) the appearance of supervening situations.

Nevertheless, the nature and purpose of the public contract cannot be modified.

Ever since the private contractor of the El Dorado Airport Concession (awarded in August 2006) expressed to the media its intention to change some designs in the airport's construction, the Colombian Government has analysed this possibility. On 14 December 2007, the contracting State entity manifested its concern for the request of change of work made by the concessionaire. On 27 February 2008, the Minister of Transportation indicated to the media that he was not going to allow a change in the contract's terms and conditions, explaining that an amendment in concession contracts cannot be subjected to the concessionaire's own will. In contrast, unsuccessful bidders have said to the media that if the El Dorado Airport Concession contract is modified by any means, they will sue the State for the violation of their rights under the bidding process and its governing principles.

On 14 March 2008, the State and the concessionaire agreed not to change some of the airport's designs, but to demolish all of it and proceed to reconstruct the airport. The State explained that the possibility of demolishing the airport had already been contemplated in the concession contract. However, the unsuccessful bidders have not expressed their concerns on these matters yet.

An unbalanced relationship

The State's extraordinary power to unilaterally amend public contracts is a right that has limits and conditions set forth in Law 80, 1993. Colombian legal doctrine has provided that the extraordinary power to unilaterally amend public contracts has been given to the State but only if this right

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is exercised to preserve public contracts that have become redundant or clauses that become inadequate for the subject matter that was taken into account originally. (See Luís Guillermo Dávila, *Régimen Jurídico de la Contratación Estatal, Aproximación crítica la Ley 80 de 1993*, second edition, 2003.)

Clause 16 of Law 80, 1993 establishes the State's extraordinary power to unilaterally amend public contracts. Nonetheless, its application is only permitted when the amendment is required to prevent the cessation of or serious effect upon public services that are intended to be satisfied with the relevant contract. The State is entitled to unilaterally amend a public contract only if it is impossible to obtain an agreement with the private contactor. The SC considers that the last mentioned condition represents a guarantee given to the private contractor because, even though a settlement is not reached, both parties will establish the aspects needed to be changed and the reasons for such unilateral amendment. (Opinion No 1293 of 14 December 2000.)

If the State wants to implement this power, it has to follow limitations and conditions required by law, as it is not a discretionary ability. Those limitations are: contracting law principles, the object and purpose of contracting law, and the effectiveness of general and social interest. (See Jairo Enrique Solano, *Contratación Administrativa*, second edition, 1997.)

As a result of a unilateral modification, the contract's price can be affected. For that reason, Law 80, 1993 sets rules to preserve the economic equilibrium of the contract. If the changes alter the amount of the contract by 20 per cent more than the original price, the contractor may stop the performance of the contract and the contracting entity is to adopt the necessary measures to ensure the conclusion of the contract's purpose.

Even though the State is allowed to use its extraordinary power to unilaterally amend public contracts, there are strict limits for such usage, so that the rights of the private contractor are not breached. In addition to the extraordinary power to unilaterally amend public contracts, the State also holds the extraordinary abilities to unilaterally interpret, unilaterally terminate and to declare the forfeiture of a public contract.

In the light of the existence of these extraordinary abilities empowered to the State, it seems that an unbalanced relationship exists between the public and private contractor. However, the State must follow a regulated procedure to be able to exercise its extraordinary powers. The State is able to exercise the extraordinary power to unilaterally amend public contracts only during its performance. The reason for the existence of this power is to guarantee the rendering of public services, despite any discussion between the parties.

Conclusions

The Theory has evolved so as to permit the modification of public contracts. The principal argument is that public welfare and interest must prevail in the contracting activities of the State. However, common factors are under the State's consideration before undertaking a modification to a contract, such as whether the modification affects the essence of the contract or the contract's performance is going to be affected by the modification.

Discussion continues as to whether the ability to make amendments to public construction or concession contracts is desirable. The SC has not adopted any unanimous decision relating to this possibility. Notwithstanding, its posture has evolved over the years. Currently there are specific situations that permit amendments; nonetheless, public entities fear the consequences.

Unilateral modification of public contracts is indeed a right for State-owned entities that creates, from the beginning, an unbalanced contractual relationship between private and public parties. On the other hand, the State's ability to use it is limited to specific cases and it is not intended to impose an unbearable burden on the private party. In any case, in recent practice, the right has almost never been applied by public entities. It will remain of interest to observe the continued evolution of the theory and practice of this crucial issue in public sector contracting.

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