



Colombia Compra Eficiente

Guide for the exercise of the Supervision and Inspection Functions in the State Contracts

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I Introduction

Colombia Compra Eficiente presents this Guide for the exercise of the Supervision and Inspection Functions in the State Contracts. The Guide is addressed to the participants in the public procurement system.

The capitalized expressions utilized in this document must be construed according to the definition contained in Decree 1082 of 2015 and are employed in the singular or plural as the context demands. The terms not defined must be construed according to their natural and obvious meaning.

II The Oversight of the State Contracts

According to the principle of responsibility that governs the State's procurement, the State Entities have the obligation to oversee the correct execution of the contracted purpose and to protect both the rights of the Entity itself as well as those of the contractor and third parties that could be affected by the execution of the contract.

The purpose of this oversight is to protect the administrative morality, prevent the occurrence of acts of corruption and to protect the transparency of the contractual activity and it must be exercised through a supervisor or inspector, as corresponds¹.

A. What is the Supervision?

The supervision of a state contract consists in “the technical, administrative, financial, accounting and legal follow up that is exercised regarding the performance of the purpose of the contract; it is exercised by the same State Entity when no specialized knowledge is required”.

Article 83 of Law 1474 of 2011 allows the State Entities to enter into services contracts to support the activities of supervision of the contracts signed by them.

1. Law 1474 of 2011 article 83

B. What is the Inspection?

The inspection is the technical follow up of different types of contracts, performed by an individual or by a legal entity retained for that purpose by the State Entity, in the following cases: (i) when the law has established the obligation of having this scheme in certain contracts, (ii) when the follow up of the contract requires the specialized knowledge in the subject matter thereof, or (iii) when the complexity or the extension of the contract justifies it.

However, the State Entity may determine that the inspection will cover actions not only of a technical nature but also of an administrative, financial, accounting and / or legal nature.

The inspection contract is principal and autonomous and although the purpose thereof supposes the existence of another contract regarding which the oversight is to be exercised, the same is independent of the latter and, therefore, its existence does not depend of the existence of the contract the subject matter of the oversight. However, the inspection contracts may be extended for the same term for which the contract the subject matter of oversight is extended in order to prevent the interruption of the follow – up of the contract subject to oversight².

The Inspection contract must be directly supervised by the State Entity; in consequence, whenever a State Entity enters into this type of contracts it must appoint an officer for the oversight of the contract, who verifies its performance in the conditions agreed.

C. Differences between the two schemes

- The supervision is exercised by the State Entity, while the inspection is carried out by an individual or legal entity retained for those purposes.
- The supervision always involves the administrative, financial, accounting and legal follow up. The inspection always involves the technical follow - up and only if the State Entity deems it necessary, it can correspond to financial, accounting and legal issues.
- The supervision does not require specialized knowledge, while the inspection does.
- The supervision must always be discharged by a public servant, while the inspection must always be discharged by a contractor.

2. Law 1474 of 2001, article 85

D. Concurrency of the inspection and the supervision

As a general rule, the supervision and inspection functions are not concurrent in respect to one same contract.

However, in case it is necessary, the State Entity may determine that the oversight of the main contract will be made jointly by a supervisor and by an inspector, in which case the inspection contract must state the activities on the charge of the inspector, in a way that the other oversight activities are understood to be in charge of the supervisor, and under no circumstances there will be duplication of functions.

In these cases, it is also advisable that the appointment made to the supervisor of the contract should specify what type of follow up must be made of the contractual performance, in order to know that some of the activities typical of the supervision are going to be exercised by the inspection.

III Selection and appointment of supervisors and inspectors of the contracts


A. Supervisors

The supervisor of the contracts must always be an officer of the State Entity. For its selection it is necessary to bear in mind that the same does not require a predetermined profile, but that it is necessary that the person is able to act at least as a peer of the contractor and that it has functions related to the contractual purpose.

It is advisable that before the State Entity appoints a public servant as supervisor, it should make an analysis of the operational load of the person that will be appointed in order not to incur in the risks derived from appointing as supervisor an officer that cannot discharge such duty in an appropriate manner.

The appointment of a supervisor must be made no later than on the same date in which the contract is awarded, when the same is the result of a competitive procurement process or assigned in the cases of direct contracting. The appointment of the supervisor of the contract does not require that the functions' manual of the State Entity establishes, in an express manner, the function of supervising contracts, because the same is inherent to the discharging of the ordinary functions of public servants.

The communication of the appointment of an officer as supervisor must always be written, construing also as such the one that is made by e-mail and it must be kept in the dossier of the contract so it is always necessary to forward a copy thereof to the instrumentality in charge of conserving the dossiers.



In case that the appointment of the supervisor is directly made in the contract, a copy thereof must be sent to the appointed officer informing that such person will be the supervisor. When this occurs, the change of supervisor will always imply an amendment to the contract.

The State Entity must bear in mind that when no supervisor is appointed, the responsibility of the oversight and control of the execution of the contract lies with the expenditure authority.

B. Inspectors

The inspection is a species of the consulting contract³ and therefore the selection of the inspector must always be made through the selection modality of merit contest unless the budget falls within the Minimum Amount, in which case the latter must be the modality used.

It is advisable that the procurement process to select the inspector starts at the same time than the procurement process the subject of which is the contract that will be the subject of oversight, so both contracts start at the same time and the follow up is made since the moment in which the term of the contract the subject of the oversight starts, in particular for contracts such as those of works, in which it is necessary to have the inspection to be able to begin.

In case that the contract the subject of the oversight has not been yet awarded, the procurement process the purpose of which is the inspection must include the data of the process that is being carried out, so the possible bidders know all the details of the contract that has to be overseen.

The inspection contracts may be extended for the same term for which the contract the subject of oversight⁴ has been extended, and the same cannot contain clauses that are exceptional to common law, or otherwise the same will be declared absolutely null.

Colombia Compra Eficiente makes available to the participants of the public procurement system the model bidding terms and the model inspection contract, which can be consulted in the following link:

<http://www.colombiacompra.gov.co/manuales-guias-and-pliegos-tipo/manuales-and-guias>.

3. Law 80 of 1993 item 1 of article 32

4. Law 1474 of 2011 article 85

IV Functions of the supervisors and inspectors

The supervisors and inspectors have the general function of exercising the control and oversight over the contractual performance of the contracts the subject of oversight, aimed to verify the compliance with the conditions agreed in them and, as a consequence thereof, they have the power to request reports, clarifications and explanations about the development of the contractual performance, give instructions to the contractor and make recommendations aimed to achieve the correct performance of the contracted purpose.

It is mandatory for the inspector or supervisor to give their orders in writing⁵ and the requirements or reports made by it must be published in the SECOP⁶.

Under no circumstances the inspectors or supervisors exercising their duties can replace the State Entity in the decision making about the contract the subject of the oversight, so such decisions must always be taken by the legal representative of the State Entity based on what the former would have reported about the performance of the contractual obligations.

A. General Functions

- To support the accomplishment of the objectives of the contract.
- To see to the performance of the contract in terms of times, qualities, quantities and the adequate performance of the resources of the contract.
- To keep the parties of the contract in contact.
- To prevent the generation of controversies and to see to the quick resolution thereof.
- To request reports, hold meetings, form committees and develop other tools aimed to the verification of the adequate performance of the contract.
- To carry out the duties of monitoring and control that are assigned to it, in coordination with the area responsible of each risk included in the respective map, as well as the identification and treatment of the risks that may arise during the different stages of the contract.

5. Law 80 of 1993 article 32

6. Decree 103 of 2015 article 8

- To approve or reject, in writing, in a timely and reasoned manner, the delivery of the goods or services when the same do not comply with the requirements of the contract, technical specifications, conditions and/or qualities agreed.
- To sign the minutes that are generated during the execution of the contract to document diverse situations and including: partial progress minutes, partial receipt minutes and final receipt minutes.
- To inform the State Entity of facts or circumstances that may constitute acts of corruption described as punishable offences, or that endanger the performance of the contract; as well as to deliver the supports necessary for the State Entity to carry out the respective activities.
- To inform the State Entity when there is breach of contract, and to deliver the supports necessary for the State Entity to develop the respective activities.

As good practice it is advisable that the supervisors and inspectors make a follow – up of the risks assigned to the parties in the risks’ matrix for the Procurement Process.

B. Administrative Oversight

- To see to the existence of a contract’s dossier that is complete, up to date and that meets the archiving standards in place.
- To coordinate the internal instances of the State Entity related to the execution, performance and liquidation of the contract. For Example: (execution) insurance policies, taxes, and documents for the execution of the contract, etc.
- To deliver the reports established that are requested by the control bodies.
- To guarantee the publication of the documents of the contract, according to the law.
- To verify the compliance with the contractor’s obligations in terms of social security, occupational health, contingency plans, environmental standards, etc., according to the nature of the contract.



C. Technical Oversight

- To verify and approve the existence of the technical conditions to start the performance of the contract (for example blueprints, designs, licenses, authorizations, studies, calculations, specifications, etc.).
- To verify that the contractor provides and maintains the personnel or equipment offered, with the conditions and suitability initially agreed, and to demand the replacement thereof in equivalent conditions whenever necessary.
- To study and decide the requirements of a technical nature that do not imply amendments or extra costs of the contract. To justify and request to the State Entity the amendments or adjustments that the contract may require.
- To request that the State Entity enforces the guarantees of the contract, when so required, and to furnish the justification and documentation as required.

D. Financial and Accounting Oversight

- To review the documents necessary to make the payments to the contract, including the receipt to satisfaction of the goods or services the subject of it.
- To document the payments and adjustments that are made to the contract and to control the budget balance of the contract for the purposes of payments and of the winding up thereof.
- To verify the delivery to the contractor of the down payments agreed as well as the adequate amortization thereof, in the terms of the law and of the contract.
- To verify that the additional activities that imply an increase of the price or the amendment of the contract's purpose have authorization and are justified in a technical, budget and legal manner.
- To coordinate the instances that are necessary to carry out the proceedings for the winding up of the contract and to deliver the support documents that correspond to do so.

V Liability of the supervisors or inspectors

In the terms of Law 80 of 1993 and of the Anticorruption Statute, the State Entities, the public servants, contractors and inspectors that take part in the execution, performance and winding up of the state contract are liable for their acts and omissions and in consequence are civilly, fiscally, criminally and disciplinarily liable for the faults committed in the discharging of their duties.

A. Civil Liability

The Civil Liability refers to the obligation that arises for a person to repair the damage that it has caused to another normally by means of the settlement of damages.

In the case of supervisors and inspectors, the Civil Liability established in Law 80 of 1993⁷ is materialized through the recovery action or the impleader⁸, which must be exercised by the State Entity when it is convicted to pay damages caused by the default, by action or omission, of its function of control and oversight over a given state contract.

Likewise, the inspector or supervisor that has not informed the State Entity in a timely manner of the possible partial or total breach of any of the obligations on the charge of the contractor of the supervised or principal contract, will be joint and severally liable with it for the damages caused because of the breach.

It is important to clarify that for the purposes of the exercise of the aforementioned actions, the contractor that supports the supervision duties and the inspector are considered by the Law as private parties who discharge public duties regarding the execution performance and winding up of the contracts entered into by the State Entities.

For the existence of Civil Liability and therefore to be able to exercise any of the aforementioned actions, it is necessary that the performance of the supervisor or inspector had been intentional or the result of serious negligence.

7. Law 80 of 1993. Item 2 of article 26

8. Law 678 of 2001 article 2

B. Fiscal Liability

The Fiscal Liability is the one attributable to public servants and/or to private parties, when in the exercise of the fiscal activity or because of it, cause, by action or omission and in an intentional or negligent manner, damages to the State's wealth⁹. The specific purpose or drive of the Fiscal Liability is the protection and securing of the State's wealth, seeking the reparation of the damages that it may have experienced as a consequence of the irregular performance of those who are in charge of the management of public monies or assets¹⁰.

For the purposes of the Fiscal Liability the fiscal performance must be construed as the set of economic – legal activities related to con the acquisition, conservation, exploitation, disposal, consumption, removal of the State's goods, as well as the collection, management and investment of their income in order to comply with the purposes thereof, and carried out by the bodies or entities of a public legal nature or by private individuals or legal entities¹¹.

This kind of liability has the following characteristics: i) it is merely of a reparatory nature, ii) it is of an economic nature, because the fiscal manager answers with its wealth and iii) it is personal because the person answerable is the one that manages or administers the public funds, which in this case is the supervisor or inspector.

As a consequence of the foregoing, the supervisors or inspectors are persons fiscally liable when due to the breach of their control and oversight duties regarding a given state contract, a financial impairment is caused to the State Entity which, among other, can be the consequence of deficiencies in the performance of the contractual purpose or in the compliance with the quality and opportunity conditions established in the contract the subject of the oversight.

Besides, in their capacity as fiscal managers it is assumed that the supervisors or inspectors of the contracts incur in Fiscal Liability: i) as fiscal willful misconduct when due to the same facts they have been declared convicted felons or the subject of disciplinary sanctions for the commission of a crime or of a disciplinary fault attributed to it: and ii) as gross negligence when it omits the compliance with the obligations typical of the inspection contracts or of the supervision functions, such as to carry out periodical reviews of goods, works or services, in a way that the correct performance of the contractual purpose or the compliance with the conditions of quality and opportunity offered by the contractors is not proven and when there is a default in the obligation of insuring the goods of the entity or the of enforcing the insurance policies in the event of occurrence of the losses or the breach of the contracts.

9. Law 610 of 2000 article 1

10. Sentence C-619/02 Issuing judge Dr. Jaime Cordoba Triviño and Dr. Rodrigo Escobar Gil.

11. State Council, Consultation and Civil Service Chamber, Consultation 848 of the 31st of July of 1996, Issuing Judge César Hoyos Salazar.



C. Criminal Liability

The Criminal Liability is the one derived from acts that breach, with no legitimate justification, the legal goods protected by the criminal laws¹².

In the particular case of supervisors and inspectors that for this type of liability are also considered as private parties that discharge public duties, the Criminal Liability is configured when any of them incurs in any of the conducts described as crimes against the public administration, namely, peculation, concussion, bribery, undue execution of contracts, traffic of influences, illegal enrichment and breach of legal duty.

It is important to clarify that the Civil Liability can be enforced within the criminal liability proceedings in the aforementioned conditions.

D. Disciplinary Liability

The Disciplinary Liability occurs when a public servant or a private person that discharges public duties incurs in any of the faults set forth in the Sole Disciplinary Code, which means the breach of duties, over reach in the exercise of rights and functions, prohibitions and violation of the regime of incompatibilities, disqualifications, impediments and conflict of interests, without being protected by any of the causes of exclusion of liability set forth in article 28 of this legal body¹³.

For the specific case of the supervisors and inspectors, the Disciplinary Liability occurs when:

i) they do not enforce the quality of the goods and services hired agreed in the contract the subject of oversight or demanded by the mandatory technical standards, ii) they certify as received to satisfaction works that have not been correctly completed and iii) they omit the duty to inform to the contracting State Entity the facts or circumstances that may be considered as acts of corruption described as punishable conducts, or that may endanger the compliance with the contract, or a default occurs.

In any case and in a general manner, supervisors and inspectors are disciplinarily liable for the breach of the duties, the abuse of rights, the over reach of functions, or the violation of the regime of prohibitions, impediments, disqualifications, incompatibilities or conflict of interests set forth in the Constitution or in the law.

12. Ruling T-440/1992. Constitutional Court

13. Law 734 of 2002 article 23



VI

Prohibitions for supervisors and inspectors

It is forbidden to supervisors and inspectors:

- To make decisions, enter into agreements or sign documents the purpose or the effect of which is the modification of the contract without the full compliance with all the relevant legal requirements.
- To request and/or receive, in a direct or indirect manner, for himself or for a third party, gifts, favors or any other kind of benefits or perks from the contracting entity or from the contractor or to handle, in a due manner, in a personal capacity, issues related to the contract.
- To omit, deny or delay the processing of the issues on his charge.
- To hinder the performance of the authorities or the exercise of the rights of the private parties in relation to the contract.
- To allow, in an undue manner, the access of third parties to the contract's information.
- To demand from the contractor waivers against amendments or additions to the contract.
- To release the contractor from any of its contractual obligations.
- To act as supervisor or inspector in the cases established by the provisions that govern the disqualifications and incompatibilities.