

External Circular Letter No. 6 of the 27th of September of 2013

To: State Entities

Subject: Contracting of de science, technology and innovation activities

The National Public Procurement Agency -Colombia Compra Eficiente- pursuant to its purpose as the governing body of the public purchasing and procurement system, enacts this Circular to clarify the regime applicable to the contracting of science, technology and innovation activities by the State Entities, independent from the source of funds utilized. This circular letter is addressed to all State Entities, in particular to Mayors, Governors, Technical Secretaries of the Collective Administration and Decision Bodies – OCAD- of the national, regional, departmental and municipal level, to the Regional Autonomous Corporations and to all the entities designated as executors of science, technology and innovation investment projects.

1. Science, technology and innovation activities

The following are the science, technology and innovation activities of the actors of the National Science, Technology and Innovation System according to the descriptions of: (a) article 2 of Decree - Law 393 of 1991; (b) article 2 of Decree - Law 591 of 1991; (c) article 18 of Law 1286 of 2009 which amended Law 29 of 1990; and (d) el CONPES Document 3582 of 2009:

1. To create, promote, develop and finance enterprises that incorporate scientific or technological innovations applicable to the national production, to the management of the environment or to the exploitation of the natural resources.
2. To organize, create and support scientific, technological and innovation centers, technology parks, business incubators and technological base enterprises.
3. To train and coach human resources for the progress and the management of the science, technology and innovation.
4. To establish and form scientific, technological and innovation research and information networks.
5. To create scientific, technological and innovation development funds at the national and regional level, special guarantees' funds and funds for the renewal and maintenance of scientific equipment.
6. To carry out science, technology and innovation seminars, courses, congresses, workshops and events at the national or international level.
7. To fund publications and to grant awards and distinctions to researchers, research groups and research projects.
8. To carry out scientific research, technological development and innovation projects; development of new products and processes.

9. To spread scientific, technological and innovation information, namely, information, publication, divulgation and advice on science, technology and innovation.
10. To develop scientific and technological services related to the making of science and technology plans, studies, statistics, and censuses; to the performance of homologation, normalization and metrology activities, quality certification and control; to the prospection of resources, inventory of land resources and territorial zoning; to the scientific, technological and innovation promotion; as well as to the creation, development, diffusion, promotion, implementation and management of total quality and technological evaluation systems .
11. To develop innovation projects that incorporate technology and the creation, generation, appropriation and adaptation thereof.
12. To enable technological transfer that comprises the advice, negotiation, appropriation, disaggregation, assimilation, adaptation and application of new technologies, national or foreign.
13. To enable cooperation in science, technology and innovation on a national or international level.
14. To enable social appropriation of science, technology and innovation through the integration of scientific, technological and innovation culture to the regional and national culture.
15. To make and develop experimental research and development (R + D) projects, scientific and technological education and training scientific and technological services an innovation and social innovation activities.

Any doubts of the executing State Entities about the cataloging of scientific, technological and innovation activities must be clarified by the Administrative Department for Science, technology and innovation - COLCIENCIAS -, which is the competent authority in this matter.

2. Contractual typologies for science, technology and innovation activities

The State Entities can carry out science, technology and innovation activities through the execution of any of the following types of contracts:

- (a) **Special cooperation agreement**, which is entered into to bring together inter – institutional resources, capacities and competencies, and can include the financing and management of projects. The special cooperation agreement is regulated by articles 6, 7 and 8 of Decree - Law 393 of 1991 and in article 17 of Decree - Law 591 of 1991.
- (b) **Financing Contracts**, which are regulated by article 8 of Decree – Law 591 of 1991 which are for the financing of scientific, technological and innovation activities and whose scope is defined by article 8 of Decree - Law 591 of 1991.
- (c) **Project management agreements** that are governed by article 9 of Decree - Law 591 of 1991; the purpose thereof is to give the management and performance of a project in these matters to a third party suitable to carry out science, technology and innovation activities..

3. Contractual Regime

The regime applicable to the contracts for science, technology and innovation activities, independent from the source if financing thereof, is the one set forth below:

- (a) The contracts for the execution of programs, projects and science, technology and innovation activities can be entered into in the direct contracting modality according to the provisions of letter (e), item 4, of article 2 of Law 1150 of 2007 and of article 33 of Law 1286 of 2009.
- (b) The special cooperation agreement is subject to private law provisions, according to Decree - Law 393 of 1991. If the respective agreement introduces action lines related to the management or financing of projects, they are subject to the same private regime of the agreement.
- (c) The financing contracts are subject to (i) Laws 80 of 1993 and 1150 of 2007 and their regulatory provisions, and can be entered into under the direct contracting modality; and (ii) article 8 of Decree Law 591 of 1991:

“Article 8 - The Nation and its decentralized entities can enter into financing agreements for scientific and technological activities, the purpose of which is to provide resources to the private contractor or to another public entity, in any one of the following manners:

- a) Mandatory Reimbursement. The contractor beneficiary of the financing must pay the resources in the conditions of term and interest that may have been agreed upon;*
 - b) Conditional reimbursement. The contracting entities may waive, in a full or total manner, the obligation of payment of the capital and/or interest when, in their opinion, the activity carried out by the contractor has been successful. This decision will be made by reasoned resolution;*
 - c) Partial Reimbursement. For investments in pre – competitive activities of a high technological risk, or of long maturity time or of a general interest, the contracting entity may determine in the contract the amount of the reimbursable resources and the amount of those that are not;*
 - d) Contingent recovery. The obligation of payment of capital and interest only arises when, in the opinion of the contracting entity, it has been determined that one of the specific causes of reimbursement set forth in the contract has occurred. The existence of the obligation will be established by reasoned resolution.”*
- (d) The project management projects set forth in article 9 of Decree - Law 591 of 1991, entered into independently from a special cooperation agreement, are subject to Laws 80 of 1993 and 1150 of 2007 and their regulatory provisions. and can be entered into under the direct contracting modality¹.

The State Entities must comply with the prior demand of assessment of opportunity and convenience

¹ Letter (e) of item 4 of article 2 of Law 1150 of 2007.

of the respective contracting, without prejudice to the regime applicable to each contracting.

4. Guarantees' Law

As from the 9th of November of 2013 the execution of inter – administrative agreements for governors, municipal or district mayors, secretaries, managers and directors of decentralized entities of the municipal, departmental or district level for the execution of public resources is forbidden; and as from the 25th of January of 2014, the direct contracting modality is forbidden for all the State Entities according to the paragraph to article 38 and article 33, respectively, of Law 996 of 2005 and to Circular Letter No. 3 of 2013 issued by Colombia Compra Eficiente.

5. Supervision and Inspection

The State Entities have the obligation to oversee the correct execution of the contracts entered into by them, either through a supervisor or an inspector².

The supervision is the technical, administrative, financial, accounting and legal follow up of the execution of a contract, carried out in a direct manner by the State Entity for which no specialized knowledge is required. The inspection is the technical follow – up of the execution of a contract that requires specialized knowledge and, in consequence, the State Entity requires hiring a third party to do so, either an individual or legal entity. As a general rule, supervision and inspection do not take place in one same contract.

The State Entity can hire the inspector under the direct contracting modality when the technical follow – up is for a contract of those that are the subject matter of item 2 of this circular.

The State Entity must take the following into account regarding the supervision or inspection of projects financed with resources of the General Royalties' System:

- The supervision and inspection can be carried out and charged against the investment project, as these are a component thereof according to the provisions of article 38 of Decree 414 of 2013.
- The formulator and the entity that submits the project to the OCAD are responsible for defining the type of supervision required by the project, namely, whether it must be supervision or inspection and what the required characteristics are to carry out these activities. The appointed executor is responsible for executing the investment project in the same terms in which it was approved.
- In case that an investment project to be financed with resources of the General Royalties' System has been made viable or approved by the OCAD or is in execution without contemplating the value of the supervision or inspection, it is necessary to adjust the project within the framework of the provisions of article 8 of Agreement 014 of the Governing Commission of the General Royalties' System.

2 Article 83 of Law 1474 of 2011.

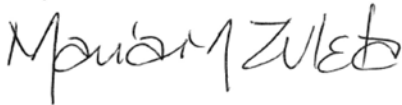
6. Compliance certificate for projects funded with resources of the General Royalties' System

According to the provisions of article 7 of Agreement 015 of the Governing Commission of the General Royalties' System, the concepts, licenses, permits and all other legal requirements in force for the execution of the science, technology and innovation program or project are requirements prior to the start of the contractual stage; The executor must accredit the compliance with those requirements before COLCIENCIAS, in its capacity as Technical Secretary of the OCAD of the Science, technology and innovation Fund, responsible to verify them and to issue the respective performance certification that will be an integral part of the administrative act of justification of the direct contracting or support to make the bid terms or contracts when that contracting modality is not used.

Notwithstanding the foregoing, for the science, technology and innovation investment projects that have been made viable, prioritized and approved under Agreement 009 of 2012 of the Governing Commission of the General Royalties' System, it will not be necessary to have the certification of compliance that is the subject matter of the preceding paragraph.

Lastly, it is important to remember that the public entity designated as executor is responsible for the correct execution of the resources assigned to the investment project, and to verify that the contracting of activities that do not fall within the notion of science, technology and innovation is made following their own procurement regime, for example, public procurement regime in the case of a territorial entity, Law 30 of 1992 when the executor is a public entity or contracting manual for the EICE. Likewise, we reiterate to the executor that in the case of doubt, he must come to the competent entity to define whether or not the activity to be contracted falls within the category of science, technology and innovation.

Yours truly,



María Margarita Zuleta González
General Director

Regulations

Article 2 of Decree - Law 393 of 1991

Article 2 of Decree - Law 591 of 1991

Article 18 of Law 1286 of 2009, which amended Law 29 of 1990

Law 996 of 2005

Article 38 of Decree 414 of 2013.

CONPES Document 3582 of 2009

Circular No. 3 of 2013 enacted by Colombia Compra Eficiente

<http://www.colombiacompra.gov.co/sites/default/files/normativas/20130816circular3leygarantias.pdf>

Agreement 009 of 2012 of the Governing Commission of the General Royalties' System

Article 8 of Agreement 014 of the Governing Commission of the General Royalties'

System. Article 7 of Agreement 015 of the Governing Commission of the General

Royalties' System.