

Surety Bond as a warranty for Public Contracts ¹

Users Manual

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INTRODUCTION

A surety bond is a mechanism placed by the law, with the purpose of protecting public shareholders wealth from the potential damage caused to a state entity from the side of the contractor, given by the noncompliance of the obligations from the contract celebrated between the two parties.

This bond goes along with the public contractual processes since its gestation in the pre contractual stage through the bid bond's policy that guarantees the payment of the damage caused by the proponents that do not honor their obligations in that stage. What is more, it protects the state against the non-subscription of the contract on the side of whoever ends up being the winning bidder.

This warranty protects the entity in the contractual and pos contractual stages, through the coverage that makes part of it, against the noncompliance of the obligations that make part of the contract's main fringe benefits. Nevertheless, this is not the only protection that this warranty gives, but also covers the damage caused by the non-execution of the related fringe benefits, as in cases related to the contractor's payments of worker's compensation debt that can be required to the state, or the ones of the advance's correct management and advanced payment.

This handbook is a guide about the conditions under which this type of bonds must be required and given, based on the ruling given in the existing norms in terms of public contracts, mainly the Law 80 of 1993, 1150 of 2007 and the Regulatory Decrees 4828 of 2008; 931 and 2493 of 2009. Furthermore, it represents a contribution from the insurance sector to the discussion of aspects related to public projects' warranties, that we hope will be a useful tool for state entities.

Companies that have surety bonds authorized

ACE Seguros SA

Chartis Seguros Colombia

Aseguradora Colseguros SA

Aseguradora Solidaria de Colombia Ltda.

BBVA Seguros Colombia SA

Compañía Aseguradora de Fianzas SA (Confianza)

Cóndor S.A.

Compañía Mundial de Seguros S.A.

Seguros Generales Suramericana S.A.

Chubb de Colombia Compañía de Seguros S.A.

Generali Colombia Seguros Generales S.A.

La Equidad Seguros

La Previsora SA Compañía de Seguros

Liberty Seguros S.A.

Mapfre Seguros Generales de Colombia

Mapfre Crediseguro S.A.

QBE Seguros S.A.

RSA Seguros S.A.

Segurexpo de Colombia S.A.

Seguros Alfa S.A.

Seguros Colpatria S.A.

Seguros del Estado S.A.

Seguros Bolívar S.A.

CHAPTER I.
WARRANTY THAT COVERS THE RISKS THAT ARISE FROM THE PRE CONTRACTUAL STAGE.

I. General Considerations

What is a bid bond?

That which vouches for the payment of the damages attributed to the bidders in the pre contractual stage.

How is the pre contractual stage defined?

The pre contractual stage is that which encompasses the group of already executed acts, not only by the state entity, but also by the bidders before the celebration of the contract and in the event of the same.

In that stage, the participants are able, with their conduct, to frustrate the state contract's set up. Consequently, the ordering of the law has established that state entities must protect themselves against the damage caused when the bidders do not meet the terms of the presented bids.

How was the regulation of the bid bond before the Law 1150 of 2007?

Before Public Contracts Law reform, the bid bond would cover as the pre contractual stage's unique damage, the non-subscription of the public contract without a fair cause on the side of the winning bidder, unless additional risks were included in the coverage of the respective policy.

In fact, numeral 12 of article 30 of Law 80 of 1993, has established in that respect:

"If the winning bidder does not subscribe in the designated term the corresponding contract, the value of the deposit or the warranty made in response to the bid bond, will be in the hands of the contracting entity, without lessening the legal acts that lead to recognize the damage that has been caused, and that is not covered by the already mentioned deposit's value or warranty"

In that respect, it is important to highlight that the State's Council vouched the previously stated stance in the concept issued March 30 of 2006, where it stated:

"a. Is it possible to declare the bid bond's claim in other cases than the ones in numeral 12 of the Article 30 of the Law 80 of 1993?"

- a. The administration cannot declare the noncompliance of the bid bond's claim in circumstances other than the non-subscription or legalization of the contract, mentioned in numeral 12 of the Article 30 of the Law 80 of 1993, except when insurance companies voluntarily take in the risk.

II. How is nowadays the regulation of this warranty?

1. Covered Perils

In its article 4, the Decree 4828 of 2008, opened up the spectrum of the bid bond’s covered perils, and besides the already mentioned in reference to the non-subscription of the public contract, included the following:

Coverage	Explanation
<p>The non extension of the deadline for the bid bond’s policy when the predicted length of the terms for the winning bid of the contract is extended, as long as the extension does not exceed three months.</p>	<p>Article 30 of Law 80 of 1993, establishes in its numerals 4 and 5, hypotheses in which it is possible to change the due date of the bid understanding this as, the term under which those interested can present their bids.</p> <p>Moreover, for the inverse auction, article 22 of Decree 2474 of 2008 foresees the possibility of extending the due date for presenting the eligibility requirements’ supporting documentation when only one bidder is qualified to take part in the same.</p> <p>In these cases, the warranty’s extension is necessary for it be in force when the winning bid takes place.</p>
<p>The lack of granting the surety bond from the winning bidder’s side.</p>	<p>In conformity the stated in article 41 of Law 80 of 1993, the warranty’s approval is a public contract’s execution requisite, therefore, if the contractor does not give the approval, the contract is not executable.</p>
<p>The withdrawal of the bid after the deadline for the presentation of the same bids is due</p>	<p>This new causal could indicate that the bid presented in the public selection process is revocable, which would be contrary to the State’s Council’s position, Corporation that in the concept of April 20th of 2006 presented the following:</p> <p>“Hence, state entities, specifically those who have the contractual activity under their command, cannot be forced to give authorization of the bidder’s withdrawal. In this case, a bidder that has manifested the will of retiring from the process during the evaluative stage, since that would mean giving an abusive reach to the will’s autonomy principle, which expands article 40 of Law 80 of 1993, and to the public contracting collective interest’s ignorance.</p> <p>The proposal is irrevocable, but this irrevocability is only translated in the obligation of compensating damages or making effective the deposit’s payment or the bid bond’s warranty. In other words, holding to the proposal’s irrevocability is to ignore the purposes and the reach of the public bid, which are different from the private bidding process. This is explained due to the irrevocable link born from the foundations of the public proposal, besides the legal arguments that arise from the concurrence and equality, the social and political significance of the affected public interest and in the player’s responsibility towards the State’s goals (Art. 2o C.P) and the Administration (Art. 209 CP).”</p>

The payment default of contract's publishing rights	<p>In conformity to article 84 of Decree 2474 of 2008, all the contracts celebrated by state entities that are subject to the Government Procurement Law, whose value is more than or equal to fifty (50) current minimum monthly legal wages should be published. The issue of these contracts should be in the Public Contracting Unique Diary or in the Official Gazette of the regional's respective entity, or through some mechanism that is set, in general terms, by the regional's administrative authority, which allows citizens to acknowledge its content.</p> <p>Contracts whose amount is less than 10% of the minimum amount will not be published, even when their value exceeds the previously mentioned fifty (50) current minimum monthly legal wages."</p>
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Taking into account that these risks must have coverage through the bid bond's policy, according to the National Government, entities cannot include other types of risks in their terms. What is more, the bid bond's policy will only cover those damages caused to the entity by the execution of either of the risks previously described. Lastly, in conformity with Decree 4828 of 2008, the absence of the bid bond along with the bid, is the reason of its rejection.

2. Sufficiency

By rule of thumb, this warranty's grant cannot be for a value less than 10% of the bid's value or of the official estimated budget, except in the following cases²:

Official Budget or Proposal's Value	Minimum percentage through which the bid bond policy can be granted
1,000,000 to 4,999,999 smmlv	2,5%
5,000,000 to 10,000,000 smmlv	1,0%
More than 10,000,000 smmlv	0,1%
Television Spaces Concession	1.5% of the Space's Total Estimate Value

3. Deadline

The deadline of this warranty must be extended from the bid's presentation till it is approved by the bid bond's contracting entity.

4. Cases when the obligation is not required

Besides the contracts stated in article 8 of Decree 4828 of 2008³, the mentioned article includes for the bid bond's case, three additional exceptions:

- Processes whose goal is property sales
- Inverse auction
- Merit competitions in which the simplified technical proposal is demanded

² Article 7 of Decree 4828 of 2008, modified by Decree 2493 of 2009

³ "Article 8°. Granting covered peril mechanism's exceptions. There will be no requirement of the warranties in the following contracts: between public entities, loan, insurance, and contracts whose value is less than ten percent (10%) of the amount designated for each entity. In this case, it will be in the hands of the contractor to determine the demanding need, taking into account the nature of the contract and the payment method.

The state entity can abstain itself from demanding the bid bond to take part in the processes whose main goal is property sale, in inverse auction processes for the property's winning bid and uniform technical characteristic exercises and of common use, as well as merit competitions in which the presentation of the simplified technical proposal is required."

CHAPTER II. WARRANTY THAT COVERS THE RISKS THAT ARISE FROM THE CONTRACTUAL AND POS CONTRACTUAL STAGES

1. General Considerations

What is the surety bond's goal?

The goal is covering the risks arising from the non-execution of the contractor's legal obligations, acquired by virtue of the public contract, which have their origins in the law as well as in the contract. Moreover, even though the mentioned benefits have a legal source, in order for them to have the bond's coverage, they must have a direct relationship with the guaranteed legal business.

On the other hand, this bond covers the damage produced in the contractual and pos contractual stages.

What is the contractual stage definition?

Is that which includes the proffered legal acts once the contract has been celebrated and until the settlement of the same.

What is the pos contractual stage?

The stage that begins once that contract is settled.

Does this mean that the bond is still in place even though the contract's has settled?

Yes. Some protection stays valid after the contract's settlement, since it offers coverage to the contractor's obligations that are still in place when the legal link has ceased, just as the State Council expressed in the Sentence of May 3, 2001⁴:

"The truth is that in the final act of the contract's settlement, whether it is by the parties' mutual agreement or by the administration's unilateral decision, the legal relationships between the parties get extinguished. Some of the contractor's obligations stay even though, the construction, the work, or the property from the contract, could already been turned in. Hence, the contracting party will respond regardless of the contract's settlement, for the defects or imperfections that can arise in the bond's period or for the hidden imperfections in the terms established by the law (art. 2060 c.c.). According to the current contractual legislation, this must end up in the construction's plumbing, from the administered property and the provision of services that have taken place. In addition, it should protect the administration from the possible actions that could take place if there is a breach in the working obligations or in third party damages. These obligations can have a warranty with the granting of insurance policies, whose validity extends through the time determined by the administration in accordance to the legal regulation."

Detached from the transcribed jurisprudence, the surety bond can also cover the pos contractual obligations to which the mentioned sentence refers.

What risks does the surety bond cover?

The surety bond is made of various types of protection or coverage, that according to article 4.2 of Decree 4828 of 2008 are the following:

- Well managed and correctly invested advance.
- Advance refund
- Surety
- wage and the social benefits payment

⁴ Expediente 12724

- Construction's quality and stability
- Quality and correct operation of the goods provided
- Service Quality

According to the coverage and to further explanation, not all of them are required for any type of contract, in terms of the type of risks that each one of them covers, for example. The request of the advance's insurance cannot take place in a contract where the delivery of that amount of money does not occur, if this one for instance, corresponds to a legal business of an instantaneous execution.

Furthermore, clearly Decree 4828 of 2008, established the independence between indemnities, meaning that the contracting entities will not be able to use the insured value that corresponds to, for example the wage coverage, in order to claim the damage caused by the occurrence of the risk covered by the construction's stability.

2. Indemnities

2.1 Well managed and correctly invested advance

What is the background of this indemnity?

As an immediate normative background, we find the previous warranties regime, set up in article 17 of Decree 679 of 1994 that stated the following:

"The value of the advance or advance payment's indemnity must be equal to one hundred percent (100%) of the amount that the contractor receives as advance or advance payment, in money or in kind, for the execution of the same;"

What do we understand from advance?

The State Council has established that the advance concept corresponds to public money given to the contractor before the contract's execution, with the goal of investing in the same. About this, the meeting of all the magistrates of the State Council expressed the following⁵:

"The advance is an agreement in the contract regulated by the law stemming from the will's autonomy, which in different occasions creates reciprocal rights and obligations between the parts. First, it is the contractor's obligation and the contracting party's right, to respectively give and receive –warranty's constitution beforehand-, a fixed amount of money charged to the contract's resources, with the objective of financing fringe benefits in charge of the contracting party (property acquisition, services, constructions, etc.). Second, the result of the advance constitutes an obligation of the contracting party and a right of the contractor in the following aspects: - From the objects stated in the contract investment and from the amortized payment, on the side of the contracting party. – From the contractor receiving through depreciation, and/or putting to effect the advance payment bond, or surety, according to the current Government Procurement Law, due to the contracting party's rights that imply imperfectly managed or incorrectly invested public property's money. The contracting parties also come to an agreement in the contract about the effectiveness conditions, the proportion of the contract's value, the time in which they must be delivered, the state's supervision over the aggregate and the depreciations."

From the mentioned sentence, the advance creates two types of obligations for the public contractors. In one hand, those arising for the public entity forced to give in the specified amount and dates, and on the other hand, the required to the contracting party for investing in the opportunity and form agreed in the will's accord.

Coverage	Explanation
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⁵ STATE COUNCIL – SALA PLENA DE LO ADMINISTRATIVE LAW
 Counselor speaker: REINALDO CHAVARRO BURITICÁ, August eighth (8) of two thousand one (2001)
 Settlement number: AC-10966 – AC 11274

Not investing	Not using the advance
Improper Use	Giving a different destination to the advance from the one agreed on the contract
Improper acquisition	Using for itself the given advance

What risks does this indemnity cover?

In conformity to article 4.2.1 of Decree 4828 of 2008, this indemnity covers three types of risks:

Sufficiency

This indemnity is made of 100% of the value submitted to the contracting party as an advance payment. Likewise, the regulatory law clarifies that when the advance is in kind, there should be an estimate of the advance money, for the establishment of the respective warranty.

Deadline

This indemnity must be up to date when the production of the contract's settlement has occurred.

2.2 Advance Payment's refund

What is the background of this indemnity?

In the same way of the indemnity related to the advance, the statement of this one is also in article 17 of Decree 679 of 1994.

What do we understand from advance payment?

In conformity to the stated by the Comptroller's Office "The advance payment makes part of the price and its delivery implies the partial extinction of the remuneration that the entity is forced to, but only in a way ahead of the contract's execution or as a first count."⁶

According to the previous definition, it is clear that the advance payment corresponds to the money belonging to the contracting party, and he is free to decide the destination of the same, contrary to what happens with the advance.

What risks does this indemnity cover?

In conformity with the article 4.2.2 of Decree 4828 of 2008, this indemnity covers a state entity against the failing to reimburse the turned-in advance payment, whether it is a partial or full one, whenever it is proper.

Sufficiency

The composition of the indemnity of the advance payment return, given to the contracting party, must be 100% of the advance payment's value.

Deadline

This indemnity must be valid at the time of the contract's settlement.

2.3 Surety

This is the basic indemnity of the ones that make up the surety bond, every time it covers not only the value of the damages caused to the contracting entity, resulting from the default that is attributable to the contracting party's obligations that arise from the public contract, as well as the contractually imposed sanctions already agreed.

What is the background of this indemnity?

⁶ Concept from March 17, 2004

As an immediate background, the regulation mentioned in article 17 of Decree 679 of 1994, which besides establishing the indemnity's incorporation duty, in terms of the insured value, determined that this one "would not be less than the forfeit clause's amount, not even to the 10% of the contract's value."

What risks does this indemnity cover?

As previously mentioned, the surety bond covers the damage caused by:

Covered Perils	Explanation
Total Default	<p>Absolute failure to execute the benefits agreed.</p> <p>If the default is severe and threatens the paralysis of the state entity's contract, the declaration of its expiration can be in conformity with the established in article 18 of Law 80 of 1993.</p>
Partial Default	<p>When divisible, fractioned failure of the benefits execution.</p>
Late Surety	<p>This is the case when the contracting party does not execute the agreed benefits in the contract's set period.</p> <p>In that sense, we must remember that in conformity with article 1608 of the Civil Law, with application to the public contracting in conformity with article 13 of Law 80 of 1993, the debtor is in delay:</p> <ol style="list-style-type: none"> 1. "When the obligation is not fulfilled under the set term, unless, as in special cases, the law demands the debtor's presence to consider him in delay. 2. When the item has not been given or executed, but under a certain time frame and the debtor lets it pass, without giving or executing it. 3. In the rest of the cases, when the debtor has judicially been counterclaimed by the creditor"
Defective Surety	<p>Produced when there is a lack of identity between the agreed benefits in the contract and the one effectively executed by the contracting party.</p> <p>Just as it will further explained, we must explain that through the surety bond, there will be coverage of the damage that this defective default causes while the contract is being executed, since the risks that will later on created for this reason, will be covered on by the quality indemnity.</p>

In order to make the bond effective, the default must be attributable to the contracting party in the previously mentioned cases.⁷

(ii) Sanctions

Article 17 of Law 1150 of 2007 gave state entities the ability to agree fines on the celebrated contracts and to make them effective through the encouraged administrative act. The regulation states:

Article 17. From the Law to the appropriate process. The appropriate process will be a main principle in terms of sanctions of contractual acting.

⁷ Look up the chapter regards to the policy's conditions, where the authorized exclusions are established.

In the development of the previously stated, and in regards to the control and surveillance duty over the contracts, which corresponds to the entities subject to the Public Administration General Government Procurement Law, they will have the authority of imposing the already agreed fines with the purpose of enforcing the contracting party to follow their obligations. The witnesses of the affected must precede this decision, which must have a minimum procedure that guarantees the right of the contracting party's appropriate process and proceeds only, while the execution of the contracting party's obligations is pending. Likewise, they will be able to declare the default, with the purpose of making effective the forfeit clause included in the contract.

Paragraph. The forfeit clause and the imposed fines will become effective through state entities, with the ability to turn to compensation mechanisms from the contracting party's debt aggregates, collection of the warranty, or any other means to obtain the payment, including the coercive jurisdiction.

Transitory paragraph. The faculties explained in this article, understood as attributable to the clauses in the fines or the forfeit clause agreed in the contracts celebrated previous to the issue of the law and, in those in which through autonomy's will of the parts, could have predicted the state entities' competition in order to impose them and make them effective."

The transcribed disposition resolved the existent controversy during the Law 80 of 1993's original text validity, in which it was discussed that state entities maintained the fine imposing faculty through the administrative act, in the same conditions allowed by Decree 222 of 1983, previous Government Procurement Law.

In a first stage, the State Council in effect vouched this possibility, based on the faculties contained in article 64 of the Administrative Law, a position modified in sentence of October 20, 2005, in which the State Council recognized that the granting of this excessive faculty was not to state entities through the Law 80 of 1993. Hence, the enforcement of the agreed fines should be under the judge so he would decide their origins.⁸

- **Fines**

The purpose of the fine agreed in public contracts, is threatening the contracting party to fulfill the benefits agreed in the contract, through the payment of a certain amount of money.

As the fine's relevant elements, extracted from the foreseen in the previously transcribed article 17, we can emphasize the following:

- A previous procedure that guarantees the contracting party's defense right, must come before its' imposition⁹.
- Taking into account that the fine has a threatening goal, the only way of imposing it is while the obligation's execution that gave origins to the same is pending.
- The fines can become effective not only through the warranty's collection of payment, but also implementing the coercive jurisdiction procedure, as long as the compensation application's requisites do not take place.¹⁰ In this case, the extinction of obligations mechanism will operate by rule of law.
- Delivering fines in contracts made before the validity of Law 1150 of 2007 will only take place, as long as, these ones were agreed in the meeting of minds and imposed after the deadline of the

⁸ Lookup third section of sentence of the State Council of October 20, 2005, File 14579

⁹ In that sense, lookup article 87 of Decree 2474 of 2008

¹⁰ "Article 1715. The compensation works only through the rule of law and still without knowledge from the debtors; and both debts are reciprocally extinguished till its value competition, from the moment that one and the other collect the following qualities:

"1. That both of them are made of money or fungible things or indeterminate of equal type or quality.

2. That both debts are liquid and

3. That currently both are required

The waiting given to the debtor stop the compensation; however, this disposition is not applied to the deadline given by the creditor to the debtor.

named law. For example, in a contract made in 2005, where they agreed the fines, these ones will be able to impose themselves after July 16 of 2007.

- **Forfeit Clause**

In conformity with the established by the State Council¹¹, the forfeit clause in public contracts “follows the same functions of the private law, which is, preventing, regulating and sanctioning the total or partial default of the obligations in charge.” In the Civil Law, article 1592 defines it as “that one in which a person, in order to guarantee an obligation’s surety, is tied to a sentence whose objective is to give or take action, in case of failing to execute or delaying the main obligation”. By rule of thumb, when the declaration is expired, the forfeit clause becomes effective¹². In terms of the first hypotheses, it is important to mention the fact that in a recent State Council’s declaration, they modified the temporary limit for this faculty’s exercise, in the current jurisprudence, in the sense of asserting that imposing the expiration would only be while the deadline for the obligations execution is not due. In that respect, it pointed out¹³:

“When studying again the temporary limits of this excessive power, the Room concludes that the contract’s expiration can only be declared during the execution’s deadline period and while it is valid, and not through the settlement stage, taking into account: First, the legal definition’s elements. Second, the purpose for the protection of the public interest, from this exceptional method. Third, the contract’s settlement stage is not under consideration for the adoption of the contract’s expiration. Fourth, even though it can receive or accept the surety of the obligation overdue, it is not a regular extension of the contract’s agreed deadline in order to execute it.”

Lastly, in terms of the forfeit clause’s application, the jurisprudence, based in article 1596 of the Civil Law, has shown that it is possible to reduce the amount the same obligation has been partially executed¹⁴.

Sufficiency

Article 7.4 of Decree 4828 of 2008 sets up two minimum limits in order to determine the value that the warranty should be given for. First, that this one cannot be less than the stipulated value in the forfeit clause’s title of the contract. Moreover, the law warns that the warranty cannot be less than 10% of the contract’s value for all cases. The application of this second limit would be in case the forfeit clause is less than the quoted percentage or in those cases where the contract does not include the forfeit clause¹⁵.

Deadline

The surety bond coverage should stay valid during the contract’s execution and settlement period. In that respect, article 11 of Law 1150 of 2007 regulates the opportunity to make effective the contract’s settlement, in the following way:

¹¹ State Council’s Research Room and Civil Service. May 25 of 2006’s Concept. Settlement 1.748

¹² Law 80 of 1993, “Article 18. About expiration and its effects. The expiration is the stipulation in which it takes place the presentation of the constituent facts of the default of the obligations in charge of the contracting party, that seriously and directly affects the contract’s execution and that it shows it can be stopped, through a well based administrative act the entity can take as finished and order its end in the state that it is in. In case that the entity abstains itself from declaring the expiration, it will abide by the necessary intervention and control mechanisms, which guarantee the hired object’s execution. The declaration of the expiration will not prevent the contracting entity from taking possession of the construction or of immediately carrying on with the hired object’s execution, whether is through the contracting party or the guarantor, to whom the expiration can be declared at the same time, when there is space for it.

If the expiration is declared there will be no space for an indemnity of the contracting party, who will become the sanctions’ creditor and inabilities predicted in this law. The declaration of the expiration will be made of the surety bond’s claim.”

¹³ State Council. Third Section. November 20 of 2008 sentence. File 17031

¹⁴ State Council. Third Section. April 22 of 2009. File 26699

¹⁵ See exception in the great infrastructure projects chapter.

“Article 11. In regards to the contracts’ settlement period. It will be a mutual agreement contract settlement under the period fixed in the terms or its equivalent, or under the one agreed by the parts for that matter. In case of a nonexistent period, the settlement will be under the four months that follow the expiration of the predicted period for the contract’s execution or the issuance of the administrative act that commands the termination, or the date that the agreement stipulates.

In those cases in which, even though previously convened or notified by the entity, the contracting party is not present at the time of the settlement period, or when the parts do not come to an agreement in regards to its content, the entity will be able to unilaterally settle it in the two (2) following months, in conformity with the established in article 136 of the C.C.A.

If the settlement has not taken place when the previous established term is due, its achievement can be anytime inside the two years after the period’s deadline to which the previous subsections refer to, unilaterally or of mutual agreement, without affecting the stated in article 136 of the C.C.A.

Through mutual agreement, the contracting parties will have the right of making exceptions to the settlement, and in this case, the unilateral settlement will only proceed in relation to other aspects that have not been the agreement’s goal.”

The transcribed law forecasts three ways of making the contract’s settlement: by mutual agreement, unilaterally, whenever the first one fails, and in a judicial set.

According to this, what should be the structure of the deadline of this coverage?

The requirement of this deadline should be during the obligations execution period, the period placed for the mutual agreement settlement and two more months.

Example:

- Duration of the contract’s period = 1 year
- Period for the contract’s settlement = 4 months (mutual agreement) + 2 months (unilaterally)
- Coverage’s deadline = one year and six more months

Is it appropriate to request that the coverage is valid also during the two years that are given by Law 1150 of 2007 and the Administrative Law in order to request the settlement in a judicial set?

No. Hence, the delivery of coverage cannot be during a stage where the contract lies without a settlement due to the insured, meaning, the contracting entity, not having made the unilateral settlement, inside the two following months to the mutual agreement’s failure.

2.4 Wage Payment and Fringe Benefits

What is the background of this indemnity?

Article 17 of Decree 679 of 1994 establishes the obligation of including this coverage in the surety bond’s unique warranty. In addition, this article sets up a “requirement for the wage and fringe benefits warranty, given to workers employed by the contracting party in the country where the contract is executed. This requirement will be in all service-provision and construction contracts in which, according to the contract, the contracting party employs third parties for the surety of their obligations, as well as in those that are considered by the state entity as essential in virtue of **article 34** of the Labor Law”.

What risks does this indemnity cover?

This indemnity covers the damages that the contracting entity might suffer as a result of the default of the labor related obligations taken by the contracting party with the employees linked with it for the contract's development.

Those damages could take place due to an eventual judicial sentence, given based with the ruling of article 34 of the Labor Law, which establishes the following:

“ARTICLE 34. INDEPENDENT CONTRACTING PARTIES. <Article modified by article 3 of Decree 2351 of 1965. The new text is the following :> 1st) Independent contracting parties and therefore, true employers and not representatives nor intermediaries, are the persons or legal persons that contracts the execution of one or more constructions or service provision in benefit of a third party, for a given price, taking in all the risks, to do them by their own means and with freedom and direct and technical autonomy. Unless the jobs are different from the normal activities of the corporation or business, the construction's beneficiary or the owner of the job, will be responsible with the contracting party for the employees' wage value and the fringe benefits and indemnities. This responsibility does not stop the beneficiary to stipulate with the contracting party the warranties of the case or, so that the payment of wages to employees that already made repeats against it.

2nd) the job's beneficiary or the owner of the construction, will also be jointly responsible, in the previous subsection's set conditions, of the contracting party's obligations with respect to its employees, even in those cases where the contracting parties are not authorized to hire the services of subcontractors.”

Hence, in the event that the entity is subject to a claim charged to this indemnity, it will be able to enforce the warranty as long as the approval of two conditions takes place:

1. That whoever makes the claim has been linked with the contracting party as an employee under the guaranteed contract and,
2. There solidarity with the employer exists between the contracting party policyholder and the state entity insured, in conformity with the mentioned regulations.

Sufficiency

In conformity with the article 7.5 of Decree 4828 of 2008, the value of this warranty must correspond at least to 5% of the contract¹⁶.

Deadline

From the deadline's perspective, this indemnity has a contractual and pos contractual nature, every time it extends during the contract's period and three more years. These three additional requested years correspond to the labor actions' prescription period, as mentioned in article 151 of the Labor Law:

“ARTICLE 151. – Prescription. The actions coming from social laws will prescribe in three years, which will start to count since the moment in which the requirement for the respective obligations has taken place. The ability to interrupt the prescription, but only for one equal interval, can be done with just the employee's written claim, received by the employer, regarding a well determined right or fringe benefit.”

2.5 Construction's Stability and Quality

What is the background of this indemnity?

¹⁶ See exception in the great infrastructure projects chapter

As an immediate background, we can find the mentioned in article 17 of Decree 679 of 1994, which established that this indemnity's value would be determined in each case. In terms of the deadline, the normative prescribed that this would not be less than five years.

What risks does this indemnity cover?

The State Council has defined as the goal for the stability and quality of the construction's indemnity, that indemnity whose destination is to cover the damage caused to the contracting entity on the side of the contracting party. This indemnity is in case the obligation defaults, which guarantees that¹⁷ "the already made construction will not be destroyed or will threaten to ruin due to the construction, or the land, or the materials, that the contracting party must have known in relation to its job or occupation."¹⁸

What is the nature of this indemnity?

This is a pos contractual indemnity, since its deadline **only starts once the contracting entity receives in its satisfaction the construction, apart that if in the contractual execution other stages take place in as in the case of licenses.** Under this perspective it would be unethical and inadmissible, to request that this indemnity was active during the contractual period.

When can the activation of this indemnity take place?

The policy will become effective, with respect to the stability and quality coverage, when the contracting entity establishes that there were damages in the construction that blocked an adequate use, or there was a loss of the conditions related to its security and structure's rigidity due to causes attributable to the contracting party, and a simple non deterioration caused by the passing of time or by an inadequate use. In that respect, the State Council stated the following¹⁹:

"Regarding a construction contract, it must respond to the stability of the construction's work, maintenance, and adjustment, made over the property. This means that during the contract's period or in subsidy of the established by the law, the already made construction will not be destroyed or will have a threat of being ruined due to the construction, ground, or the materials that the contracting party should have known due to its job or occupation. It is important to warn that the plumbing does not cover the damage naturally produced by the normal use of it, or by an inadequate use of the same ones."

Hence, under the administrative act's motivation, in this event there should be reference of this body of case that shows the construction failure's impeachment to the contracting party. To that matter, the Comptroller's Office in the Concept of September 5 of 2002 manifested:

"It is appropriate to mention that the facts for reporting the claim must have a technical ruling support that not only should describe the construction's current situation and the conditions under which it was received, but is should also make an analysis of the circumstances that lead to the deterioration of the same, attributable to the contracting party due to a default, either by shortage or excess of the technical conditions agreed in the contract. We must be clear that in regards to the policy's effectiveness, the caused damages' rate must be the consequence of the causal link between the technical default of the contracting party and the damage produced in the construction."

Just as the previous cited concept mentions, the technical ruling in which the claim's report is based on must also support the estimate of the damages pretended to be effective through the warranty.

¹⁷ State Council's third section, File 10876

¹⁸ "In conformity with article 2060 of the Civil Law, the regulation of the construction contract states: "In the ten years after the building perishes or there's a threat of ruin, partial or full, the businessman will be accountable. In addition, whether is due to the construction, or the land that the businessman or the people he has employed that know in terms of their job, or by its materials,

¹⁹ STATE COUNCIL. ADMINISTRATIVE LAW'S ROOM. THIRD SECTION. March 16 of 200. C.P. Doctor RICARDO HOYOS DUQUE File No. 10.876.

Sufficiency

Article 7.6 of Decree 4828 of 2008 delegates the set up of the insured value to the entity, in order for the contractor to take into account, the agreed obligations and the value in the respective contract.

Deadline

The already mentioned article 7 forecasts that the deadline of this indemnity is not less than five years, starting from the receipt on the side of the contracting entity's satisfaction, unless the entity technically justifies the request of a lower deadline.

It is important to show that in some events, for technical reasons, it is necessary that this coverage is given for an lower deadline as authorized by the law, as in those cases in which the constructions to be executed do not imply a structure intervention.

Since when should the operation be regarding the license of these constructions coverage?

This coverage must be required once the construction's stage is finished and not when the operation stage is finished, every time they give the stability warranty for 20 or more years of the construction's exploitation. In other words, once the project's operation has finished, this would imply that the agent would have to do construction's interventions in the last period of the license, in order to reestablish the structural conditions in the same way as originally proposed (20 years back). This would imply that it must take into account those constructions in the financial structuring of the project.

On the other hand, after 20 or more years of the construction's operation, the production of a risk's status alteration could have taken place, which makes it hard for the analysis and deliberation of the incurred claim's probability, and at the same time, it holds the attainment of reinsurance, a fundamental element to grant the surety bond.

2.6 Service Quality

What is the background of this indemnity?

The indemnity in article 17 of decree 679 of 1994 established that the value's settlement would take into account the guaranteed contract's amount.

What risks does this indemnity cover?

In conformity with article 4.2.8 of Decree 4828 of 2008, this indemnity's covered perils refer to those damages caused to the contracting entity, produced after the contract's termination, and that has proved that the cause lies between two hypotheses: (i) bad quality²⁰ or the scarcity of the handed products as a result of a consultancy public contract and (ii) bad quality of the services rendered, as long as it gives credit to the fact that these ones are attributable to the contracting party.

How is the judgment regarding the bad quality or scarcity of the delivered products with the purpose of the consultancy or the service rendered?

The establishment of these must be in conformity with the agreed obligations in the contract.

In what types of contracts should this indemnity be required?

In consultancy contracts²¹, in service rendered contracts²², in those that by the nature of its obligations results proper and in those that are nameless and atypical but that consecrate the fringe benefits

²⁰ According to the Real Spanish Academy Dictionary, it is understood "property or group of properties attached to something, which allow judging its value." From the normative point of view, article 1 of decree 3466 of 1982 known as the consumer's ruling, defines the quality of a good or service as the "Aggregate group of the properties, the ingredients and components that make it, determine distinguish or individualize."

²¹ Article 32 of Law 80 of 1993 defines the consultancy contract in the following way: "2nd. Consultancy contracts are those celebrated by state entities in reference to the studies needed for the investment projects' execution, diagnosis studies, pre feasibility or feasibility for programs or specific projects, as well as the coordination, control and supervision' technical advising. Consultancy contracts are also those who have as a purpose the supervision, advising, construction or project management, management, programming and the execution of the designs, terms, preliminary plans and projects."

under the agreed obligations, as well as in those corresponding to other contractual typologies that for example, imply the development of consultancy jobs or service rendering²³.

The damages caused due to the bad quality of the services, produced during the contract's execution, to which indemnity are they charged to?

Since these would belong to the default of contractual obligations, they would become effective through the surety bond.

Sufficiency

Article 7 of Decree 4828 of 2008, establishes that the warranty's value will be established by the entity in the terms, taking into account the object, the value and fringe benefits agreed in the guaranteed contract.

Deadline

The regulation in the previous paragraph establishes that the entity should be the one to set up the deadline taking into account the structuring of the contract.

Nevertheless, we must not forget this indemnity is of pos-contractual nature, since it covers risks proven after the contract's termination and therefore, the beginning of the coverage's operation must match the end of the legal link.

Would this indemnity cover the quality of the designs and studies?

Yes. That is one of the products generally agreed under the consultancy contract

2.7 The good's quality and correct operation.

What are the normative fundamentals and the background of this indemnity?

From the legal perspective, article 4 of Law 80 of 1993 establishes as a duty of state entities that these will "*Demand that the quality of the acquired goods and services...adjusts to the minimum requests explained in the technical binding rules, without affecting the power to demand that those goods or services abide with the Colombian technical regulation, or failing that, with international regulation made by worldwide known institutions or with foreign regulation accepted in international agreements signed by Colombia*".

Hence, it is clear that there is a direct relationship between quality coverage and the correct performance with the state entities' obligation to demand the suitability of the acquired products. Accordingly, the previous warranties' regime consecrated in article 17 from Decree 679 of 1994, demanded state entities the quality coverage and correct performance requirement. In addition, in relation to this indemnity, it established that: "The indemnity's value, of ... quality of good or service, ... should be determined in each case subject to the contract's terms in reference to that pertaining the final value of the construction, the contracted good or service or the contract's object."

What risks does this indemnity cover?

None of the supervisor's ordering of a project can be given verbally. It is ruled for the supervisor to give in written its orders or suggestions and they must be under the terms of the respective contract."

²² Article 32 of Law 80 of 1993 defines de fringe benefits contract as "Fringe benefits contracts are those made by state entities to develop activities related to the entities' administration or operation. These contracts can only be made with persons when those activities cannot be made with factory's staff or require specialized knowledge.

In no case, these contracts generate labor relations or fringe benefits, and its celebration will be in the strictly essential term.

²³ Article 54 of Decree 2474 of 2008 states that "if the contractual objective involves consultancy services and other main obligations, as in the case of the execution of projects that include the work's construction and design, the contracting party's choice must be through the public bid, direct contracting or shorten selection, depending on the type of assignation in conformity with the stated by the law and in the present decree. In any case, the professional and expert team must have the entity's approval.

In conformity with article 4.2.7 of Decree 4828 of 2008, this indemnity will cover two types of risks, as long as they are attributable to the contracting party:

- (i) Those caused due to the bad quality of the supplied goods in conformity to the agreed in the contract and
- (ii) Those arising from the default of the good's technical²⁴ regulation.

In recent jurisprudence, the State Council proclaimed that the quality and correct performance correspond to two risks with different characteristics, although they should be under the same coverage. In that respect, he mentioned²⁵:

"In that respect, we must clarify that the quality and correct performance are two independent indemnities since they cover two different types of risks: i) the quality, covers the insured against the risk derived from the contracting party's default of the obligations in terms of the minimum requests and specifications agreed in the contract, and, ii) the correct performance protects the insured against the harm suffered due to a faulty performance of the goods or of the supplied, installed or repaired equipment. These risks might be sheltered under the same coverage, since there is a stretch complement between them, every time that the service quality - repair of machinery or equipment -, has been satisfactory, or the supplied elements – machinery and equipment – are of good quality, which will have a direct influence on the correct performance."

Moreover, we must specify that by legal ruling in the consumer's protective regulation, all those able to be suppliers, producers or dealers of goods and services must guarantee the quality and suitability of what they produce and sell. Hence, just as the Trade supervisor explains it²⁶, according to the established in the Consumer's Law, Decree 3466 of 1982, three types of warranties exist:

1. The Minimum Alleged Warranty: Article 11 of the Consumer's Law confirms the producers' obligation to guarantee the suitability and quality conditions of those goods subject to license or registration. The regulation points out the following:

"Art. 11. Minimum Alleged Warranty. Understanding the producer's obligation of fully guaranteeing the quality and suitability conditions mentioned in the license or registration, as agreed in all the fringe benefits and sale contracts. This registration or license corresponds to the adjustment derived from the official status of the technical regulation or from the registration's modification, as well as the quality and suitability corresponding to the official status of the technical regulations, even if the good or service has not been the registration's objective.

According to this previous statement, in that matter, it is a mandatory request of all registration to indicate the term during which it guarantees the offered quality and suitability conditions. This takes place whenever the competent authority does not appoint through a resolution the term of this minimum alleged warranty, according to the nature and type of goods and services. Furthermore, whenever the term fixed by the competent authority affects any term already registered, this last one is understood as automatically modified by the same, unless the previous registered term is bigger than the one fixed by the competent authority, case in which the one registered by the producer will prevail.

In the eyes of the consumers, the minimum alleged warranty to which this article refers to, directly relies on the dealers and suppliers, without any possible damage arising from the demanding surety of the mentioned minimum warranty to their dealers or supplier, regardless of them being producers or not.

The warranty that this article is about can become effective in the terms forecasted in article 29."

²⁴ Decree 2269 of 1993 defines the technical regulation as the "Document established through consensus and approved by recognized organism, which supplies, for common and repeated use, rules, directives and characteristics for the activities or the results, aimed at a goal of an optimal order degree in a given context. The technical regulation should be based on the science, technology and experience consolidated results and its objectives should be the optimal benefits for the community;"

²⁵ State Council. Third Section. Sentence of April 22nd of 2009, exp. 14667.

²⁶ Concept 02016425 of February 28th, 2002

2. Voluntary warranties: As the name explains it, they come from will's autonomy of the manufacturers or suppliers of products that give warranties in excess of the alleged minimum.
3. Minimum quality and suitability warranty guaranteed in terms of the goods not subject to license or registration.

In this sense, understand the granting of the warranties not harming the contracting party's obligation in conformity to the consumer's protection regime previously described.

Sufficiency

Article 7.7 of Decree 4828 of 2008 states that guaranteed value should conform to the characteristics in the insured contract.

Deadline

The warranties current regime specifies that the set up of the validity of this coverage should be in the hands of the contracting entity. Nevertheless, the period to which the fixed minimum limit for its execution corresponds to, is that in which the contracting party must grant the minimum alleged warranty and answer the hidden vices.

Budgetary Liability

Article 4th's paragraph of Decree 4828 of 2008 stated that the surety bond would also cover the damage caused to the contracting entity, derived by the contracting party's budgetary liability declaration, as long as this declaration is due to the default of the obligations that appear in the guaranteed contract. That means that THE COVERAGE OF THESE DAMAGES IS NOT CHARGED TO AN INDEPENDENT COVERAGE, and will activate the respective indemnity depending on the nature of the unexecuted fringe benefit.

CHAPTER III. WARRANTY'S EFFECTIVENESS

When the guaranteeing of the public contract is through an insurance policy, in relation to the claim presented to the insurer, stated in article 1075 and following ones of the Code of Commerce, the Code of Commerce's regime sees itself replaced by the application of the public contracts' special arrangements. These give the contracting entity endorsement to, through a motivated administrative act, set up the claim and make the forfeit clause effective or estimate the amount of the caused damage. In that respect, the recent State Council jurisprudence has mentioned the following²⁷:

"...it is clear that public entities can make effective the warranties set up in its favor by the contracting party, through the administrative act, which can be that one in which the default is previously declared.

It is true that this section had acquired different perspectives in terms of the faculty of declaring the default through the administrative act, with the purpose of enforcing the surety bond. Furthermore, we must specify that the recent room jurisprudence has considered that the law stipulates this faculty, when it regulates the entity's competence of unilaterally declaring the insured claim's incident."

From the normative perspective, this faculty has support in article 14 of Decree 4828 of 2008, which is as follows:

"Article 14. Warranties' effectiveness. Whenever a default takes place, of any of the events covered by the warranties explained in this decree, the contracting entity will proceed to make them effective in the following way:

14.1 If expired, once the right process is finished and defense rights bonding, and the guarantor and contracting party's contradiction have taken place, it will utter the administrative act in which, besides the expiration declaration, the effectiveness of the forfeit clause or quantification of the damage's amount, and the order of the payment to both the guarantor and the contracting party will be made.

14.2 If expired, once the right process is finished and defense rights bonding, and the guarantor and contracting party's contradiction have taken place, it will utter the administrative act in which the enforcement of the fine and the order of the payment to both the guarantor and the contracting party is be made. For this case, the administrative act is the claim in the warranties given through the insurance policy.

14.3 In the rest of default cases, once the right process is finished and defense rights bonding, and the guarantor and contracting party's contradiction have taken place, it will utter the administrative act in which the default will be declared, will proceed to quantify the amount of the loss or making effective the forfeit clause, if agreed and the order of the payment to both the guarantor and the contracting party is be made. For this case, the administrative act is the warranties' claim given through the insurance policy."

The notification of this administrative act should be to both the contracting party and the insurance company, with the purpose that these could make effective their defense right through the formulation of the replacement resource in conformity with the regulation in the Administrative Law.

As seen, two faculties given in the cited regulation to the contracting entities: (i) the one of making the claim effective in order to activate the warranty and (ii) the one of calculating the loss.

In terms of the first part, a controversy took place historically in relation to the administrative act's constituent and declarative nature, which seemed that the transcribed regulation overcame, where in a

²⁷ STATE COUNCIL. THIRD SECTION. Counselor speaker Dr. RAMIRO SAAVEDRA BECERRA May (13) of two thousand nine (2009). Filling 25000-2331-000-11430

diaphanous way it states that for the expiration and fine events of the administrative act, the claim is constitutive, not in the rest of the default cases. Regardless of this, jurisprudential pronouncements made by the State Council after the Decree 4828 of 2008 came into force, have sustained in general terms the thesis of the declarative nature, just as shown in the following transcribed sentence.²⁸

“Gathered from the previously stated, the maximum term to declare the claim for the Administration has is two years after having knowledge of the constituent facts of the same. In case of the issuance and execution of the administrative act that declares it, through the governmental way end, it will begin to run the two years term that the law has established for the contractual action exercise. This does not mean that the administrative act that declares the claim must be solid in the two years after the Administration has knowledge of the event, but it only requires the declaration by the same under that term; otherwise, it would mean to limit the Administration’s competence to issue the act.”

Along with this, in the same jurisprudential pronouncement, the State Council modified its stance regarding the expiration term’s counting, when the controversial action is in exercise, transforms into the administrative act through which the warranty becomes effective. In effect, it showed that if the policy becomes effective during the contract’s execution, the expiration term would start to count from the contract’s termination or settlement. Moreover, if it is a pos contractual indemnity, the expiration term will start to count from the execution of the claim’s administrative act.

Regardless of this, we take into account that besides the expiration and fine cases, in the event of the declaration of default, the administrative act through which the claim becomes effective is also essential, reason why this must uttered and must stand still during the respective coverage’s validity.

The previous statement finds support in the surety bond’s constitution, since taking into account that the covered peril is the default of the public contractor’s obligations, the facts covered by the policy are not the only ones required, but also that the entity qualifies the same ones as constituent of that default. In that sense, the State Council has manifested²⁹:

“...the administrative act that recognizes or declares the event the risk is CONSTITUENT of the claim, reason why, to my judgment, it is essential that the corresponding policy is valid not only at the time when the insured event takes place, but also when the administrative act that represents the claim takes power...Likewise, there are important jurisprudential pronouncements that since 1998, clearly defined that the claim’s set up did not exclusively depend on the occurrence of the mainly real insured events or risks, but for the set up of the same, the issue of the corresponding administrative act was essential. This, as it is natural, should be able to preach its execution.”

Additionally, as manifested by the State Council, the fines constitute a species under the forfeit clauses’ gender³⁰:

“For the Real Academy dictionary, the word fine means “forfeit imposed by a fault, excess or crime, or due to infringing the agreed in this condition,” proposal that clearly indicates that in common language the term fine is implemented to define forfeit sanctions that are public (this is of the “fault, excess or crime”), as well as private (the conventionally agreed ones). This definition is brought with the goal of showing that a contractual stipulation named “fines”, can be a forfeit clause regulated by private law in the noted ruling, in a way that is not necessarily a clause entitled in a public contract, that implies by itself that a “forfeit sanction” is being agreed in an exorbitant authority way. In each specific case, the discussed agreement needs analysis, applying the rules regarding the interpretation of the contracts contained in articles 1618 to 1624 of the Civil Law, according to which should be on the part’s will

²⁸ STATE COUNCIL. THIRD SECTION. April 22nd, 2009 CP: MYRIAM GUERRERO DE ESCOBAR Filing number: 19001-23-31-000-1994-09004-01(14667)

²⁹ March 4th of 2008, Aclaración de voto a sentencia. Gil Botero, Enrique.

³⁰ STATE COUNCIL REFERENCE ROOM AND CIVIL SERVICE Counselor speaker Enrique Jose Arboleda Perdomo, May twenty fifth (25) of two thousand six (2006). Filing: 1.748

once it is clearly known, and also the one that shows that in the sense that the clause is able to have any effect, should be preferred to that one not able to produce any effect.”

Under this perspective, and taking into account that the surety bond covers the payment of fines and the agreed forfeit clause, there is no reason why the administrative act should make effective a treatment in the event of the fines and another one in the case of the forfeit clause.

Hence, under the exposed thesis, the administrative act that declares the expiration, imposes a fine or declares the default, should be issued and stay still during the policy’s validity. The risk covered by the warranty is made of its existence and improvement.

In relation to the damages quantification faculties, must be clear that the administrative act’s motivation should leave the foundations used for its estimation, according to article 1.077 of the Commerce Code.

CHAPTER IV. DIVISIBILITY

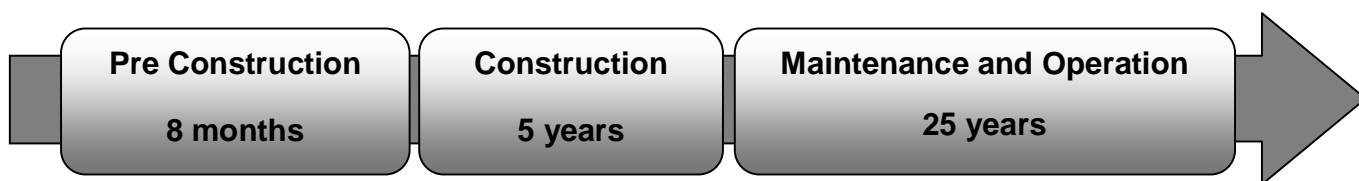
One of the main progresses of the reform to the public contract's regime contained in Law 1150 of 2007 refers to the possibility predicted in article 7 of this ruling of dividing the warranties given to endorse the state's project. The legal ruling gave in effect a free way to that possibility and referred to the ruling, the establishment of the legal conditions under which will be allowed to grant several warranties for only one project.

Article 9 of Decree 4828 of 2008 expands the warranties' divisibility principle, under the following rules:

- The warranty's indivisibility constitutes the general rule and the divisibility is the exception.
- In order that the warranty's division is legally viable, two conditions must take place: i) that the contract's deadline exceeds five years and (ii) that due to the legal business structure, it is executable through stages or that the stage division is required for its development.

When the carrying out of these requisites takes place, how does the divisibility operate?

The contracting party's has the possibility to grant individual surety bonds for each of the contract's execution stages, a situation explained with the following example:



Hence, the contracting party will be able to grant a warranty in the pre construction stage, another for the construction and another for the maintenance and operation.

Why is the possibility to divide these warranties favorable?

Due to the fact the policy's achievement eased every time there was a difficulty in the reinsurance placement (an essential element for the granting of surety bonds), in terms of a long-term contract (as in the case of concessions). The main reason was that it was covering insured values that were too high, and were not able of fully retaining them in the insurance company's shareholders wealth.

What covered perils would be under the warranty in this stage?

The covered perils will relate with the payment of the damage caused by the default of the obligations, which must execute in the respective stage, even if these extend to a subsequent one. In this case, whenever the execution of an obligation is in several stages, the coverage by one of these will be enough.

How is the calculation of the insured values of these warranties, when given in these stages?

The basis of the calculation is the cost of the obligations that will execute in the guaranteed stage; a situation should have a clear definition in the terms.

How does this divisibility operate?

Taking into account that the warranty is given in each stage, six months before the end of the same, and the guarantor should demonstrate to the contracting entity, in written, that it will not continue to guarantee the project's next stage. This interval is useful in order for the contracting party to start looking for a new warranty, since the fact that the insurer decides not to continue, does not exempt him from his obligation to find a new endorsement.

What happens if the guarantor remains silent and does not notify his will of not guaranteeing the next stage?

He will be force to grant the warranty in the next stage.

What happens if the guarantor resigns and the contracting party is not able to find a replacement for the warranty?

Although article 9 of Decree 4828 of 2008 states the mechanism to reestablish the warranty should be predicted in the contract, the truth is that if the contracting party does not find it, the following step would be the anticipated contract's termination, situation that must be foreseen in the will's settlement, as it was previously mentioned.

If the contracting party defaults the obligation of renewing, replacing or granting the warranty, can the entity declare its expiration?

No, for two reasons: (i) the already mentioned, article nine, specifically states that when the contracting party is not able to find a new warranty, the effectiveness of the granted on the previous stage cannot take place. (ii) The revocation of article 13 of Decree 2493 of 2009, which established that not replacing, renewing or granting the warranty, was the cause of the expiration.

**CHAPTER V.
GREAT INFRASTRUCTURE PROJECTS**

In practice, the surety bond for state entities has two characteristics that make it different from the rest of property and casualty (P&C) insurance. On one hand, in some cases the covered perils overcome the annual deadlines. On the other hand, it implies in some projects, the coverage of an important amount aggregate, which at the same time corresponds to the designated “mega projects” of great importance for the development of the country’s infrastructure.

Due to the amount and type of covered perils, this type of insurance has a close connection with reinsurance, since this one represents an essential element for its grant in big infrastructure projects. Actually, the branch transfers 53% of the written premiums to the reinsurer.

Moreover, in financial crisis, when there is a reduction of reinsurance supply due to capital shortage, the reinsurers decide to redirect their resources to branches demanding smaller sums and through which it covers annual deadline risks, whatever allows for a bigger capital movement.

Taking into account the shortage that the insurance supply suffered for the surety bond branch in the first semester of 2009, and the related increase in contracts, whose amount overcame the five hundred thousand million pesos, the National Government issued Decree 2493 of 2009, through which two important adjustments took place in order to make viable insuring great infrastructure projects: (i) Possible division of the maintenance and operative stage and (ii) reduction of those megaprojects’ insured values.

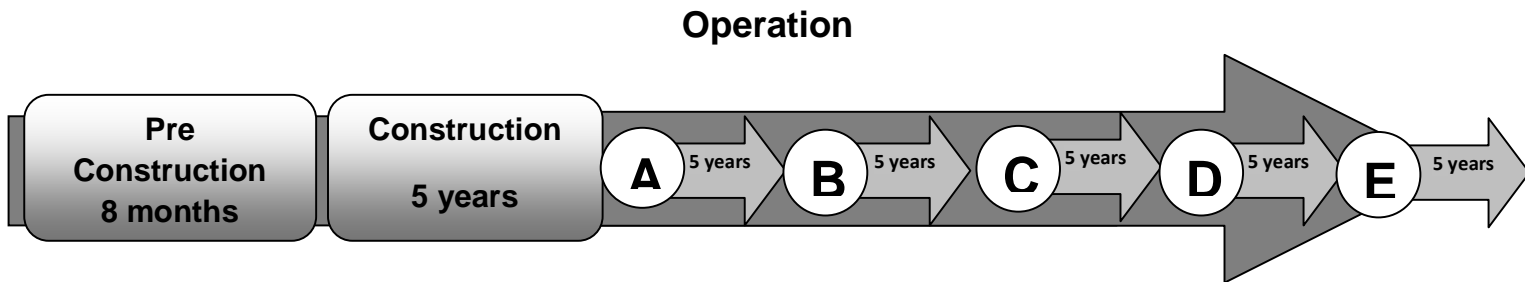
Divisibility in the operative and maintenance stage

As explained in the previous chapter, there were market difficulties to insure projects that the validity overcame five years, since that is the maximum deadline for which the reinsurance gives the backup. Hence, the reason why article nine of Decree 4828 of 2008, allowed the divisibility of a contract for the purpose of its insurance, as long as this one had a deadline for more than five years, and that the surety of the same would develop in stages or that this division was specified for its execution. Under the cited regulation’s authorization, the contracting party (of for instance a concession vial), could grant a warranty in the pre construction stage, another for the construction and one for the operative.

Nevertheless, the difficulty for the warranty in the operative stage was still in place, a typical phase of the concession or exploitation projects, every time this is the largest one of the projects and generally, when the term lasts more than five years.

This is why Decree 2493 of 2009 stated the possibility to subdivide the operative stage whenever this one exceeds the five years in stages of one to five years. In this event, the insured value of this “sub-stages” will be determined in the terms and should have proper support.

Under this perspective, instead of having a warranty for the pre construction stage, another for the construction and another for the operative one, the subdivision of this last one can now take place at the same time in stages, just as the following sketch presents it:



Is essential to mention that the stages, in which the maintenance and operation of the project divide in, would have the application of the same rules that the original regulation predicted. In other words, the

guarantor's possibility to retire if it notifies the entity with six months before the expiration of each sub stage and the inability to influence the warranty issued in the previous deadline if the contract party is not able to get a new one.

Insured Values' Reduction

Given that the insured value has a direct relationship with the contract's amount, every time that the fixing of the first one is made based on a percentage of the second one (in the case of great infrastructure projects), in conformity with Decree 4828 of 2008, besides overcoming the national market supporting ability, the established values were unnecessary in some cases for the amount demanded, as in the case of the wage coverage and fringe benefits, since due to strict controls that by law, state entities make in regards to the contracting party's surety of the job obligations, it would be technically impossible that a claim for this risk increased (for example to amounts near to the fifty thousand million pesos).

Under this perspective, Decree 2493 of 2009, placed a paragraph in article 7 of Decree 4828 of 2008 in which, with support and justification of the previous documents and studies, authorizes that the corresponding percentages for public contracts whose amount exceeds the one million current minimum legal wages (four hundred and ninety six thousand nine hundred pesos of 2009), can have a reduction in the different indemnities that make up the surety bond, for which the regulation established a floor. In other words, the requested insured values that resulted from applying this rule will not be able to be for all cases less than the ones corresponding to a project of one million current minimum legal wages.

It is easier to use an example to better illustrate the referred normative adjustment:

If a two billion pesos project we apply the required percentages of Decree 4828 of 2008 for the surety bond and wage coverage, we would have an insured value of 200 thousand million pesos for the first case and of 100 thousand million pesos for the second. With the adjustment made by Decree 2493 of 2009, these indemnities could have a reduction up to fifty thousand and twenty five thousand million pesos, respectively.

It is essential to highlight that this rule will have its application only for the indemnities that make up the surety bond. In terms of the bid bond, Decree 2493 of 2009 also modified the required insured values in the following way:

Contract's Value	Insured Value Decree 4828 of 2008	Insured Value Decree 2493 of 2009
From 1 to 999,999 s.m.m.l.v	minimum 10%	minimum 10%
From 1 million to 4 million 999 thousand s.m.m.l.v	minimum 5%	minimum 2,5%
From 5 to 10 million s.m.m.l.v.	minimum 2,5%	minimum 1%
More than 10 million s.m.m.l.v	minimum 2,0%	minimum 0,5%

In both of these measures, promote the achievement of reinsurance, and in that way the insuring processes of the great infrastructure projects are invigorated.

CHAPTER VI. POLICY'S SPECIAL CONDITIONS

In the development of the mandate in article 7 of Law 1150 of 2007, Decree 4828 of 2008 stated in its article 15, the general conditions that must be in the warranties when these ones materialize in an insurance policy. In this sense, special attention should be to the regulation related to the allowed exclusions, the proportionality clause and the non-termination due to a nonpayment of the premium.

I. Proportionality clause prohibition

In the policies guaranteed by public contracts, article 15.3 of the referred Decree forbids the inclusion of the proportionality clause. This clause was defined as one that, by virtue of "the insured value that covers the damage derived from the total default of the guaranteed contract, and in case there is partial default of the same, the indemnity in charge of the insurer of the damage, will not exceed the proportion of the insured value, which is equivalent to the default percentage." For a deeper understanding of the scope of this clause, an example is as follows:

If a one thousand million pesos contract is guarantee, the insured value for the surety bond coverage will be of one hundred million pesos. Furthermore, if the contracting party defaults 10% of the contract, and the mentioned proportionality clause were agreed, the indemnity paid would not be of 100 million pesos, but ten, of which it is the result of applying the default percentage to the insured value.

It is important to state that this previous explained prohibition does not hold any relation to the possibility of reducing the value of the forfeit clause, in proportion to the received by the contractor, in conformity with article 1.596 of the Civil Law.

II. Exclusions

The named exclusions correspond to a³¹ "decision, which generally corresponds to the insurance company, in virtue of which the warranties of the policy of certain risks are not included, or having these included, the contract's warranty will not have any effect when specific circumstances or pre-established conditions combine with them."

In terms of insurance policies that support public contracts, Decree 4828 of 2008 established that the agreement of the following exposed exclusions would be the only valid one:

1. Foreign Cause

Numeral 15.2.1 of Decree 4828 of 2008 defined this exclusion as the "force majeure, the act of god, the case of a third party or the victim's exclusive fault". These terms will have further analysis.

Force Majeure and act of god: Article 1 of Law 95 of 1890 defines force majeure or the act of god as "the unexpected impossible to resist, such as a shipwreck, an earthquake, or the capture by enemies, the authority acts made by a civil servant". These terms, understood as exempt of contractual responsibility, according to its unforeseeable and unbearable nature. The State Council³² in that respect has pointed out:

"In that respect, it is observed that the force majeure and act of god figures are grounds for the contractual default's explanation, when they absolutely block the fringe benefits execution in charge of each of the parts, and not simply when they make it more difficult, for which as it is well known, nobody is forced to the impossible. On the other hand, it should be regarding unforeseeable and supervening circumstances, meaning they did not exist at the moment of celebrating the respective contract. That is how as article 1 of Law 95 of 1890 stipulates that "Is called force majeure or act of

³¹ 1 Mapfre Insurance Dictionary

³² 2 State Council Third Section Sentence of February 16 of 2006

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god, the contingency to which is not possible to turn to, such as a shipwreck, an earthquake, the capture by enemies, the authority vehicles executed by a civil servant, etc”

Therefore, taking into account the damages, which are caused by the default produced due to an event of a circumstance classified as an act of god or force majeure, are not attributable to the contracting party, it is logical that they are included as causes of the warranty's exclusion.

A third party event: If the cause of the default has its origin in a person other than the contracting party, when it cannot attribute the casualty, the damages cannot be claimed charging the warranty.

Victim's Fault: This exclusion is accordant with the principle of the law in virtue of which “nobody can argue in its own favor its own negligence.”

- 2. Damage cause by the contracting party to the entity's goods, not destined to the contract, during the execution of the same:** The damage caused to the contract's related goods (when during the development of a construction contract that has as an objective restructuring the second floor of the entity's central office, the frontage gets spoiled), they are protected under another insurance, in conformity with the stated in article 16,4 of Decree 4828 of 2008 of the following:

“16.4 Goods Protection

In conformity with the stated in article 4th's numeral 6, of Law 80 of 1993, the contracting entity should evaluate if in case of the contract's execution there is a damage risk for its goods. In that event it must demand to its contracting party, in the policy of responsibility not in the contract, contracting an attachment of contractual responsibility that covered the damage to these goods that can be created in the event of the contract. The establishment of the insured value will be subject to the entity's judgment.”

- 3. Improper use**
Decree 4828 of 2008 states as an acceptable exception in the surety bond the related to the “improper or inadequate use of the lack of preventive maintenance to which the contracting entity is forced to”. This one is in agreement with the responsibility's exempt cause of stated in article 26 of the Consumer's Law is the following:

“The only acceptable as exempt causes of the producer's responsibility that gives places to the administrative sanctions application predicted in articles 24 and 25, and to the damages indemnity contemplated in article 26, the force majeure, act of god not taking place due to his fault, the wrongful use of the good or service on the side of the affected, or a third person's event (...) properly proven in conformity with the procedure specified in article twenty-eight. Anyhow, it should also prove the causal nexus between the reason of the invoked dismissal and the lack of correspondence between the quality and suitability registered or contained in the license or the official technical regulation, or with the ones that ordinarily and regularly are demanded in the market and the ones than in effect have the respective good or service”.

Thus, clearly if it does not come from the producer's responsibility declaration, it also would not be feasible to make the warranty effective.

4. Natural deterioration or faultiness of the goods

This exception finds an explanation in the lack of insurable risk, that in conformity with the Commerce Code, is one of the insurance contract's elements, every time that the faultiness or deterioration of the goods is a true fact.

III. No repeal due to the failure to pay the premium

In this part, the regulated Decree 4848 Of 2008 reiterated the stated in article 7 of Law 1150 of 2007, in virtue of which the warranties “did not expire due to the premiums default payment or

unilateral revocation.” Consequently, in conformity with the mentioned legal precept, and applying the economic principle stated in article 25 of Law 80 of 1993, there is no need to demand the premium’s payment receipt, on the side of state entities.

IV. Other Aspects

Not opposable exceptions due to reluctance and inaccuracy

With the purpose of keeping the insurance contract’s unity and guaranteeing the equilibrium of the obligations arising from the same, the Code of Commerce states two regulations that complement each other, when different people are involved in the insured part (insured, client and beneficiary). The first one of them is article 1041 which shows that the obligations arising from the contract must be followed by whoever is able to do it, and the second one is article 1044 of the mentioned law, which gives the insurance company the faculty to deny to any of these persons the exceptions that may have been denied to the client, insured or beneficiary, unless that through the autonomy’s will it is agreed otherwise.

Nevertheless, Decree 4828 of 2008, limits the autonomy’s will at this point, every time it states that “It will not be opposable to the state entity on the side of the insured the exceptions or defense coming from the insurance client’s conducts, especially those derived from the reluctance and inaccuracy that take place in this one with the event of contracting the insurance, and not in general, regardless of any exceptions that the insured owns against the contracting party.”

Warranty’s approval

Taking into account that article 40 of Law 80 of 1993 has as a public contract’s execution requisite the warranty’s approval, following the previous regulated precaution, article 11 of Decree 4828 of 2008 established the parameters for this approval, which refer to the fulfillment of the legal and regulatory arrangements of each coverage case. Additionally, the regulatory rule states that the entity should verify that the warranty covers the perils established as the object of several indemnities.

According to the State Council’s jurisprudence, this approval, besides being an essential requisite for the contract’s execution, generates an important legal consequence in the sense that it transforms the state entity into part of the insurance contract, just as it was shown in the January 30 of 2008 vehicle in which the following was manifested:

“In this sense, we have that insurance contracts celebrated to guarantee the surety of other public contracts, whenever the contracting state entity gives the approval that makes up the legal requisite, so it can give birth to the execution of the public contract whose surety is guaranteed (article 41, Law 80)-. It can accept qualify as a third party the respective contracting state entity, completely indifferent to the referred surety bond contract, since it can be seen in the event of acceptance or ratification that she gives to the stipulation that the insurance company has done in favor of the same. I) this one directly assumes the condition of the part of the corresponding insurance contract. Ii) Because in any way, clearly the contracting state entity is the true holder of the covered peril. Thus, the insured’s position corresponds to it and also Iii) because in every case we have that the acceptance or ratification that the contracting state entity gives the insurance company’s stipulation, makes up a contractual relationship that builds to it, in the only legitimate one to demand the insurance company the payment of indemnity obligations, in the events where the respective claim takes place”.

Finally, it is important to clarify that the approval of a warranty that does not abide with the legal or regulatory rules or that do not correspond to the coverage mechanisms endorsed by Decree 4828 of 2008, may cause to incur to the civil servants the disciplinary, fiscal and even penal responsibility, in conformity to the stated in article 26 of Law 80 of 1993.

Transformable certificates

Even though the insurance contract is agreeable, in conformity to the states in the Code of Commerce's article 1036, its existence can only have a written or confessed reputation. As a result, to ensure that the public contract stays guaranteed, when the transformations to the same are made, it is important that the other one or the additional contract that includes it is referred to the insurance company, so that if this one accepts to assume the new risk, it demonstrates its consent and issues with an evidential character, the respective modifying attachment.