Issues to consider when contracting with Venezuelan state-owned entities

在和委内瑞拉国有企业签订合同时须考虑的问题

Foreign companies should consider a variety of essential legal issues when entering into contracts with Venezuelan state-owned entities, the understanding of which is essential for concluding a successful business transaction or project in that jurisdiction.

在和委内瑞拉国有企业签订合同时，外国公司应考虑各种重要的法律问题，
了解在该国实施成功的商业交易或项目，都有哪些重要因素。

The Venezuelan government plays an active role in the country's economy and relies on imports to meet Venezuela's fundamental needs, creating numerous opportunities for foreign companies looking to sell goods or render services in the country. As many sectors of the Venezuelan economy are dominated by Venezuelan State-owned entities or are reserved for the State, a good number of contracts executed by foreign companies are signed with the Venezuelan government.

Public Bid vs. Direct Award

As a general rule, contracts for the sale of goods, rendering of services or execution of works for Venezuelan State-owned entities are subject to Venezuelan public procurement law and the corresponding regulations. Pursuant to public procurement law, such contracts must be awarded through a public or private bid.

Contracts for the execution of works, acquisition of goods or rendering of services entered into within the framework of international cooperation treaties between Venezuela and other governments, including contracts with joint venture companies, are excluded from the application of Venezuelan public procurement law, including the requirement of submitting a prior bid.

Registration with the Venezuelan National Contractors Registry

Companies must register with the Venezuelan National Contractors Registry (*Registro Nacional de Contratistas*) in order to participate in bids for contracts with the Venezuelan government. Registration must be updated annually.

Notwithstanding the above, registration may not be required for (a) entering into directly awarded contracts, as described in the previous section, (b) companies participating in international open bids and (c) companies rendering highly specialized services of temporary use, small food enterprises or enterprises producing basic products declared as being of first necessity.

Currency of Payment

There are significant restrictions for private companies to convert the Venezuelan local currency (bolivars) into foreign currency. However, the government can, and generally does, pay private contractors in foreign currency for the “foreign component” of the contract (i.e., that represented by the value of the assets and spare parts included in the cost structure, which ownership or use is transferred to the government, provided that they are not manufactured in Venezuela; or maintenance costs of such assets as well as services which rendering requires knowledge, technology and advisory services not available in Venezuela). The “local component” (i.e., cost of Venezuelan labour or other costs incurred in Venezuela) must be paid in bolivars.

Advance Payment

Venezuelan procurement law allows the contracting entity to make advance payments to private contractors of up to 70% of the contract price. To receive the advance payment, the private contractor must provide a bond issued by a Venezuelan registered bank or insurance company in favour of the Venezuelan contracting entity to secure the correct application of the advance payment (or the reimbursement of the advance payment, if applicable) for an amount equal to the advance payment.

Performance and Labour Bonds

In addition to the advance payment bond, private contractors are also required to post a bond to guarantee the performance of the contract by the contractor (the performance bond) equal to 15% of the contract price (subject to certain exceptions) and, in the case of execution of works, a bond for up to 10% of the labour cost involved in the contract to ensure that the private contractor complies with its labour obligations (the labour bond). The bonds must be issued by a Venezuelan registered bank or insurance company. The private contractor and the contracting entity may negotiate a withholding of a portion of the payments due to the contractor in lieu of the issuance of the bonds.

The posting of the bonds does not limit the liability of private contractors under the contract. As a general principle, bonds issued by Venezuelan registered banks or insurance companies are not first demand guarantees. Venezuelan banks and insurance companies may request counter guarantees from private contractors as a condition to issue the bonds.

Insurance

Private contractors may also be required to take out insurance covering the contractually agreed works.

Social Responsibility Commitment

As a general rule, private contractors are required to comply with a "social responsibility commitment", which varies form one to five percent of the amount of the contract (the contracting entity must determine the specific percentage), "for the attention of at least one of the social demands related to (a) implementation of social community development projects, (b) creation of new permanent jobs; (c) social productive formation of community members, (d) sale of goods at cost or at affordable prices; (e) contributions in cash or in kind to social programs selected by the Venezuelan government or not-for-profit organizations; and (f) any other that satisfies the essential needs of the social environment of the contracting entity".

Termination of Contract

In the event of a material breach of the contract by the private contractor, the State-owned entity may terminate the contract without judicial intervention. However, under the current criteria of the Venezuelan Supreme Court, in the event of a material breach by the State-owned entity, the private contractor must commence proceedings to obtain a judicial (or, if applicable, arbitral) declaration of the termination of the contract.

Suspension of Works

Unless specifically established in the contract, in the event of a breach by the government, private contractors may not suspend works under executed contracts.

Attachment, Requisitions and Occupation in the event of a Breach

If the government commences a procedure to determine whether or not there exists a breach of the contract by a private contractor and the works have been paralyzed or there exists an imminent risk of paralysis, the government may order preventive measures such as the attachment (requisition) and occupation of the assets, equipment, facilities and machinery as well as the takeover of the materials used for the works in order to guarantee the continuity of the works and ensure completion of the works within the established timeframe. If it is determined that the private contractor was not in breach, the contractor may demand that the government compensate for investments made with respect to materials, machinery and equipment.

Governing Law and Settlement of Disputes

Under Venezuelan law, and subject to specific exceptions, contracts with the government could be governed by foreign law and could include arbitration clauses. However, in practice the government is very reluctant to accept foreign law and include arbitration clauses in contracts other than for international financing.

Arbitration clauses included in contracts with the government must be approved by the highest authority of the contracting entity (e.g., board of directors) and also require the approval of the Minister that oversees the corresponding contracting entity. The clause must establish at least three arbitrators. Venezuela is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which establishes that arbitral awards are enforceable without requiring a confirmatory judgment (exequatur) or a retrial or re-examination of the merits.

Investment Treaty Protection

Venezuela is a party to bilateral investment protection treaties with several countries. These treaties grant specific protections in the event of expropriations or nationalizations by the Venezuelan government. The protections include the possibility of suing the Venezuelan government in an international arbitration to seek compensation at market value and freely convertible currency in the event of nationalizations, confiscations, expropriations or sweeping expropriations.

Double Taxation Treaties

Venezuela has entered into bilateral tax treaties with several countries[1], including China. All tax treaties to which Venezuela is a signatory are based on the OECD Model Tax Convention and include certain provisions of the United Nations Model Tax Convention. The tax treaties significantly reduce withholding income taxes, taxes on capital gains and other income taxes.

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[1] Among the countries that Venezuela has entered into bilateral tax treaties are: Austria, Barbados, Belgium, Belarus, Brazil, Canada, China, Cuba, Czech Republic, Denmark, France, Germany, Indonesia, Italy, Iran, Korea, Kuwait, Malaysia, the Netherlands, Norway, Portugal, Russia, Spain, Sweden, Switzerland, Qatar, Trinidad and Tobago, the United Kingdom, the United States of America, and Vietnam.