

LATIN LAWYER REGULATORS

Ministry of Public Works (Chile)

Ministerio de Obras Públicas

Fernando Landeros, Alex Wagemann
and Elina Mereminskaya

Wagemann Lawyers & Engineers

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Useful pages on the regulator website

Main MOP site: <https://www.mop.cl/Paginas/default.aspx>

Key regulation: <https://www.mop.cl/acercadelmop/MarcoLegal/Paginas/default.aspx>

Tender processes: <https://www.mop.cl/servicios/Paginas/ConcursosyLicitaciones.aspx>

Contractors and consultants: <https://www.mop.cl/servicios/Paginas/ContratistasyConsultores.aspx>

Documentation centre: <https://www.mop.cl/CentrodeDocumentacion/Paginas/default.aspx>

Key individuals

- Alfredo Moreno Charme, Civil Engineer: Minister of Public Works
- Cristóbal Leturia, Civil Engineer: Undersecretary of Public Works
- Carlos Guzmán Jara, Civil Engineer: Director of General Public Works
- Francisca Morandé Errázuriz, Lawyer: Legal Department

Regulatory oversight

The Ministry of Public Works (Ministerio de Obras Públicas (MOP)) is the cabinet-level administrative office in charge of planning, studying, designing, constructing, repairing, maintaining and operating public infrastructure in Chile.

Its work embraces roads, highways, bridges, tunnels, airports, harbours, hospitals, public schools, stadiums, reservoirs, border crossings and airfields, among many others. It is also responsible for the management, distribution, use and conservation of all water resources within the country and for enforcing the national Water Code.

The MOP's mission also considers new public building work and the enhancement of existing buildings that have a particular economic character.

The MOP is also responsible for enforcing the country's concessions legislation (also known as public-private partnership). It can also support the work of other ministries that are required by law to construct or repair different types of infrastructure, including institutions, firms or companies with state participation, regional governments and municipalities.

It does not conduct or oversee all public works executed in Chile. Many public organisations (Ministry of Housing and Urban Planning, Ministry of Health, Municipalities, among others) execute their projects without the MOP's participation either in budgetary matters or in the management of the project. The MOP also acts as project administrator for other public entities from time to time.

There are a number of laws that regulate the MOP. One of the main statutes is the DFL No. 850, which determined the organisation of the MOP, its functions and powers to act in the public sector. Other laws that are important in relation to public works are the following:

- Decree No. 900 MOP - Public Works Concessions Law (Ley de Concesiones de Obras Públicas);
- Law No. 21,044 - General Directorate of Public Works Concessions (Dirección General de Concesiones de Obras Públicas);
- Law No. 21,082 - Infrastructure Fund (Fondo de Infraestructura);
- Decree No. 75 MOP - Regulation for public works contracts (Reglamento para contratos de obras públicas); and
- Decree No. 956 MOP - Regulation for the Concessions Law (Reglamento para la Ley de Concesiones).

Reporting and disclosure obligations

The General Directorate of Public Works is responsible for the administration of the Contractors Register, which comprises the Register of Major Works and the Register of Minor Works. These registers comprise natural persons and legal entities that are authorised to serve as contractors of the MOP.

Articles 7 and 8 of Decree No. 75 MOP list the minimum requirements for the information that is required to be entered on each of the registers.

For the purpose of classifying contractors, the Register of Major Works is divided into Specialities of Civil Works and Assembly, which in turn are divided into registers according to the type of work and whose experience requires accreditation. Contractors may request registration in one or more of the categories and specialities of the Register of Contractors. Each record will, in turn, be categorised according to experience, economic ability, professional quality and professional plant staff.

To access any of the registers, a contractor must gain accreditation for the speciality required and prove a minimum level of experience, which is measured by the amount of work it has carried out.

Monetary sanctions and recent behaviour

The monetary sanctions contained in Supreme Decree No. 75 (DS 75) are generically called 'fines' and, technically, correspond to 'penalties'. In other words, they do not correspond to a genuine pre-estimation of the damage caused to the state and are applied irrespective the existence or not of any damage. Therefore, they do not need to be proven nor are they recoverable by the contractor. The types of activities for which sanctions are imposed include the following:

- For a contractor's failure to comply with any order of the fiscal inspector (article 111, DS 75), a daily fine ranging from 0.5 to 8 UTM (monetary unit equivalent to approximately US\$60). The representative of the MOP on site is called the fiscal inspector, defined by article 110, DS 75 as 'the professional officer, appointed by the competent authority, who has been directly responsible for ensuring the correct execution of a work and, in general, for the fulfilment of a contract'.
- For failure to deliver information relating to contracted workers (article 123, DS 75), a daily fine of 1 UTM for each day of delay. The same measure applies when a contractor does not report occupational accidents and diseases in accordance with the current legal provisions (article 124, DS 75), and when a contractor does not adopt the necessary measures to maintain hygiene and safety at work on site (article 125, DS 75). A similar sanction is applied when a contractor does not deliver monthly a list of workers who are active in the various tasks, including subcontractors, within the five days following the month reported (article 143, DS 75).
- When anticipated termination of the contract occurs that is the responsibility of the contractor (article 148, DS 75). Further, article 152, DS 75 states that the contractor 'will lose as a penalty, as soon as the contract is terminated, at least 25% of the value of the guarantees that ensure its compliance', with the exceptions indicated in the same article.
- Article 163 of DS 75 establishes a daily fine for 'not delivering the fully finished work within the contractual term, including any extensions of time granted'. The calculation for the daily fine is ' $K \times P / d$ ', where 'K' is a factor to be defined in the tender documents (or, absent a base amount, 0.50); 'P' is the amount of the contracted work, including extensions and decreases of the contracted amount; and 'd' is the number of running days of the contract duration, including eventual extensions of time. According to article 163, the tender documents may also establish fines for partial milestones.

According to article 135 of DS 75, the amounts of all these fines may be modified in the tender documents, according to the magnitude of the work, its duration, degree of urgency and importance, or other reasons that are considered important. In any case, the total fine for delay in the completion of work (contained in article 163) may not exceed 15% of the value of the contract. This amount does not include other fines, as indicated above.

Article 135 also states: 'Regarding possible fines for technical breaches, they will be clearly established in the bases.'

Finally, article 165 indicates that the application of these fines will be made without trial or arbitration, and communicated in writing to the contractor and deducted from any due payment, withholding or guarantees, if other means are not sufficient.

Non-monetary sanctioning powers and behaviour

The non-monetary sanctions established by Supreme Decree No. 75 (DS 75) are contained in articles 43 to 45, for contractors of work on either a major or minor scale. These sanctions consist mainly of the suspension or reduction of category in the General Register of Contractors. In this regard, note that the MOP can only contract with companies that are incorporated in this Register, which is divided in respect of contractors, pursuant to Article 5 of the Decree, between the Register of Major Works, regulated in article 7 et seq and the Register of Minor Works, contained in article 48 et seq. A suspension is a serious sanction, since it prevents a contractor from developing any business with the Ministry. Likewise, the reduction of category prevents a contractor from accessing bids for higher amounts.

The sanctions can be applied automatically (for example, paragraph 1 of article 43 provides for a suspension in the event that a contractor 'does not comply with its obligations before the General Register of Contractors' for the entire period in which that breach continues) or, by decision of the 'Commission of the General Register of Contractors, which will review the situation (for example, of the contractor does not comply with his or her contract, as indicated in paragraph 2 of article 43).

Article 44 of DS 75 states that 'the Commission of the General Register of Contractors may suspend from this Register for a pre-determined period, the contractor who, in its opinion, has committed serious or repeated offences or breaches of the provisions of these Regulations, or for other reasons that in its opinion advise it, the situation that must be duly founded in the corresponding Act of this Commission, and communicated to the suspended contractor'. The suspension will become effective once the contractor's statements have been received, or if 15 days have elapsed since the suspension was notified and the latter remains silent.

Article 45 of DS 75 establishes a catalogue of cases, which is not exhaustive (for example, article 173 determines the suspension from the Register for not correcting defects during the guarantee period of the work), in which a suspension or reduction of category is determined, as the case may be, for example: due to poor performance by the contractor's management, in relation to the work carried out; or if the contractor obtains ratings below 4.5 (out of 7) within a period of five years; or when a bank guarantee or insurance policy is not presented or renewed in a contract.

The presentation of falsified documents or false information has a sanction of suspension from the Register for up to eight years, without prejudice to the corresponding legal actions.

Finally, it is important to mention a particular reason for elimination from the General Register, contained in article 119 of the Regulation, in the case of foreign contractors, for the purposes of claims or interpretation of the contract. The prohibition is that the contractors aforementioned 'may not invoke the protection of their governments or make claims through diplomatic channels, under any pretext'. The provision ends by stating that the 'contravention of this article will be reason for the contractor to be eliminated from the General Register of Contractors or Special Registries'.

Recent and upcoming developments

At the level of internal governance, given the need to provide special treatment for the public-private partnerships scheme, after a long period of legislative discussion, through article 22 bis of Law No. 21,044, enacted on 17 November 2017, the General Directorate of Public Works Concessions was created, under the supervision of the MOP. The functions of this General Directorate include proposing to the Ministry:

- the acceptance or rejection of private initiative concession ideas presented by individuals, pursuant to the provisions of article 2 of the Law of Concessions;
- the programming of the bidding procedures for the contracting of studies, projects and the execution of fiscal public works through the concession system;
- the administrative and economic conditions to which the bidding processes will be subject, for the concession of public fiscal works, in accordance with current regulations;
- the rules for auditing concession contracts, according to current regulations; and

- any modifications that may be necessary to incorporate into the concession contracts under construction or operation, pursuant to the provisions of current regulations.

A review to make improvements to Supreme Decree No. 75 (DS 75), which corresponds to the Public Works Contracting Regulations, in its different aspects, is currently being carried out. It is important to keep in mind that DS 75 is, by definition, the subsidiary rule applicable to all public works contracts. For its part, in parallel with the existing working group, an expert committee was established in 2019, which has been working with the Chilean Chamber of Construction and the Ministry of Public Works to develop a regulatory framework for the regulation and implementation of dispute boards (panel técnico de acompañamiento) for public works contracts with direct investment from the state. Alex Wagemann, one of the authors of this analysis, was a member of this expert committee. Currently, there is a pilot plan, made up of five contracts with different types of dispute boards, which are being evaluated, with the aim of establishing how they work in practice in Chile. The result of this pilot will provide useful input for improving the regulatory framework of the dispute boards, which will be incorporated directly as a Chapter of DS 75.

Finally, from the perspective of the public budget, the investment in public works managed by the MOP has remained relatively stable in the past five years, representing around US\$6 billion per year and around 2.2% of gross domestic product (source: 'Chile: Investment in Public Use Infrastructure 2005-2018', page 30).

Challenges

The MOP is facing multiple challenges, several of them relating to the general need to modernise the management of the state.

The first of these challenges is having the necessary and qualified human and material resources to carry out the annual budget execution processes within the corresponding periods, given that the lack of speed and the bureaucracy in the bidding processes mean that, despite having funds available, they cannot be executed within the corresponding public year.

Another key challenge is to substantially improve the content of the Public Works Contracting Regulation, Supreme Decree No. 75, in several respects relating in particular to the distribution of risks, the introduction of provisions that facilitate free competition (note here that the Chilean Court of Free Competition issued a series of recommendations in this respect on 13 March 2020 to improve DS 75) and the incorporation of forms of alternative dispute resolution, in particular, the dispute boards.

Further, bearing in mind the current situation relating to the long-standing drought in the Chilean central valley (which has worsened in recent years) and the covid-19 pandemic, the MOP is having to prioritise both the construction of infrastructure to reinforce the water supply system and the telecommunications infrastructure, particularly to grant internet access to a majority of the population.

Interacting with the regulator

Pursuant to Law No. 19,880 Establishing the Basis for the Administrative Procedures Governing the Acts of the Agencies of the State Administration, persons can submit queries, complaints, suggestions and congratulations to the public authorities. The MOP offers an online contact form, which can be accessed at: https://siac.mop.gob.cl/docs/formulario_solicitud_siac_septiembre_2019_ley_19880.pdf

Applicants receive a response following submission of this form within approximately 10 business days.

Further, it is possible to request public information generated, owned or administered by the MOP as a consequence of the exercise of its powers and attributions within the framework of Law No. 20.285 on transparency. The online form for this purpose can be accessed at:

https://siac.mop.gob.cl/docs/formulario_solicitud_siac_septiembre_2019_ley_20285.pdf

The deadline for a response to a request for information is 20 business days. In exceptional circumstances, it can be extended for another 10 business days, when those circumstances make it difficult to gather the requested information.

Law No. 20,730, which was published on 8 March 2014, regulates the lobbying and the procedures that represent particular interests before the authorities and officials, constituting a major advance in providing tools for public activity that make those procedures more transparent.

Meetings and other hearings requested by lobbyists and managers of private interests may be held to influence a public decision. Note, however, that the authority of the Minister and its Secretaries is subject to reporting obligations under Law No. 20,730.

Notes for foreign investors

Pursuant to article 12 of Supreme Decree No. 75 (DS 75), except for exceptional cases duly qualified by the Director General, foreign companies or consortiums in which they intervene may participate in a tender. Foreign companies will be required to meet the same requirements that are required of national contractors, or the equivalent under the laws and regulations in force in the country of origin. The registration procedure for foreign companies is established in article 35 of DS 75.

Article 35 provides:

The Head of the Registries Department may accept, in accordance with the background information, requests for inscription in the Registry of Major Works of foreign legal persons, which must have an accredited representative in Chile, of natural persons who possess a professional title granted by a foreign university with an academic level equivalent to the national level and recognised in Chile, and legal entities in which a natural person who is in this latter condition has participation. Foreign corporations must also, for the purpose of registration, comply with the rules that are determined in Chilean law for them.

Other regulators it works closely with

Servicio de Evaluación Ambiental

SEA

Environmental Assessment Service (Chile)

Contraloría General de la República

CGR

Office of the Comptroller General of the Republic (Chile)

Pursuant to article 116 of the General Urbanistic and Construction Law, all construction work requires a permit issued by a municipal works directorate. Pursuant to article 126 of the same Law, the cost of permits is calculated based on the budget of the work by applying established unit costs per square metre of construction, in accordance with the types and construction materials to be used. The time scale for obtaining this permit varies between four and eight months.

Large-scale infrastructure projects will need to obtain an environmental permit known as an environmental qualification resolution (Resolución de Calificación Ambiental (RCA)). These permits are issued by an Evaluation Commission established by article 86 of the Law No. 20,417 on the Ministry, Environmental Assessment Service and Environmental Agency, once proposed by the Environmental Assessment Service (Servicio de Evaluación Ambiental), an agency of the Environmental Ministry.

Entities wishing to obtain an RCA must submit to the SEA either a declaration that environmental regulations have been met in every respect and that no additional measures are required, or an official environmental impact assessment (EIA). The preparation of an EIA requires different investigations and is usually costly in terms of both time and expense. A study conducted in 2017 by the Chilean Copper Commission concluded that 'on average projects remain in the system close to 200 days, the

remaining time of approved projects being an average of 289 days. Therefore, in considering the preparation of an EIA, an entity must allow two to three years to obtain an RCA.

The acts of public servants can be reviewed by the Office of the General Comptroller of the Republic (Contraloría General de la República), which is a supreme audit institution of the state administration and is autonomous with respect to the Executive Branch and other public bodies. It controls the legality of administrative acts and safeguards the correct use of public funds.



Fernando Landeros

Wagemann Lawyers & Engineers

Partner of WAGEMANN Lawyers & Engineers.

He is an architect with more than 12 years of experience in the fields of architecture, infrastructure construction, contract management and engineering and construction claim analysis. Before joining WAGEMANN as a partner, he was at the head of the division of the Faculty of Engineering of the University of Chile charged with carrying out technical surveys and analysis in court and arbitration proceedings.

He has participated in more than 60 disputes between Owners and Contractors, both in public and private sectors, on construction, mining, energy and infrastructure projects, providing technical and strategic support to Owners, Contractors, courts and arbitral tribunal. He has performed technical surveys required by ordinary and arbitration courts and Concession Commissions (PPP).

He is currently focusing his practice on working with Owners and Contractors in establishing preventive measures which allow the adequate management of contracts throughout their duration, along with leading dispute settlement proceedings.

He is an assistant professor in Contract Management courses at the Pontifical Catholic University of Chile.



Alex Wagemann

Wagemann Lawyers & Engineers

Lawyer and founding partner of WAGEMANN Lawyers & Engineers.

He has focused his professional career on providing consultancy services to large companies in engineering, construction and services contracts covering such areas as mining, power generation, manufacturing, public works and concessions. He holds both a broad legal knowledge and an encompassing technical outlook. This unique combination of skills has enabled him to participate in important infrastructure projects both in Chile and abroad.

He has more than 20 years of experience leading several planning, tendering and contracting proceedings, risk analysis, contract and claims management, expert opinions, surveys and arbitration proceedings. Most recently, he has concentrated on providing expert support and guidance to multidisciplinary teams with expertise in the aforementioned areas, participating in high-level task forces and with the aim of improving the Owner-Contractor relationship.

He held the office of National Councilor of the Construction Chilean Chamber (CChC) and was the chairman of the Owner-Contractor Task Force of the same Chamber for seven years. He has been a member of the following institutions: The Board of the Construction Law Chilean Society, the Construction Law group of the International Bar Association; the Dispute Resolution Board Foundation, and the Contracts Committee of the Engineers Institute of Chile.

At an international level, since 2018 he has been the Chairman of the Construction Contracts Working Group at the Confederation of International Contractors' Associations (CICA), an organization whose members represent 57% of the specific PIB of the Construction Industry. Its main task is to promote and propose improvements to construction contracts on a global scale, as well as the most widespread international construction standards, specially the FIDIC models.

He has participated as co-author of two books in his field of specialty: "Contracting and Contract Management Strategy – Investment Projects" (2015, Engineers Institute of Chile) and "Construction Law: A theoretical and practical analysis" (2017, Editorial DEN). At the same time, he has written a number of columns and articles on technical/legal conflicts in infrastructure projects, published on domestic and foreign media.

During recent years, he has participated as a speaker in several international congresses on Construction Law in Colombia, Costa Rica, Chile, Ecuador, Mexico, Paraguay y Peru, among other countries.

In 2019 and 2020, Who's Who Legal has distinguished him as one of the 12 Leading Individuals in Latin America in the Construction category. Additionally, he was selected by Latin Lawyer for two consecutive years: in 2019 to prepare, together with Elina Mereminskaya, the chapter on References for Construction in Chile; and in 2020, to develop the Regulator edition of Construction in Chile, together with the firm's partners Elina Mereminskaya and Fernando Landeros.

Within the academic field, he is a professor of the Engineer Faculty of the Pontifical Catholic University of Chile, lecturing in the Construction Management Master's Program (MAC), the Diploma Course in Contract Management and the Diploma Course in Advanced Management and Project Leadership, on subjects such as contract modalities for engineering and construction, contract management, alternate dispute resolution methods, and claim management.



Elina Mereminskaya
Wagemann Lawyers & Engineers

Lawyer and partner of WAGEMANN Lawyers & Engineers.

She has focused her professional practice on providing consultancy services to Chilean, Latin-American and European companies in

construction, infrastructure, mining and energy projects, in both public and private sectors. She is experienced in the field of dispute prevention and claim management in construction contracts, excelling also as a specialist in arbitration.

Before joining WAGEMANN, she worked as Senior Lawyer in the Litigation and International Arbitration Group at Bofill Mir & Álvarez Jana Abogados. Prior to that, she worked as Counsel for International Arbitration in the Center for Arbitration and Mediation of the Santiago Chamber of Commerce (CAM Santiago).

She is currently a member of the Board of CAM Santiago; member of the roster of arbitrators of CAM Santiago and the Lima Chamber of Commerce; member of the nominating committee of the Chilean National Committee of the International Chamber of Commerce (ICC); co-chair of ITAFOR (ITA Latin-American Arbitration Forum), and chairperson of the Arbitrators Evaluation Committee of the Dispute Resolution Center of NIC CHILE.

Between 2004 and 2018 she was a graduate and postgraduate professor of National and International Arbitration, International Commercial Arbitration, International Contracting and Private International Law at the Faculty of Law of the University of Chile. She is currently a professor in the Diploma Courses in Construction Law at the Pontifical Catholic University of Chile and at the Los Andes University.

In 2018 and 2019, she was highlighted by Who's Who Legal as Future Leader in Arbitration. In 2020, she was distinguished in two WWL rankings as one of Chile's expert Construction Law lawyers, as well as one of the best four specialist lawyers in the Arbitration ranking.

Her most relevant publications are the book International Commercial Arbitration in Chile: Challenges and Development, Thomson Reuters, 2014; "Latin Lawyer References – Construction Chile", 2019, and "The formation of consent in the contract for the construction of private works: the role of clarifications and responses to inquiries", Derecho de Construcción, 2017, both with Alex Wagemann, and "Suggested Policies for Tribunal-Appointed Experts in Construction Disputes", TDM Papers Special Issue on Non-Legal Adjudicators in National and International Disputes, 2017, with Fernando Landeros.

Wagemann Lawyers & Engineers

We have an expert team in construction and infrastructure. We look at the world of engineering and construction from both a technical and legal viewpoint, knowing that this is a multidimensional industry.

We offer multidisciplinary solutions on contract and claim management, expert opinions and arbitration proceedings for infrastructure projects, merging legal and technical aspects, which allows us to design complete and consistent solutions.

Each professional in our team makes a singular and distinct contribution, whether from experience in site management, forensic analysis, contract drafting, alternative dispute resolution methods, arbitration proceedings or litigation.

Nueva Tajamar 481, oficina 705,
World Trade Center Santiago,
Torre Sur Las Condes,
Santiago de Chile
Tel: +56 (2) 3244 3620

Fernando Landeros
flanderos@wycia.com

Alex Wagemann
awagemann@wycia.com

C/ José Abascal, 44 – 1ª Planta
Madrid 28003, España
Tel: + 34 91769 7439

Elina Mereminskaya
emereminskaya@wycia.com

www.wycia.com