

THE GOVERNMENT  
PROCUREMENT  
REVIEW

SEVENTH EDITION

Editors

Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

THE  
GOVERNMENT  
PROCUREMENT  
REVIEW

SEVENTH EDITION

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# CONTENTS

PREFACE.....	v
<i>Jonathan Davey and Amy Gatenby</i>	
Chapter 1	ARGENTINA..... 1
<i>Juan Antonio Stupenengo and Santiago José Barbarán</i>	
Chapter 2	AUSTRALIA..... 14
<i>Geoff Wood, Anne Petterd and Sally Pierce</i>	
Chapter 3	AUSTRIA..... 26
<i>Philipp J Marboe</i>	
Chapter 4	BELGIUM ..... 37
<i>Frank Judo, Stijn Maeyaert and Klaas Goethals</i>	
Chapter 5	BRAZIL..... 51
<i>Mauro Hiane de Moura and Filipe Scherer Oliveira</i>	
Chapter 6	BULGARIA..... 62
<i>Katerina Novakova and Radoslav Mikov</i>	
Chapter 7	CANADA..... 74
<i>Theo Ling and Randeep Nijjar</i>	
Chapter 8	EUROPEAN UNION ..... 89
<i>Clare Dwyer, Michael Rainey and Andrew Carter</i>	
Chapter 9	GERMANY..... 103
<i>Jan Bonhage and Simone Terbrack</i>	
Chapter 10	ITALY ..... 116
<i>Filippo Pacciani and Ada Esposito</i>	

## Contents

---

Chapter 11	MEXICO .....	132
	<i>Federico Hernández A, Ana P Rumualdo Flores and Julio S Zugasti González</i>	
Chapter 12	PORTUGAL.....	142
	<i>Paulo Pinheiro, Rodrigo Esteves de Oliveira, Catarina Pinto Correia and Ana Marta Castro</i>	
Chapter 13	RUSSIA .....	155
	<i>Olga Revzina, Lola Shamirzayeva and Olga Vasilyeva</i>	
Chapter 14	SPAIN.....	169
	<i>José Alberto Navarro Manich</i>	
Chapter 15	UNITED KINGDOM .....	180
	<i>Amy Gatenby, Bill Gilliam, Ryan Geldart and Paul Minto</i>	
Chapter 16	UNITED STATES .....	197
	<i>Daniel Forman, Adelia Cliffe, Judy Choi and Christian Curran</i>	
Chapter 17	VENEZUELA.....	208
	<i>José Gregorio Torrealba R</i>	
Appendix 1	ABOUT THE AUTHORS.....	217
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	231

# PREFACE

It is our pleasure to introduce the seventh edition of *The Government Procurement Review*.

Our geographic coverage this year remains impressive, covering 17 jurisdictions, including the European Union, and the continued political and economic significance of government procurement remains clear. Government contracts, which are of considerable value and importance, often account for 10 to 20 per cent of gross domestic product in any given state, and government spending is often high profile, with the capacity to shape the future lives of local residents.

It is frankly depressing to have to refer in the future tense to Brexit for the third successive edition. However, it remains the case that the United Kingdom continues to recognise the importance of procurement law both during and beyond any ratified transitional period. Her Majesty's Government has pronounced itself committed to the need for continued regulation of procurement, and has secured approval from the World Trade Organisation for the United Kingdom to become party to the Agreement on Government Procurement (GPA) in its own right, rather than through the European Union, once Brexit happens.

In the UK and EU we are starting to see increasing use of the national legislation emerging from the Concessions Directive and there is also a growing body of case law on the Hamburg exception.

UK practitioners are coming to terms with the Court of Appeal's landmark decision in the *Faraday* case, which has called into question the use of what had become reasonably widely utilised approaches to avoid the application of the procurement rules where a developer initially had a right (rather than an obligation) to carry out works. That case will continue to have wide-ranging implications for real estate development affected by procurement law.

Looking further afield, it is clear that law and policy on government contracting continue to be shaped by political developments at national and international level:

- a* with GPA parties giving formal approval in October, Australia joined the (revised) GPA on 5 May 2019;
- b* new international agreements on government procurement have emerged in the US, Mexico, Canada Trade Agreement (USMCA), executed in December to replace NAFTA, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which entered into force between Canada, Australia, Mexico, Japan, New Zealand and Singapore in December;
- c* US sanctions against Venezuela constrain US financing for Venezuelan public bodies and the state-owned Petroleos de Venezuela, with the future outlook for government purchasing and procurement policy very much dependent on the outcome of the current political situation; and

- d* Brazil, under a liberal political agenda, has launched a programme of privatisation involving the sale of public assets and the award of contracts for the management of public services across a range of economic sectors.

When reading chapters regarding European Union Member States, it is worth remembering that the underlying rules are set at EU level. Readers may find it helpful to refer to both the European Union chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. So far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this seventh edition as well as the tireless work of the publishers in ensuring that a quality product is brought to your bookshelves in a timely fashion. We hope you will agree that it is even better than the sixth edition and we trust you will find it to be a valued resource.

**Jonathan Davey and Amy Gatenby**

Addleshaw Goddard LLP

London

May 2019

# ARGENTINA

*Juan Antonio Stupenengo and Santiago José Barbarán<sup>1</sup>*

## I INTRODUCTION

Argentina is a federal country, which means that the federal government only has jurisdiction over matters expressly delegated to it by the provinces through its Constitution. Provinces have jurisdiction over all other matters that have not been delegated, including those intended for the exclusive provincial environment, such as matters related to contracts entered into by the provincial and municipal governments to satisfy their own requirements.

Despite this preventing the existence of a legal framework for all public contracts with government bodies in Argentina, certain common principles are applicable to public contracts with both the federal government and the provinces, municipalities and the city of Buenos Aires. Procurement is thus analysed at the federal level in this chapter.

The General Regime for Public Procurement (GRPP) was approved by means of Decree 1023/2001, issued on 13 August 2001 by the federal executive by exercising legislative powers delegated to it by the legislative under the terms of Section 76 of the Constitution. After the inauguration of the current government, on 15 September 2016 the federal executive issued Decree 1030/16, approving the new regulation of the GRPP (the Regulation of the GRPP) and abrogating the existing Decree 893/12. Finally, on 27 September 2016 the National Procurement Office issued Dispositions 62-E/2016 and 65-E/2016, by means of which the Contracting Procedure Manual (CPM) and the electronic contracting system, called COMPR.AR, were approved.

Notwithstanding the above, at the federal level there are several specific regimes that regulate certain public contracts. Among these, Law No. 27,328 can be mentioned, and its regulation, issued by Decree 118/17, by which the public–private partnership contracts modality was approved, containing specific regulations on public procurement.

## II SCOPE OF PROCUREMENT REGULATION

### **i Public authorities with jurisdiction over government procurement matters**

The GRPP is organised on the basis of two different approaches to procurement matters: the centralisation of public procurement contracts and regulation, and the decentralisation of the operational management of government contracts.

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<sup>1</sup> Juan Antonio Stupenengo is a partner and Santiago José Barbarán is an associate at Beccar Varela.

- According to the regulation mentioned above, the regulating authorities are:
- a* the National Procurement Office, a body subordinated to the federal executive that serves as the governing entity for the GRPP and its Regulation. Under Section 23(a), it is empowered with functions such as:
- submitting public procurement and organisational policies;
  - drafting laws and regulations regarding public procurement;
  - issuing explanatory, interpretative and complementary rules; and
  - drafting general specifications documents; and
- b* different operating units for public procurement, which operate in each of the authorities governed by the GRPP and its Regulation (Section 23(b)). Under Section 12 of the GRPP, these units have different powers and duties, such as:
- construing or modifying public contracts based upon public interests;
  - deciding the expiry or termination of public contracts;
  - modifying public contracts up to 20 per cent of the total amount of the contract, under agreed conditions and deadlines, and by adjusting the contract terms; and
  - monitoring, inspecting and directing public contracts by applying sanctions to bidders and contractors.

## **ii Types of government contracts subject to the GRPP**

The GRPP and its Regulation are applicable to certain contracts entered into by the central administration (namely the federal executive and its ministries, departments and other central government bodies) and its agencies, comprising social security institutions.<sup>2</sup> They are also applicable to contracts entered into by the national universities.<sup>3</sup>

Therefore, the GRPP and its Regulation are not applicable to, *inter alia*, contracts entered into by the judicial or legislative branch, and contracts entered into by corporations in which the federal government has shareholding, such as YPF and Aerolíneas Argentinas. All of these entities are empowered to adopt their own procurement rules. Notwithstanding this, it should be noted that many of these specific procurement regulations are similar to those contained in the GRPP and its Regulation.

From an objective perspective, the contracts that are governed under the GRPP and its Regulation are the following: sales, supplies, services, consulting, leasing, swaps, concessions of state goods and assets, and, in general, any other agreement that is not expressly excluded by the GRPP.<sup>4</sup> Despite public trusts not being governed by the GRPP and its Regulation, Budget Law 2019 – Law No. 27,467 – states that procedures for the selection and contracting of works, goods and services carried out by public trusts shall comply with the guiding principles of the GRPP and its Regulation.<sup>5</sup>

Among the contracts excluded are those regarding public works, public works concessions, public service delegations, licences and those related to sovereign debt transactions.<sup>6</sup> The GRPP and its Regulation are supplemented by certain sector-specific procurement legislation, including legislation applicable in the public utilities fields.

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2 Section 2, GRPP.

3 Section 2, Decree 1030/16.

4 Section 4, GRPP.

5 Section 59, Law 27,467

6 Section 5, GRPP and Section 3, Decree 1030/16.

The GRPP and its Regulation are also not applicable either to public–private partnership contracts, which have been recently regulated by Law No. 27,328 (the PPP Law) and Decree 118/17 E 1/2017. According to this regime, public–private partnership contracts are an alternative form of public procurement whereby federal state entities or agencies and private or public companies enter into a public contract with the aim of developing projects of public interest in the fields of infrastructure, housing, activities and services, productive investment, applied research or technological innovation.<sup>7</sup> Although public–private partnership contracts are not governed by the GRPP and its regulation, the PPP Law and Decree 118/17 contain much of their principles and rules, such as the obligation to hold a public tender and guarantee the principles of transparency, publicity, dissemination, equality, concurrence and competence.<sup>8</sup> Nevertheless, in certain aspects, the PPP Law and Decree 118/17 differ from the GRPP and its Regulation (e.g., with regard to the prohibition of resorting to the mechanism of direct award).

Through Resolutions 3300-E/2017 and E 147-E/2018, issued by the National Roadways Direction, the first international public tender under the PPP Law and Decree 118/17 was launched for the building and maintenance of road corridors. In 2018, the National Roadways Direction awarded the contracts by means of Resolutions 1126/2018. Through Resolution 81/2019, issued by the Federal Secretary of Energy, the second international public tender under PPP Law and Decree 118/17 was launched for the building and operation of high-voltage lines.

### III SPECIAL CONTRACTUAL FORMS

#### i Framework agreements and central purchasing

The Regulation of the GRPP sets forth that the National Procurement Office is empowered to enter into framework agreements with private sector providers to ensure the direct supply of goods and services to governmental entities, in accordance with the form, terms and other conditions established in such agreements.

Once the framework agreement has been signed and entered into force, the contracting entities are required to buy exclusively under such framework agreement, interacting directly with the provider that has been selected by the National Procurement Office.<sup>9</sup>

This obligation applies to all federal jurisdictions and contracting entities that operate in each ministerial jurisdiction, unless they themselves can demonstrate that the goods or services included in the existing framework agreement do not fulfil their needs or that they could solely obtain more advantageous conditions. In these circumstances, an entity must inform the National Procurement Office.<sup>10</sup>

#### ii Joint ventures

Under Argentine law, joint ventures are contractual arrangements developed to perform a certain activity, execute a specific contract or render a service for a limited period of time. They do not involve the establishment of a separate legal entity.

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7 Section 1, Law No. 27,328.

8 Sections 1, 7 and 12 of the PPP Law.

9 Section 25(f), Regulation of the GRPP; and Section 126, CPM.

10 Section 126, CPM.

According to the GRPP, bidders can submit tenders individually, or as part of a group, joint venture or association, or with a different legal person.

Notwithstanding this, and according to the above-mentioned PPP Law, which governs public–private partnership contracts, individuals and companies may enter into a cooperative agreement with a public authority provided they are developing a project of public interest.

## IV THE BIDDING PROCESS

### i Procedures

The GRPP provides for three different procurement procedures to award government contracts:

- a* a public bid (the principal method of procuring), which implies a broad call to tender;
- b* a private bid, which consists of an invitation to tender addressed to certain specific bidders already enrolled with the National Procurement Office Registry; and
- c* direct award, where there are no competitive procurement procedures. This exceptional procedure is applicable only to cases expressly authorised by the GRPP, including:
  - whenever the contract is valued at below 1.3 million pesos;
  - whenever, according to the applicable rules, it is not possible to apply a different procedure;
  - whenever the service to be hired or asset to be acquired are exclusively carried out or produced by a certain company, artist or specialist (e.g., goods or services that are covered by exclusive IP rights);
  - in the event of the failure of a previous tender or competitive procedure;
  - whenever, for duly proved urgency or emergency reasons, it is not possible for the contracting entity to call for a public or private bid; and
  - whenever the procuring entity is contracting for the repair of machinery, vehicles, equipment or engines whose disarmament, removal or prior examination is essential to determine the necessary repair.<sup>11</sup>

The procedure to be used in each case of direct award depends on the threshold value of the contract. If the contract to be awarded is valued at less than 1.6 million pesos, the contracting entity is authorised to award a contract without a competitive procedure. If the contract to be awarded is valued at over 1.6 million pesos, a competitive procedure is required. In this case, if the contract is valued at over 1.6 million pesos but less than 8 million pesos, the contracting authority shall call for a private bid, submitting invitations to tender to bidders already enrolled with the National Procurement Office Registry. Public contracts valued at over 8 million pesos must be awarded after a public bid procedure, which implies a broad call to submit offers and a general announcement.<sup>12</sup>

Finally, under the public–private partnerships regime, Decree 118/17 states that the mechanism of direct award is not applicable in any case.<sup>13</sup>

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11 Section 25(d), GRPP.

12 Section 27, GRPP.

13 Section 12, Subsection 3.

## ii Notice

The GRPP and its Regulation set forth that, in cases of open tendering, procuring entities must publish notices of invitation to tender in the official publication of the government (i.e., the Official Gazette) and either on the National Procurement Office's website<sup>14</sup> or in the Electronic Contracting System.<sup>15</sup> In practice, the invitation to tender is also commonly published in the relevant national or local newspapers. The aforementioned publication must take place over two days, and at least 20 or seven days in advance of the date fixed for the opening of the bids, depending on whether the call is published or not on the website.<sup>16</sup> For international public tenders, at least 40 days before the date fixed for the opening of the bids, notices of an invitation to tender must be published on the official website of the United Nations (UN Development Business) or the World Bank (DG Market).<sup>17</sup>

In the case of private bids, the contracting authority must send invitations to at least five suppliers that are already enrolled with the National Procurement Office Registry for the category of goods or services to be awarded. Such invitations must be sent a minimum of seven days in advance of the date for the opening of the bids. In addition, calls for private bids shall be advertised on the National Procurement Office official website as of the date on which invitations were sent.<sup>18</sup>

In the case of direct awards, the contracting authority must send invitations to at least three suppliers and, in certain cases, make available procurement information on the National Procurement Office's website.<sup>19</sup>

In accordance to the Regulation of the GRPP, certain information and documents must be published on the National Procurement Office's official website, such as notices of invitation, drafts of specification documents, specification documents that are in force and their clarifications, minutes of a bid's opening, comparison tables of bids, opinions on the evaluation of the bids and the objections raised against them, awards, contracts and any other data that the regulations establish.<sup>20</sup>

The Regulation of the GRPP provides a list of the information that the procuring entities must always include in the notice of invitation to tender in the case of an open tender. Such information includes:

- a* the individual details of the procuring entity;
- b* the type of procedure (i.e., whether or not it is an open tender);
- c* the identification number of the procurement administrative record;
- d* the prices of the tender documents;
- e* the place and time frame for consultation of the tender documents; and
- f* the email address of the procuring entity.<sup>21</sup>

Regarding the public–private partnerships regime, Decree 118/17 states that the notice of invitation to tender must be published in the Official Gazette of Argentina for the term of

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14 [www.argentinacompra.gov.ar](http://www.argentinacompra.gov.ar).

15 <https://comprar.gob.ar>.

16 Section 40, Regulation of the GRPP.

17 Section 32, GRPP; and Sections 40 and 42, Regulation of the GRPP.

18 Section 41, Regulation of the GRPP.

19 Section 44, Regulation of the GRPP.

20 Section 47, Regulation of the GRPP.

21 Section 17, CPM.

three days. The last publication must take place within a minimum of 60 calendar days in advance of the date fixed for the presentation of the bids or for obtaining of tender documents, whichever is first. In addition, the notice of invitation to tender must be published on the website of the Subsecretariat of Public–Private Participation and on the website of the contracting authority.

Additionally, in the case of international bidding, the call must also be made through the publication of a notice on the United Nations website (UN Development Business), on the World Bank website and on the Inter-American Development Bank website; in any case, for a term of three days with a minimum of 60 calendar days in advance of the date fixed for the presentation of the bids or for obtaining of tender documents, whichever is first.

Additionally, depending on the nature of the project, the contracting authority may order the publication of the invitation to tender in mass circulation media in the country or abroad.<sup>22</sup>

### **iii Submitting and amending bids**

Prior to the submission of a bid, it is necessary to comply with the federal tax regulation in order to participate in a public procurement for contracting with the federal government. In this sense, Resolution 4164-E/2017 of the Federal Administration of Public Revenue states the procedure throughout the federal administration can verify that the bidders comply with tax regulation. Also it is necessary to register before the Suppliers System of Information (SIPRO). At the provincial and municipal levels, the prior registration of bidders in different local registries of suppliers is also mandatory.

According to the Regulation of the GRPP, bids must be submitted at the place and within the time frame specified in the tender documents.<sup>23</sup> Therefore, the procuring entity must reject any bid that is submitted after such deadline. Bids can also be submitted by mail, according to the rules stated in the GRPP.<sup>24</sup>

The submission of a bid implies, for the bidders, full knowledge and acceptance of the rules and clauses governing the tender;<sup>25</sup> therefore, such rules and clauses cannot be validly challenged after such submission.

According to the Regulation of the GRPP, as a principle, the bid shall not be amended after the expiry of the bid submission term.<sup>26</sup> The amendment of bids is exceptionally accepted to correct some correctable errors, such as data or information already included in databases of public bodies, being written in a foreign language, or, in general, when it does not alter the principle of equal treatment of bidders.

To be admitted, every bid must accomplish certain formal requirements, such as the bid being written in Spanish, the original bid being signed on every page by the bidder or his or her representative, or the bid being submitted with the number of copies stated in the tender documents. The bidder must also establish a special address where every notification must be issued within the tender, and the price offered that, as a rule and unless something different is stated, must be established in the national currency. Any other information or document that may be required in the tender documents must be also included. Although

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22 Section 12, Subsection 8.

23 Section 51, Regulation of the GRPP; and Section 22, CPM.

24 Section 22, CMP.

25 Section 52, Regulation of the GRPP.

26 Section 53, Regulation of the GRPP.

there is not an established fee to submit a bid, suppliers must give a guarantee that the offer will be maintained for the duration of the tender. The maintenance bid guarantee is 5 per cent of the final price of the bid.<sup>27</sup>

Unless a different term is established in the tender documents, bidders must maintain their bids for at least 60 calendar days from the date of the opening of the bids. This term can be automatically extended, for the same 60-day period, every 60 days. A bidder who has decided not to maintain his or her bid for a new time period must give notice of this decision at least 10 days before the expiry term. As a consequence, the bidder will be excluded from the public tender, but will not lose the maintaining bid guarantee.<sup>28</sup>

The bids must be opened at the place, date and time stated in the tender documents, at a public event.<sup>29</sup> The original version of each bid must be available to the bidders for the following two days.<sup>30</sup>

## V ELIGIBILITY

### i Qualification to bid

According to the GRPP and its Regulation, the following persons cannot enter into contracts with the public administration:

- a* bidders who are a continuation, transformation, fusion or division of other companies with no authorisation to enter into contracts with the public administration or their controllers;<sup>31</sup>
- b* bidders who are not authorised to enter into contracts with the public administration;<sup>32</sup>
- c* bidders who, according to the precision and concordance of the bids, have cooperated with each other in the bidding process, arranging or coordinating positions. It is presumed that this case is configured between bids presented by spouses, partners or relatives within the first grade both naturally, adoption or any other, unless proof in contrary;<sup>33</sup>
- d* bidders who, according to the precision and concordance of the bids, have simulated real competition or concurrency;<sup>34</sup>
- e* bidders who, according to the precision and concordance of the bids, have created a simulation tending to elude the effects of these qualifications to enter into contracts with the public administration;<sup>35</sup>
- f* bidders who, within a term of three years prior to the submission of the bid, were sanctioned for abuse of dominant position, dumping or any other form of unfair competition;<sup>36</sup>
- g* bidders who have breached previous public contracts;<sup>37</sup>

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27 Section 78(a), Regulation of the GRPP.

28 Section 54, Regulation of the GRPP.

29 Section 59, Regulation of the GRPP.

30 Section 60, Regulation of the GRPP.

31 Section 68(a), GRPP.

32 Section 68(b), GRPP;

33 Section 68(c), GRPP.

34 Section 68(d), Regulation of the GRPP.

35 Section 68(e), Regulation of the GRPP.

36 Section 68(f), Regulation of the GRPP.

37 Section 68(g), Regulation of the GRPP.

- b* companies that have been convicted abroad of bribery or transnational bribery practices under the terms of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; these companies will not be eligible for a period equal to twice the sentence;<sup>38</sup> and
- i* individuals or legal entities that were included in the lists of disabled persons of the World Bank or the Inter-American Development Bank, as a result of corrupt practices referred to in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>39</sup>

Regarding the public–private partnerships regime, Decree 118/17 states that the offer must be rejected when the bidder is included in the list of ineligible persons of the World Bank or the Inter-American Development Bank as a result of conducts or practices of corruption, or in the case of convicted persons, with final judgment, in Argentina or abroad, for practices of bribery or transnational bribery under the terms of the Convention for Combating the Bribery of Foreign Public Servants in International Business Transactions of the Organisation for Economic Co-operation and Development (OECD).<sup>40</sup>

According to Law 27,401 – the Criminal Liability of Legal Entities Act, legal entities willing to make agreements with the government shall have and comply with an integrity programme. Said integrity programme must contemplate, among other aspects, procedures to promote integrity, supervision and control, detecting and correcting irregularities and unlawful acts. The integrity programme required must be related to the risks inherent in the activity carried out by the legal entity, its size and economic capacity.<sup>41</sup>

## **ii Conflicts of interest**

According to Decree 202/17, the bidders must complete, sign and attach to the bid an affidavit stating that they are not affected by any cause of conflicts of interest;<sup>42</sup> otherwise, they will be excluded from the corresponding procurement procedure.<sup>43</sup> Falsehood in the information included in the affidavit shall be considered as a maximum severity infringement, which could trigger the application of sanctions.<sup>44</sup>

## **iii Foreign suppliers**

Foreign suppliers are allowed to submit bids exclusively within international tenders. In this scenario, due to the nature of the object or the service to be hired, the call to bid is extended to interested parties and bidders from abroad. According to the GRPP, a ‘foreign bidder’ is a bidder whose principal place of business is outside Argentina and that does not have a branch duly registered in Argentina.<sup>45</sup>

As mentioned above, notices of invitation to take part in an international public tender must be published on the official website of the United Nations (UN Development

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38 Section 68(h), Regulation of the GRPP.

39 Section 68(i), Regulation of the GRPP.

40 Section 24.

41 Section 22 and 23.

42 Section 1, Decree 202/17.

43 Section 6, Decree 202/17.

44 Section 6, Decree 202/17.

45 Section 26(b), Subsection 2, GRPP.

Business) or the World Bank (DG Market), at least 40 calendar days before the date fixed for the opening of the bids.<sup>46</sup> Under the public–private partnerships regime, in the case of international bidding, this notice must take place for a term of three days with a minimum of 60 calendar days in advance of the date fixed for the presentation of the bids or for obtaining of tender documents, whichever is first.<sup>47</sup>

Foreign suppliers are only allowed to bid in a national tender provided they have already incorporated a branch or subsidiary in Argentina.

If, for certain reasons, the contracting authority needs to purchase a specific asset or hire a certain service from abroad because such is not available in Argentina, it may invite foreign suppliers to take part in direct awarding.

In procurement proceedings related to the construction of public works, as well as in cases related to the contracting of consulting services, Law No. 18,875 prohibits the participation of foreign construction and consulting services providers unless they enter into joint venture agreements with local companies. This restricted participation of foreign providers can only take place if the government has previously called for an international public bid.

## VI AWARD

### i Evaluating tenders

The period for evaluating tenders runs from the time that the procurement administrative record is sent to the Evaluation Commission up to the time of the notification of the evaluation report to all the bidders.<sup>48</sup>

The Evaluation Commission is a consultative body whose main function is to issue a non-binding opinion over the submitted bids. It is composed of three members and their alternates, all of whom must be appointed by the highest authority of the contracting entity. The following cannot be appointed to the Evaluation Commission: persons who decided the opening of the public tender, and persons who have the power to finally approve the whole procedure.<sup>49</sup>

The opinion issued by the Evaluation Commission must analyse the formal requirements of the bids, the subjective evaluation of the bidders (that is, whether they meet the requirements stated in the GRPP, its Regulation and in the tender documents), and the objective evaluation of all the submitted bids. The latter analysis must objectively take into consideration all the requirements established by the tender documents for the admissibility of the bids. Regarding the admitted bids, the Evaluation Commission must consider the different aspects provided in the specification documents in order to compare them and determine their order of merit.<sup>50</sup>

According to the GRPP, the contract must be awarded to the ‘most suitable offer’, taking into consideration the price, the quality of the good or service, and the bidders’ economic, financial and technical capabilities. Therefore, unless the opposite is expressly stated in the

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46 Section 32, GRPP; and Sections 40 and 42, Regulation of the GRPP.

47 Section 12, Subsection 8, Decree 118/17.

48 Section 61, Regulation of the GRPP.

49 Sections 62 and 63, Regulation of the GRPP.

50 Section 27, CPM.

tender documents, the analysis of the Evaluation Commission and the procuring entity must not be exclusively based on the economic aspects (i.e., the lowest price) but rather on the three above-mentioned aspects.<sup>51</sup>

The non-binding opinion of the Evaluation Commission must be published on the official website of the National Procurement Office, and duly notified to all of the bidders within a term of two working days from its issuance.<sup>52</sup> As discussed below, the non-binding opinion may be challenged by the bidders as well as anyone who invokes and proves his or her interest in the subject matter of the opinion.

## ii National interest and public policy considerations

Law No. 27,437 gives preference to bids offering 'goods of national origin', being those goods produced or extracted within the territory of Argentina, as long as the cost of imported materials or inputs does not exceed 40 per cent of its gross production value.<sup>53</sup>

In general terms, the preference provided under Law No. 27,437 is granted to bids that, in offering 'goods of national origin', have the same or a lower price than those bids involving goods that are not of national origin, after the price of the latter is increased by 15 per cent when such offers are made by companies classified as small and medium-sized enterprises, and 8 per cent when made by other companies.<sup>54</sup>

## VII INFORMATION FLOW

According to the GRPP and its Regulation, the principles of openness and publicity are general principles that govern all procurement procedures.<sup>55</sup> This is why many provisions of the GRPP and its Regulation refer to the flow of information regarding public procurement:

- a* the GRPP states that any interested party has the right to access the public procurement administrative record, except for those documents protected by confidentiality rules or that are declared to be either confidential or secret by the procuring entity. During the period of evaluation of the tenders, bidders and third parties are not entitled to have access to the record;<sup>56</sup> and
- b* regarding the draft of the tender specifications, even when commonly prepared and approved by the procuring entity with no prior mandatory public consultation, the GRPP states that, when the complexity or the amount of the procurement so justifies, such entity may allow a preliminary stage, before the bid call, for receiving comments from any interested party about the tender specifications draft.<sup>57</sup>

Despite the procuring entity not being bound by the comments issued by potential bidders, prior to approving the tender specification it must consider all the bidders, and justify the reasons whether they are admitted or not.

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51 Section 15, GRPP.

52 Section 73, Regulation of the GRPP; and Section 28, CPM.

53 Sections 2 and 5, Law No. 27,437.

54 Section 2(a), Law No. 27,437.

55 Section 3(d), GRPP.

56 Section 4, Regulation of the GRPP.

57 Section 26, Regulation of the GRPP.

Regarding the tender documents, the GRPP states that anyone can have access to them or purchase them either from the offices of the procuring entity or from the website of the National Procurement Office.<sup>58</sup> Nevertheless, it must be noted that it is very common that the tender documents – especially those of a technical nature – are only accessible through purchasing them at the offices of the contracting entity. Under the public–private partnerships regime, Decree 118/17 states that the tender documents can also be accessed from the website of the Subsecretariat of Public–Private Partnership.<sup>59</sup>

Suppliers can submit written questions to the procuring entity for clarification of the tender documents. Unless otherwise stated, any questions can be submitted up to three days before the date fixed for the opening of the bids.<sup>60</sup> Following these questions, the procuring entity may issue explanatory circulars (up to two days before the date fixed for the opening of envelopes) or amendments to the tender documents (up to one day before the date fixed for the opening of envelopes) that are construed as amendments to the tender specifications and become mandatory for both contracting authorities and bidders. Both types of documents are available to all interested suppliers.<sup>61</sup> Under the public–private partnerships regime, Decree 118/17 sets forth that such questions can be submitted up to seven days before the fixed date for the opening of the bids, unless a different term is stated in the tender documents.<sup>62</sup>

Regarding submitted bids, originals must be exhibited for all bidders for two days as of the date of the bid opening. Bidders may obtain a copy.<sup>63</sup>

## VIII CHALLENGING AWARDS

### i Procedures

The Regulation of the GRPP only provides for a special procedure for challenging the non-binding opinions of the Evaluation Commission.<sup>64</sup> It does not provide for a specific procedure for challenging an award. Despite this, as outlined below, awards may be challenged either by any of the unsuccessful bidders or by any other aggrieved person through the general administrative and judicial review procedures established in the Administrative Procedures Act, approved by Law No. 19,549 and its regulation.

### ii Grounds for challenge

Challenges are submitted before the public administration or before the judiciary. In cases in which a challenge is filed before an administrative body (that is, the procuring entity itself or its superior administrative authority), the challenge may refer to the illegitimacy of the procedure, the illegitimacy of the award of the incorrect evaluation or assessment of the tender. Besides, in those cases where a challenge is submitted before the administrative body,

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58 Section 48, Regulation of the GRPP.

59 Section 12, Subsection 11.

60 Section 49, Regulation of the GRPP.

61 Section 50, Regulation of the GRPP.

62 Section 12, Subsection 11.

63 Section 60, Regulation of the GRPP.

64 Section 73, Regulation of the GRPP; and Section 29, CPM.

it may also be based on the fact that one bid is preferable over another for reasons unrelated to the legal aspects, such as, for example, the quality of the goods or services, the reputation of the bidder.

The grounds for challenge are considerably more restricted if filed before a court of justice. In such case, the judicial claim should be based exclusively on the basis of illegitimacy either related to the procedure or to the award. Moreover, not all forms of illegitimacy will secure the success of a judicial claim, since judges tend to be very strict in their approach to these types of cases. The federal courts have traditionally adopted a deferential approach regarding government procurement challenges.

### iii Remedies

We must distinguish between the remedies provided for challenging an opinion of the Evaluation Commission from those provided for challenging an award.

According to the Regulation of the GRPP, as mentioned above, Evaluation Commission opinions may be challenged by bidders (within three calendar days of such notification) and by any other aggrieved person (within three calendar days of an opinion's publication on the official website of the National Procurement office), and in any case, if applicable, by previously providing the challenge guarantee (that is, the guarantee that is usually required for the viability of the claim so as to assure its seriousness).<sup>65</sup>

The contracting entity must make a decision on the merits of those complaints in the same resolution whereby the public contract is awarded.<sup>66</sup>

Regarding challenges of awards, the Administrative Procedures Act, approved by Law No. 19,549 and its regulation provide different remedies for filing a complaint.

- a The challenger has the option to first file a complaint before the contracting entity. In this case, the challenger shall request the procuring entity to reconsider its decision. The complaint should be filed before the awarding authority (which is usually the procuring entity itself) within 10 calendar days of the notification of the award.<sup>67</sup>
- b If the previous complaint was not filed or if, having been filed, it has been rejected, the challenger must file another administrative complaint before the superior administrative authority. In this case, the complaint should be filed before the authority that awarded the contract (which is usually the procuring entity itself) within 15 calendar days from the notification of the awarding of the rejection of the previous remedy.<sup>68</sup>
- c If the complaint before the superior administrative authority is rejected, the challenger shall request the federal judiciary, within 90 working days, to review the award on grounds of its illegality.<sup>69</sup> If the judiciary nullifies the challenged award, the procuring entity can opt to re-award the contract in full adherence with the considerations set out in the court's ruling or to cancel the procurement proceedings. Note that the court itself does not have the power to award the contract to the claimant.

As a rule, the filing of such claims does not trigger, *per se*, a suspension of the procurement process. However, on its own initiative or by means of a request from a claimant, the

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65 Sections 73 and 78(d), Regulation of the GRPP.

66 Section 74, Regulation of the GRPP.

67 Section 74, Regulation of the GRPP.

68 Section 89, Decree 1759/1972.

69 Section 25(a), Law No. 19,549, Administrative Procedure Act.

contracting entity may suspend the process for public interest reasons, to avoid the causation of damages to the aggrieved party, or when a nullity has been duly invoked and accredited by the petitioner.<sup>70</sup> If the contracting entity rejects the suspension request, the claimant is entitled to file before the judiciary a request for preliminary measures to obtain the provisional suspension of the public procurement proceedings while the complaint is pending.<sup>71</sup>

## **IX INTERNATIONAL PUBLIC PROCUREMENT**

Regarding international public procurement, Argentina is an observer of the World Trade Organization's Agreement on Government Procurement, whose fundamental aim is to liberalise government procurement markets.

In the regional sphere, the state parties of Mercosur, including Argentina, signed the Mercosur Public Procurement Protocol to provide suppliers and service providers established in the Mercosur Member States with a guarantee of non-discriminatory treatment in any procurement processes carried out by public entities of any of the state parties. The Congress of Argentina approved the Protocol through Decision 23/10 of the Common Market Counsel; however, the state parties decided to subject the Protocol to a review process that is currently ongoing.

Finally, it must be mentioned that, unlike its predecessor, the new Regulation of the GRPP does not contain any provision aimed at governing public procurements that take place in foreign countries.

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70 Section 5, Regulation of the GRPP; and Section 12, Law No. 19,549, Administrative Procedure Act.

71 Law No. 26,854.

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