Public Procurement World - Argentina

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# 1. The Laws

## a. What is the applicable legislation?

The Argentine Republic has a federalist government system: the country is divided into several provinces and the Autonomous City of Buenos Aires, which have the power to approve their own constitutions and legislate, within their territories, on matters not delegated to the National Government. At the same time, the provinces have also granted certain specific powers to municipalities.

Provinces, the Autonomous City of Buenos Aires and municipalities establish their own public procurement regulations. However, they are usually similar to those established at the national level.

As a general rule, the following legislation (jointly, the “Public Procurement Regime”) applies, at the national level, to all procurement procedures:

Contracting Regime for the National Public Administration, approved by Executive Order No. 1023/2001;

Rules of the Contracting Regime for the National Public Administration, approved by Executive Order No. 1030/2016;

National Public Administration Contracting Procedures Handbook, approved by National Contracting Office’s Disposition No. 62/2016;

General Terms and Conditions, approved by National Contracting Office’s Disposition No. 63/2016;

Public Administration’s Providers Database Registration Handbook, approved by National Contracting Office’s Disposition No. 64/2016;

National Administration Contracting Electronic System COMPR.AR, approved by National Contracting Office’s Disposition No. 65/2016; and

National Administration Contracting Electronic System CONTRAT.AR Procedure Handbook, approved by Executive Order No. 1336/2016.

Note that many of these rules may apply even when the documents for a particular bid do not expressly mention them.

Besides, a particular governmental contract is also regulated by specific and ad hoc rules, namely:

the Specific Terms and Conditions;

the winning bidder’s offer;

the samples submitted;

the governmental decision awarding the contract (adjudicación); and

the terms of the contract or the purchase order.

In addition, the Buy Argentinean Act (Law No. 25,551) applies to all public contracting procedures, and obliges specific authorities and entities to, under certain conditions, grant preference to the acquisition or hiring of national goods and services and to comply with certain publicity obligations during their contracting procedures.

Also, there is specific legislation for certain contracts, such as concession agreements (Law No. 17,520), public-private partnerships (Law No. 27,328) and contracts for the construction of public works and infrastructure (Law No. 13,064).

Finally, many public utilities and public interest activities (e.g., electricity and natural gas transportation and distribution, water provision, oil exploitation) are subject to special regulatory regimes, which usually include specific procurement provisions.

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

Argentina is a member of the Mercosur Customs Union together with Brazil, Paraguay and Uruguay (Venezuela is in the process of joining). By means of Decision 23/06 of the Common Market Council (*Consejo Mercado Común*), a Protocol on Government Purchases was approved. As of November 2011, it has only been ratified by Argentina. Furthermore, Decisions 23/10 and 9/11 of the Common Market Council have ordered a review of the Protocol in order to update it. Thus, the Protocol is still not in place and it is not clear when it will enter into force.

The purpose of the Protocol is to set the basic rules on public procurement in the member states. Those rules include: transparency, impartiality, equality, due process, publicity, and non-discrimination of companies of other member states in governmental purchases.

The Protocol will apply, in principle, to purchases by all kinds of governmental entities, both at the national and provincial level.

## c. What are the basic underlying principles of the legal framework?

The basic underlying principles of the legal framework are the following:

equal treatment to all bidders;

effective competition between the potential and current bidders;

transparency and publicity of the procedure;

reasonableness and efficiency of the procedure; and

accountability of public officers authorizing, approving and managing public contracts.

## d. Is aerospace and defense procurement treated differently from other types of procurement?

As a general rule, regulation and jurisdiction over aerospace and defense matters are powers granted to the National Government. At the national level, aerospace and defense procurement are not treated differently from other types of procurement. Hence, the same general regulatory framework explained in Section 1(a) above would apply.

The National Government could acquire aerospace or defense products or services without a public bidding procedure, for example, in cases of duly proven and grounded urgency or emergency reasons or cases where the purchase should be kept secret because of national defense or security purposes (see Section 3(a) below for further details).

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

Due to a specific legal provision, the Public Procurement Regime applies to the centralized and decentralized National Public Administration –*i.e.*, the Executive Power, Ministries, Secretariats, and other lower rank offices, and regulatory agencies and other governmental entities (*e.g.,* universities, internal revenue service, and social security institutions)–.

The Public Procurement Regime does not apply, in principle, to state-owned companies –unless it is expressly stated in their bylaws or other specific legislation–, non-state public entities, state trust funds, and any other agencies not included in the centralized or decentralized National Public Administration. Also, it does not apply to authorities or entities acting under the supervision of other powers (judiciary, legislative power or public attorneys’ office).

However, the Buy Argentinean Act is also applicable to certain private contracting procedures (*e.g.,* those of public utilities companies) and, therefore, the latter are bound to such regime.

## b. Which private entities are covered by the laws?

Private entities are mainly subject to private law and are not covered by the general procurement legislation mentioned in Section 1(a).

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

Contracts executed between public bodies are exempted not from public procurement law, but from the requirement to undergo a public bidding procedure.

## d. Which types of contracts are covered?

The Public Procurement Regime applies, as a general rule, to all types of contracts. However, there is specific legislation for certain contracts, such as concession agreements (Law No. 17,520), public-private partnerships (Law No. 27,328) and contracts for the construction of public works and infrastructure (Law No. 13,064).

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

The contracting authority is entitled to increase or decrease the contract amount at its sole option up to a 20%. For an increase or decrease above the 20% of the contract amount, the consent of the counterparty is needed. An increase or decrease above the 35% of the contract amount is forbidden, even with the consent of the parties.

Also, the contract may be extended only once and for a period equal or less than the limit set in the initial contract. If the contract is multiannual, it may not be extended beyond one additional year.

Any change other than those above must undergo a new procurement procedure.

## f. What is the applicable regime for framework agreements?

The only framework agreement regulated by the Public Procurement Regime is intended to supply goods and services by a single provider to multiple public jurisdiction or entities. However, other framework agreements may be admissible insofar as they comply with the Public Procurement Regime, which generically applies to all contracting procedures.

## g. What is the applicable regime for public-private partnerships (PPPs)?

Public-private partnerships are regulated by Law No. 27,328. Such regime grants broad discretion to the contracting authority to determine which provisions to include in the contract (*e.g.*, liability limitation; international arbitration). It also states that for the selection of the private partner a competitive bidding procedure must be implemented.

## h. How are concessions dealt with?

Concessions for the use of public goods are subject to the general procurement provisions set forth in Section 1(a). Concessions for public utilities and public interest activities (e.g., electricity and natural gas transportation and distribution, water provision, oil exploitation) are subject to special regulatory regimes, which usually include specific procurement provisions.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

As a general rule each contracting authority is in charge of its application through a Contracting Procedures Unit, which may apply some penalties in case of violations to the public procurement legislation (loss of the guarantees, fines, termination of the contract).

Additionally, the National Contracting Office must further efficiency and transparency in the National Public Administration’s contracting procedures. For these purposes, it must propose the policies and establish the rules, systems, and operational procedures that will govern public contracting, and it may also apply other sanctions (warning, contracting suspension or disabling). Finally, violations of applicable rules and the sanctions applied may be reviewed by the contracting authority’s superior office and eventually by a judicial court.

On another note, both the General Auditor’s Office (*Auditoría General de la Nación*) and the Comptroller General’s Office (*Sindicatura General de la Nación*) perform monitoring and controlling of expenditure and management of public funds made by the National Public Administration.

Finally, the contracting authority must reject any offer and even terminate the existing contract if illegal acts (such as acts of corruption) were committed during the contracting procedure or the contractual performance. In this regard, if irregularities or frauds are committed during the contracting procedure, bidders may be also subject to the several penalties and sanctions, including criminal or civil liability, regardless of the public officers’ liabilities. In antitrust matters, Law No. 25,156 prohibits bid rigging and other anti competition practices.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

According to the general procurement legislation mentioned in Section 1(a), there are two different main procedures in order to select the contractor for a public contract: (i) the public bidding procedure, which is the standard procedure; and (ii) the direct contracting procedure, which is only permitted in certain specific cases, such as: when the amounts involved are low; when the very special nature of the contractor would not allow a public bid; when the second public bid fails or is declared void; when there is a proven urgency or emergency; or when there are confidentiality reasons.

## b. What status do electronic means/procedures have?

There are newly enacted contracting electronic systems whose applicability depends on the matter of the contract. The CONTRAT.AR system applies to public works contract, public services or public works concessions or licenses, and the COMPR.AR system applies to the other procedures (*e.g.*, purchase, supply, services, lease). Although they were created in 2016, they are being consistently used so far.

## c. Where are contract notices, i.e. calls for bid, published?

Most but not all tenders must be published on the National Contracting Office’s website (www.argentinacompra.gov.ar). Also, each contracting authority (*e.g.,* each ministry, secretariat, agency) usually publishes its contract notices in its own webpage.

## c. Can certain prospective bidders be excluded from the competition?

According to the general procurement legislation mentioned in Section 1(a), certain prospective bidders can be excluded from the competition for, mainly, having been penalized due to previous breaches of public contracts; being an officer of the National Government or of the corporations under its control; being under a reorganization or bankruptcy procedure; or having been held guilty in court for criminal offences.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

The rule is that the public contract must be awarded to the “most convenient offer”—taking into account, as a whole, the price, quality, and other characteristics of the bid, as well as the bidder’s suitability and aptitude for the contract.

However, in the acquisition of standardized products or for the hiring of standardized services, the contract should be awarded to the least expensive offer.

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Only in some contracting procedures is prequalification allowed for. The requirements and procedure for such prequalification will be determined in the specific terms and conditions of the bidding.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

As a general rule, all bidders must be registered before the National Public Administration Providers Registry (also known as “SIPRO”) and there is no general “blacklist”.

However, the Public Procurement Regime sets forth general disqualifications to contract with the Public Administration applicable to individuals or legal entities that: (i) have any penalties from contractual relationships with the Public Administration; (ii) are officers or agents of the Public Administration, pursuant to the Ethical Law No. 25,188; (iii) have been judicially convicted for fraud; (iv) are under current judicial investigation for corruption or crimes against the Public Administration, property, or public faith; (v) have infringed their tax obligations; (vi) have infringed public funds or subsidies stipulations set forth by Law No. 24,156; or (vii) are included in the Public Registry of Labor Infractions (“REPSAL”).

Also, the contracting authority is required to dismiss bids issued by individuals or entities: (i) suspect of having rigged their bids or having simulated competition; (ii) that were penalized in the previous 3 years for practices in violation of the Antitrust Law; (iii) that were convicted in a foreign country for transnational bribery; and (iv) that are included in the World Bank’s and Inter-American Development Bank’s corruption blacklists.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

Undue influences by a company in the drafting of the tender documents may exclude it from bidding in the procedure and/or may annul an eventual contract.

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

There is no bar to submitting a joint bid, although the bidders will need to comply with the requirements against bid rigging set forth in Antitrust Law No. 25,156. Consequently, such joint bid should not significantly restrict access to the market by other competitors nor should it constitute abuse of substantial market power.

## g. Can members of a bidder consortium be changed during a procurement procedure?

Yes, but the contracting authority should previously authorize such change.

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

There is no bar to bids by related bidders, although the bidders will need to comply with the requirements against bid rigging set forth in Antitrust Law No. 25,156. Consequently, such bids should not significantly restrict access to the market by other competitors nor should it constitute abuse of substantial market power.

# 5. Specifications

## a. Are there any rules on the specifications?

According to the general procurement legislation described in Section 1(a), the technical specifications must be drafted so as to allow equal access to potential bidders and not to create unjustified burdens to competition. They must be precise and clear on the goods or services that are being requested.

Note that the rules on the criteria and specifications of the contracting procedure are set forth by the “General Terms and Conditions”, the “Specific Terms and Conditions”, the offer of the contractor, the governmental decision granting the public contract to a specific contractor (*adjudicación*), and the specific written contract and/or purchase (or service) request order. Such framework specifies the mandatory criteria and specifications that the submitted bids must comply with. Any bid that fails to meet them could be rejected on inadmissibility grounds.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

As a general rule, bidders cannot change the specifications or submit their own standard terms of business. However, a case-by-case analysis must be conducted to determine if a given term or condition may be introduced by the bidder in its bid.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

The Buy Argentinean Act, applicable to the procurement legislation, grants a preference to local production companies (including small and medium companies) in the acquisition of goods and services by the national public administration and its contractors.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

The bid documents can state different rules on the awarding of contracts, such as those attending to the lower price, the experience or skills of the bidder, the quality of the materials, or other criteria.

The default rule is that the public contract must be awarded to the “most convenient offer”, taking into account, as a whole, the price, quality, and other characteristics of the bid, as well as the bidder’s suitability and aptitude for the contract. Please note that, in procurement procedures for the acquisition of standardized products or for the hiring of standardized services, the public contract would be awarded to the least expensive offer.

## b. Are there any limitations regarding the offered bid price?

No. However, the specific terms and conditions of a given bid may set otherwise.

## c. Are there any rules on alternative bids?

Alternative bids are allowed by the general procurement legislation mentioned in Section 1(a), unless expressly prohibited by the bid documents. Alternative bids would nevertheless be inadmissible if they do not comply with the requirements, criteria and specifications set forth in the bid documents.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

Under certain circumstances, a public contract could be directly awarded, overlooking the competitive bidding procedure (see Section 3(a) for further details). Also, private biddings could be followed, for example, if only a few potential bidders were identifiable.

## b. What are the consequences for violation of the competitive bidding requirement?

If the contracting authority fails to implement competitive bidding in violation of the legal framework, the awarded contract may be construed as null and void.

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

Any bidder has the right under the general procurement legislation mentioned in Section 1(a) to challenge administrative decisions issued during the public bidding procedure, including the contract award. Such challenges must be previously filed at the administrative level, and only when all administrative remedies are exhausted, can the administrative decision be challenged in court.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

Depending on the case, other remedies -such as criminal complaints or damages claims against the public administration, as well as those regulated in the Public-Private Partnership Law- may be available.

## c. Is there a specific forum before which procurement disputes are heard?

At the national level, as a general rule, the judicial disputes regarding public procurements must be heard by the Federal Courts having jurisdiction on Administrative Disputes Matters.

At the provincial level, the forum will depend on the regulations of each province, because such power has not been delegated to the National Government.

In some exceptional cases (e.g., public-private partnerships) arbitration can be agreed upon following certain requirements (e.g., international arbitration must be previously approved by the National Executive Power).

## d. Are there any timing requirements for the review?

Challenges must be filed before the contracting authority generally within 10 days. After exhausting the administrative procedure, the challenge must be brought before the judicial courts within 90 days.

## e. What are the main preconditions for review?

The main pre-conditions for the review of an administrative decision issued in a procurement procedure are (i) to have an interest in the contract or in the procurement procedure, (ii) to file the prior administrative challenge within the timing mentioned above, and (iii) to provide the corresponding guarantee (if applicable).

## f. What are admissible grounds for starting a review proceeding?

The review proceeding may have grounds on any violation of procedural rules (e.g., inadmissible direct award, breach of the publicity requirements, anti-bribery causes). Also, it can challenge the award’s reasonableness, but courts usually grant wide discretion to the contracting authority to determine which is the most convenient offer.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

As a general rule, the review proceeding does not affect an on-going tender or an awarded contract. Suspension of the administrative procedure or the execution of the awarded contract must be requested by an interested party to the administrative authority, or must be unilaterally decided by the administrative authority. If such request is denied, interested party may request such suspension with courts.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

The consequences of a successful review proceeding may vary depending on the stage in which the tender procedure was challenged. As a general rule, the act whose validity is challenged and all the other acts issued as a consequence will be invalid (including the award). If the awarded contract is declared invalid, the awardee would not have any right to claim for the price. Then, the tender procedure shall be restarted from the last act valid (if any).

## i. How long does a judicial proceeding for review take?

The length of a review proceeding varies on a case-by-case basis. However, as a general rule, the complete procedure (including the eventual appeal) may take a few years, and it may be extended if the evidence stage is complex.

## j. Must unsuccessful bidders be notified before the award? If so, when?

The award must be published in the official website of the National Contracting Office and notified to the awardee and the unsuccessful bidders.

## k. Are review proceedings common?

It is usual for unsuccessful bidders to challenge the award before the administrative authority. However, it is not very usual to submit those claims in court.

## l. Are damage claims in relation with procurement procedures common?

No, such claims are mostly directed to annul a decision or award. However, if a decision or award is annulled, the affected bidder may eventually seek compensation for the damages caused by it.

## m. What are the leading court decisions involving procurement disputes?

Some of the leading Supreme Court decisions regarding these matters are “*Ingeniería Omega S.A. v. Municipalidad de la ciudad de Buenos Aires”, “Cardiocorp S.R.L. v. Municipalidad de la Ciudad de Buenos Aires”* and *“Técnicas de Investigación y Servicios de Luis A. v. Municipalidad de la Ciudad de Buenos Aires”*. These decisions led to a current legal trend which states that if a public contract does not follow the public bidding procedure when it is expressly requested by the applicable laws, then it must be deemed as non-existent.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

Other related bodies of law relevant to procurement by public agencies are the Public Ethics Law No. 25,188 and the National Regime of Private Initiative enacted by decree 966/2005.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

The general procurement legislation mentioned in Section 1(a) applies universally, regardless of the specific industry sector. The public administration or the public agency may set forth specific rules regulating a particular procurement, but it has not yet issued such rules in this sector.

## b. Are there any specific laws or practices that apply in the defense sector?

The general procurement legislation mentioned in Section 1(a) applies universally, regardless of the specific industry sector. The public administration or the public agency may set forth specific rules regulating a particular procurement, but it has not yet issued such rules in this sector.

However, as explained above in Section 1(d), procurement for defense purposes is usually exempt from the competitive bidding requirements set forth by the general procurement legislation.

## c. Are there any specific laws or practices that apply in the health care sector?

The general procurement legislation mentioned in Section 1(a) applies universally, regardless of the specific industry sector. The public administration or the public agency may set forth specific rules regulating a particular procurement, but it has not yet issued such rules in this sector.

In the health care sector, the Ministry of Health plays a central role in the public procurement for health care, purchasing medicines and medical devices for public hospitals and public health policies. The Ministry of Health is subject to the general procurement legislation mentioned above.

Also, the National Institute of Pensioners and Retirees (also known as “PAMI”) is a key player in the provision of health care to seniors across the country. Unlike the Ministry of Health, PAMI is subject to specific procurement legislation which, however, sets forth similar rules as the general legislation.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

N/A.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

The new government that took office in December 2015 renewed most of the general procurement legislation, as Section 1(a) indicates (only Decree 1023/01 precedes the current administration). Further, there is currently a draft bill sent to Congress by the Executive Power to enact a new Buy Argentinean Regime.

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