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# THE GOVERNMENT PROCUREMENT REVIEW

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EDITORS  
JONATHAN DAVEY AND JAMES FALLE

LAW BUSINESS RESEARCH

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# EDITORS' PREFACE

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It is our very great pleasure to introduce this first edition of *The Government Procurement Review*. The first edition brings together contributions from eminent procurement lawyers across five continents and provides real insight to the key issues in government procurement across the different jurisdictions.

The importance of government contracts for the economy cannot be overstated. Indeed, these contracts often account for 10 to 20 per cent of GDP in any given state. While Keynesian economic theory suggests that increased government spending will support growth in times of recession, in practice the ongoing downturn has often been accompanied instead by austerity and government cuts have been the byword. Nevertheless, the debate continues as to whether the continuing economic torpor is best treated by tax and spend or by deficit reduction, and there are some signs of possibly changing policy to be gleaned from the rhetoric coming from various institutions. It will be interesting to see in the coming year or so how this affects the opportunities for private sector suppliers to bid for public contracts. Certainly, even though government spending has been curbed, the cumulative value of government contracts remains considerable and they still offer a significant opportunity for many firms.

Against this backdrop of ongoing fiscal stress, it is perhaps not surprising that certain common themes emerge from national chapters. In particular, we note policy considerations aimed at improving efficiencies or at improving the lot of local providers. Additionally, promotion of small and medium-sized enterprises ('SMEs') is a particular focus of attention, whether because the SME is viewed as more efficient or because it is likely to be locally based.

Other noticeable common threads that run through the different national legal systems are worthy of note. The systems of most, if not all, jurisdictions now embrace the key principles of transparency, value for money and objectivity. These principles go hand in hand with the continuing drive against corruption and bribery. These threads are now embedded in the UNCITRAL Model Law on Public Procurement, updated in 2011, and the guidance contained in the 2012 Guide to Enactment, together with the WTO's Government Procurement Agreement ('GPA') and the EU directives.



At the same time, there are some significant divergences in national approaches. Perhaps most notably, some national laws seek to treat all contractors equally without distinction as to the origin of the supplier, or at least give equal access to suppliers from states that are parties to a multilateral agreement – as is the case for all GPA members. Other legal systems overtly favour national sourcing, for example by explicitly reserving certain contracts for national suppliers.

While there seems to be a trend towards disappointed bidders being more willing to challenge authorities' award decisions, it is perhaps not surprising that there is considerable variance in the number of challenges brought within the different jurisdictions and the legal remedies available to disappointed bidders vary hugely from one country to the next. No doubt there are many reasons for this variance in the frequency of challenge, such as the relative complexity and cost of bringing challenges in some states compared with others; whether the jurisdiction has specialist procurement tribunals; the speed with which the courts might be expected to dispose of a claim; and the remedies that could be available (for example, can the courts cancel the award decision or are they restricted to awarding damages to the claimant?).

An often vexed question for procurement lawyers is how land transactions should be treated. In particular, if a public authority sells land with a clear understanding that the purchaser will develop it in a particular way, is this subject to the procurement rules? In some jurisdictions, land transactions are regulated by the same rules as government purchasing; in others, unless the land disposal can be said to constitute a public works contract, then it is unregulated from a procurement law perspective (although other rules may come into play such as those relating to state aid and to obtaining proper value for the disposal).

It is also noteworthy that different jurisdictions take different approaches to the scope of procurement regulation. For example, in the field of utilities, contracts awarded by privately owned utilities are sometimes regulated by national procurement law where the utilities enjoy special or exclusive rights. However, this is not universally the case and, in other jurisdictions, only state-owned utilities are regulated.

Probably the largest cross-border market of all is defence. This remains a key focus for lawyers, following controversies such as the US Air Force's \$35 billion tanker contract and, in the EU, the bedding down of the Defence Directive.

Overall, we continue to see procurement law evolving internationally. The UNCITRAL Model Law on Public Procurement was last updated as recently as 2011 and the GPA text was revised in 2012. And there is a major reform package going through the EU institutions at present, which could be on the EU statute books late in 2013 or, perhaps more realistically, in 2014. Among the many EU reforms is expected to be the regulation of service concession contracts, which have hitherto only been lightly touched upon by the EU rules but are of considerable economic importance in some Member States. Meanwhile, UNCITRAL is exploring possible future work in the area of public-private partnerships.

It is worth highlighting that in the European Union, rules are made at EU level and then implemented by each Member State. Underlying these EU rules is the desire to create an EU single market where EU suppliers can compete on a level playing field, whatever their nationality. When considering the rules in Belgium, France, Germany, Greece, Italy, Luxembourg, Portugal, Romania, Spain or the United Kingdom, the

reader may find it helpful to refer to both the European Union chapter and the relevant national chapter, as the authors have sought as far as possible to avoid simply repeating the EU rules when setting out the noteworthy features within their national jurisdiction.

Finally, we would like to thank all the contributors for their hard work in producing their national chapters. We also wish to acknowledge the tireless work of the publishers in collating what we hope you will find is a helpful and interesting publication. We believe that this annual publication will provide a valuable source of comparative information on procurement to international businesses operating or seeking to operate cross-border, policymakers, academics and practitioners alike.

**Jonathan Davey and James Falle**

Addleshaw Goddard LLP

London

May 2013

# CONTENTS

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<b>Editors' Preface</b>	.....v
	<i>Jonathan Davey and James Falle</i>
<b>Chapter 1</b>	ARGENTINA.....1
	<i>María Morena del Río</i>
<b>Chapter 2</b>	BELGIUM.....12
	<i>Dirk Lindemans, Frank Judo, Jochen Honnay and Aurélien Vandeburie</i>
<b>Chapter 3</b>	BOLIVIA.....24
	<i>Carolina Aguirre U</i>
<b>Chapter 4</b>	BRAZIL .....39
	<i>Massami Uyeda Junior and Rodnei Iazzetta</i>
<b>Chapter 5</b>	EUROPEAN UNION.....51
	<i>James Falle and Clare Dwyer</i>
<b>Chapter 6</b>	FRANCE .....65
	<i>Romarc Lazerges</i>
<b>Chapter 7</b>	GERMANY .....80
	<i>Olaf Otting and Udo H Olgemöller</i>
<b>Chapter 8</b>	GHANA.....89
	<i>Divine Kwaku Duwose Letsa</i>
<b>Chapter 9</b>	GREECE .....105
	<i>Irene Economou</i>

<b>Chapter 10</b>	INDIA .....121 <i>Sunil Seth and Vasanth Rajasekaran</i>
<b>Chapter 11</b>	ITALY .....132 <i>Filippo Bucchi, Maria Vittoria La Rosa and Alfonso Polillo</i>
<b>Chapter 12</b>	LUXEMBOURG .....144 <i>Benjamin Marthoz</i>
<b>Chapter 13</b>	MALTA .....158 <i>Adrian Delia and Matthew Paris</i>
<b>Chapter 14</b>	MEXICO .....167 <i>Javier Arreola E and Vanessa Franyutti J</i>
<b>Chapter 15</b>	PORTUGAL.....179 <i>Paulo Pinheiro, Rodrigo Esteves de Oliveira, Catarina Pinto Correia and Ana Marta Castro</i>
<b>Chapter 16</b>	ROMANIA .....192 <i>Oana Gavrilă</i>
<b>Chapter 17</b>	SPAIN .....204 <i>Álvaro Remón Peñalver</i>
<b>Chapter 18</b>	TAIWAN .....217 <i>Pauline Wang and Claire C Lin</i>
<b>Chapter 19</b>	UNITED KINGDOM.....230 <i>James Falle and Clare Dwyer</i>
<b>Chapter 20</b>	UNITED STATES .....243 <i>Richard B Clifford, Jr, Andrew E Shipley and Seth Locke</i>
<b>Appendix 1</b>	ABOUT THE AUTHORS.....270
<b>Appendix 2</b>	CONTRIBUTING LAW FIRMS' CONTACT DETAILS .. 283

## Chapter 1

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# ARGENTINA

*María Morena del Río<sup>1</sup>*

## I INTRODUCTION

On 7 June 2012 the Executive Branch issued Decree 893/2012 aimed at regulating and further implementing, for certain kind of contracts, the General Regime for Public Procurement approved by Decree 1023/2001 ('GR'). As stated in the whereas of Decree 893/2012, these regulations introduce different treatments for each type of selection proceedings and regulate new types of contracts and set clear rules, in order to strengthen and deepen the efficiency, effectiveness, economy and simplicity in managing public procurement.

To that end, Decree 893/2012 provides that the National Contracting Office ('ONC') is the governmental body empowered to ensure a high degree of uniformity in the standards applicable to all procurement proceedings. In particular, the ONC will take part in the consultations aimed at reinforcing the relationship between Mercosur and the EU, in all matters related to public procurement.

Procurement proceedings ruled by Decree 893/12 are applicable to the central government and to all entities of the Executive Branch, apart from government wholly-owned companies, which are not obliged to adopt the GR and, therefore, are free to adopt other procurement rules. The provisions of Decree 893/12 are mandatory to sales contracts, supplies, services, locations, consulting, rent to own, swaps, permits to use government property and those contracts not expressly excluded.

On the contrary, Decree 893/12 does not apply to public works, public utilities, public employment contracts, small purchases or agreements held with foreign states, public international entities or multilateral lending institutions.

Among the specific set of regulations applicable to contracts entered into with the government that are excluded from Decree 893/12 it is worth mentioning the Public

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1      María Morena del Río is a partner at Allende & Brea.

Works Act (Law 13,064), the private initiative regime (approved by Decree 966/05), the public-private partnership ('PPP') regime (approved by Decree 967/05), and the Public Utilities Concession Act (Law 17,520).

## **II YEAR IN REVIEW**

Decree 893/12 points towards a new policy implemented by the central government, directed at establishing a management programme for procurement. Thus, among the main innovations of Decree 893/12 are the enactment of sustainable procurement procedures, the possibility of negotiating general framework agreements to purchase goods or hire services for all jurisdictions within the central government and the duty of all contracting authorities to submit an annual plan for procurement. This annual plan should be approved by the highest authority of the jurisdiction within which the contracting authority is operating. The ONC will centralise all the information resulting from those plans, which must be publicised on the ONC's website.<sup>2</sup>

## **III SCOPE OF PROCUREMENT REGULATION**

### **i Regulated authorities**

The GR is mandatory for procurement procedures in which the federal government, its ministries, departments as well as any other central government bodies or decentralised agencies, comprising social security institutions, take part. Conversely, the GR is not applicable to procurement procedures carried out by the Judicial or Legislative Branch.

All contracting authorities must comply with the selection proceedings set up by the GR. The GR will bypass the bidding procedure under the following exceptional circumstances:

- a* the contracting authority can prove the objective need for urgency and the genuine impossibility of allowing the normal periods prescribed for bidding procedures;
- b* the previous call for bids failed due to the absence of interested bidders; and
- c* it is evident that, for particular reasons, only a specific supplier is able to satisfy a concrete government need (Section 24, Decree 1023/01).

As those exceptions are likely to restrict competition, they are construed in a narrow sense. In any event, the contracting authority may not manipulate these rules (i.e., value thresholds) to avoid compliance with the applicable procedure. There is also sector-specific procurement legislation, such as the Public Works Act, which obliges the contracting authority to call for a public bid before the contract is awarded.

### **ii Regulated contracts**

The GR and Decree 893/12 are both mandatory for sales contracts, supplies, services, locations, consulting, rent to own, swaps, concessions to use public property and to any other agreement except for those expressly excluded.

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<sup>2</sup> [www.argentinacompra.gov.ar](http://www.argentinacompra.gov.ar).

The GR is supplemented by sector-specific procurement legislation as explained in Section I, *supra*. Argentina also has a special procurement regime for the army. Law 20,124 creates a permanent administrative commission empowered to set up the rules for military procurement and to award contracts. The acquisition of military equipment must comply with the requirements set by the administrative commission and also be approved by the competent head of the armed forces and later ratified by the Ministry of Defence (Law 24,948).

The GR provides for three different kinds of procedures for awarding public procurement contracts: public bid (broad call to tender), private bid (invitation to tender addressed to certain bidders already enrolled with the ONC's Procurement Registry ('SIPRO')), and direct award and auction for the purchase of real or personal property, including art or other property of historical interest. The procedure to be used will depend on the threshold value of the contract. However, the contracting authority may choose to call for a public bid even if this procedure is not mandatory (Section 15, Decree 893/12).

If the contract to be awarded is valued at under 75,000 pesos, the contracting authority is free to award the contract at its own discretion (simplified direct award for small purchases). If the contract is valued at over 75,000 pesos but under 200,000 pesos the contracting authority is authorised to award a contract without a competitive procedure. If the contract to be awarded is valued at over 200,000 pesos a competitive procedure is required. Therefore, if the contract is valued at over 200,000 pesos but under 800,000 pesos, the contracting authority shall call for a private bid submitting invitations to tender to bidders already enrolled with SIPRO. All contracts valued over 800,000 pesos must be awarded after a public bid procedure which implies a broad call to submit offer and general announcement.

As an exception to the mandatory selection proceedings, the contracting authority is authorised to award a contract without following a procurement procedure (direct awarding) in certain cases expressly authorised by the GR and Decree 893/12. In general terms, direct awarding is possible when the potential contract involves exclusive IP rights, extreme urgency or an emergency situation, when a prior competitive procedure has failed and in case of certain services that can only be rendered by a determined supplier. Please see Section V, *infra*, for further details.

## IV SPECIAL CONTRACTUAL FORMS

### i Framework agreements and central purchasing

The ONC is entitled to enter into framework agreements with suppliers to seek the direct supply (no competitive procurement is required) of goods and services for certain government department or agencies. Contracting authorities are obliged to buy under the framework agreements that were in force, interacting directly with suppliers selected by the ONC.

## ii Joint ventures

Under Argentine companies law joint ventures ('JVs') are contractual arrangements to perform a certain activity, execute a contract or render a service for a limited period of time. JVs do not therefore involve the establishment of a separate legal entity. According to Section 67 of Decree 893/12 bidders can submit tenders individually or as part of a group, JVs, association or a different legal persona. In any case, JVs are not bound by the rules on public contracts.

On the other hand, as a result of the PPP regime (approved by Decree 967/05), individuals and companies may, under certain circumstances, enter into a cooperative agreement in order to develop a project of public interest. According to Decree 967/05, the contracting authority is always obliged to perform the corresponding procurement procedure, depending on the applicable threshold, and PPPs are bound by the rules on public contracts.

## V THE BIDDING PROCESS

### i Notice

Decree 893/12 carefully states specific rules for public procurement publicity.

In case of public bids, the contracting authority shall advertise the call for tenders for two days in the Official Gazette at least 20 days in advance of the fixed date for the opening of tenders. In addition, the call will be advertised on the ONC's website as of the day the call was published in the Official Gazette. The contracting authority shall also address notices advertising the call to chambers of commerce or similar associations that bring together suppliers, producers, manufacturers and traders that can furnish the goods or render the services related to the contract to be awarded. Finally, the contracting authority is obliged to send invitations to at least five suppliers for the category.

For advertising private bids, the contracting authority shall send invitations, a minimum of seven days in advance of the date for the opening, to at least five suppliers that are already enrolled with SIPRO for the category of goods or services to be awarded. In addition, the call for private bid shall be advertised on the ONC's website.

If the private or public bid call is addressed to foreign suppliers, then the contracting authority is obliged to advertise the call at least 40 days in advance of the date for opening. In addition, the contracting authority shall advertise the call on the United Nations website called UN Development Business.<sup>3</sup>

The call for auction shall be advertised on the ONC's website at least 10 days in advance of the date fixed for the auction.

In case of direct awarding, the contracting authority shall send invitations to at least three suppliers when possible, and make available procurement information on the ONC's website, in certain cases (see subsection ii, *infra*, for further details).

It is important to highlight that the contracting authority shall consider and evaluate the tenders submitted by those who were not invited to participate in the

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3 www.devbusiness.com.



procurement procedure. Therefore, the invitation to submit offers is only a means of advertising and does not imply an exclusive right to participate in the tender.

The advertising notice and the invitations addressed to potential bidders shall contain the following information:

- a* details of the contracting authority;
- b* the type and modality of the applicable procurement procedure;
- c* details of the administrative dossier;
- d* the cost of the tender specification (if any);
- e* the place, term and time for purchasing the tender specifications;
- f* the place, date and time for submitting tenders and for the opening; and
- g* the e-mail address of the contracting authority.

## ii Procedures

### *Competitive procedures*

As explained in Section III, *supra*, the contracting authority shall adopt the applicable procurement procedure in light of the financial threshold stated by Decree 893/12. Notwithstanding the foregoing, the contracting authority is always entitled to call for a competitive procedure (i.e., a private or public bid, depending on whether the call is addressed to a determined or undetermined number of potential bidders).

Without prejudice to enforceability of the applicable threshold, in all cases, the contracting authority shall follow the procurement procedure that best contributes to guaranteeing that the contracts to purchase goods or hire services are entered into with the best technology, at the right time and at the lowest possible cost.

To that end, the contracting authority is entitled to adopt any the following types of procurement modalities for competitive procedures:

- a* Single stage or multiple: the tender or competitive procedure will be single stage when evaluating tenders and qualities of bidders can be done in a single act. On the contrary, the procurement procedure must be implemented in the form of multi-stage when the high degree of complexity of the contract to be awarded justifies adopting two or more phases for the evaluation and comparison of the qualities of the bidders, their business and technical background, their economic and financial capacity and analysis of the economic components of the bids.
- b* National or international: the procurement procedure will be qualified as national when the invitation is addressed to stakeholders and bidders whose residence or principal place of business is in Argentina, or have a branch duly incorporated in the country. The procurement procedure will be international when, due to the characteristics of the goods to be purchased, the complexity of the service or contract to be awarded, the call is extended to foreign suppliers (i.e., those whose principal place of business is abroad and do not have a branch duly incorporated in the country).

### *Non-competitive procedures*

The contracting authority is authorised to award a contract without following a competitive procurement procedure (direct awarding) in certain cases expressly authorised by the GR and Decree 893/12. For instance, the contracting authority may avoid a competitive