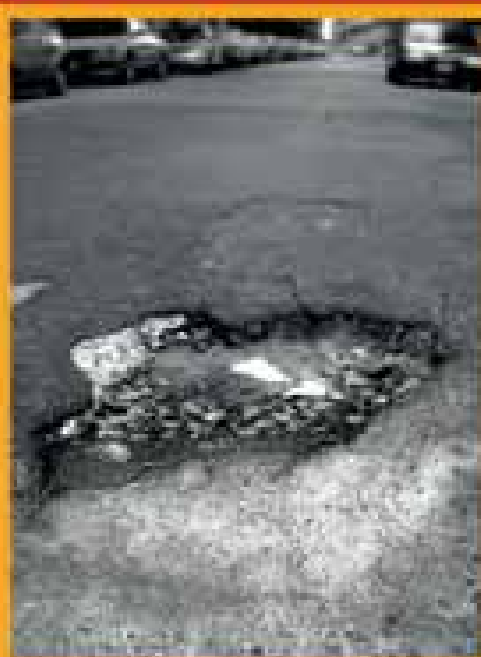


# PODER CIUDADANO



## CONTRATACIONES PUBLICAS VULNERABLES

ÁREA TRANSPARENCIA  
Y ANTICORRUPCIÓN

PODER CIUDADANO

# VULNERABLE PUBLIC CONTRACTING

**Research on the perception of vulnerabilities of  
the National System of Public Contracting**

Transparency and Anti-corruption Area



Embajada Británica

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# PODER CIUDADANO

## VULNERABLE PUBLIC CONTRACTING

Transparency and Anti-corruption Area

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Foreword.....	8
Introduction .....	10
A. Methodological aspects of the risk map of public contracting.....	14
I. The “risk map” tool.....	14
II. Methodological specifications .....	14
B. Perception of planning according to the experts.....	20
I. General aspects.....	20
II. Vulnerabilities.....	20
III. Consequences .....	22
IV. Special considerations on public works .....	23
IV.1. General Aspects.....	23
IV.2. Vulnerabilities .....	24
IV.3. Consequences .....	25
I. General aspects.....	26
II. Vulnerabilities.....	26
III. Consequences .....	28
IV. Special considerations on public works .....	29
IV.1. General aspects.....	29
IV.2. Vulnerabilities .....	29
IV.3. Consequences .....	30
D. Perception of discretion according to the experts.....	31
I. General aspects.....	31
II. Vulnerabilities.....	32
III. Consequences .....	35
IV. Special considerations on public works .....	36
IV.1. General Aspects.....	36
IV.2. Vulnerabilities .....	36
IV.3. Consequences .....	38
E. Perception of the access to information according to the experts.....	39
I. General aspects of goods and services and public works.....	39
II. Vulnerabilities of goods and services and public works.....	39
III. Consequences of goods and services and public works .....	40
F. Perception of citizen participation according to the experts .....	42
I. General aspects of goods and services and public works.....	42
II. Vulnerabilities of goods and services and public works.....	42
III. Consequences of goods and services and public works .....	43
G. Perception of control according to experts .....	45
I. General aspects.....	45
II. Vulnerabilities.....	46
III. Special considerations on public works.....	49
III.1. General aspects .....	49
III.2. Vulnerabilities .....	49
IV. Consequences of goods and services and public works .....	49
H. Conclusion .....	52
ANNEX I.....	54
Perception of the contracting process with financing from multilateral credit entities according to experts.....	54
I. Planning.....	55
II. Training.....	56

III. Discretion .....	57
IV. Access to information.....	59
V. Citizen participation .....	60
VI. Control.....	60
Abbreviations and Acronyms .....	63
Glossary .....	63

## Foreword

I have the privilege to write the foreword to this work, which was composed within the framework of the programme “Transparent Public Contracting”, of the Transparency and Anti-corruption Area of Poder Ciudadano, which focuses on purchase and procurement processes carried out by the State, the biggest purchaser and the main character to contracts of large works.

Apart from the amount of money involved, for the purpose of assessing the core aspects of inefficiency over governance, we must realise that inefficiency adds to the circumstances that promote corruption leaks, which worsen its effects and magnifies its perception.

I have had the chance to participate, together with outstanding experts, in the discussions that contributed to the development of the risk map of public contracting.

Within this framework, I could verify the commitment, creativity, interest and effort displayed by men and women to carry out this important project.

It is admirable that a civil society organization has undertaken this task and contributed to improve the knowledge that is essential to frame public policies adequately.

This risk map lets us get closer to the current scenario of public contracting with an approach that goes through the habitual opacity of the government, using a meticulous methodology that lets us disentangle – starting from the analysis of the perceptions of the protagonists – which are the main problems and weaknesses.

We are faced with an excellent guide of deficiencies and vulnerabilities as regards public contracting. It contains basic information that proves essential to draw up and plan transparent public policies, a seriously anaemic area within a wide range of public policies, due to reasons that go far beyond short-term vision, lack of interest or incapacity, which should be dealt with in another research.

We succeeded in making this risk map all-embracing, since, during the course of the investigation and due to relevant and diverse contract phenomena, it was decided to focus the attention also on public work contracting and multilateral credit organizations.

The work and its conclusions destroy the myth that transparency is opposed to or harmful for efficiency. It is clear that the public contracting system in the Argentine Republic is not transparent, and it is not efficient either. Besides, it is evident that higher transparency standards would contribute to higher efficiency and effectiveness, to the extent that more circulation of information would render inefficiencies indefensible and would help enhance procedures; its creation would promote competition and control over the due performance of the obligations agreed upon, preventing abusive deviation of the rules and subsequent concealment thereof.

The problems detected – due to their scope and importance – must be object of thorough and deep analysis, and concrete preventive actions must be proposed, since corrective measures – apart from being deficient – are not taken or are taken late, especially



when problems reach no end of small contracting processes, which, taken all together, are highly important.

In short, would there be political will – which is an essential and basic assumption – the conclusions of this work should be considered so as to project solutions and answers with respect to legislation – both regarding the law and purchase regulations – and increase transparency and efficiency through the correction of dominating practices, facilitating citizen participation and access to information and optimizing existing controls.

A good starting point is Section 9 of the United Nations Convention against Corruption, which has analyzed several aspects that need to be considered to develop preventive measures against corruption in public contracting.

We must work to remove opacity and its consequences: the Argentinean State paying more, lying helpless under low-quality goods and services, public contracting no longer being advantageous for economic development.

The purpose of all this is, ultimately, to stop public performance from being perceived as a corruption niche alien to state rules and regulations and above the law.

Our precarious democratic institutions do not allow us to be lethargic or incompetent.

Let us, then, welcome this praiseworthy endeavour of Poder Ciudadano.

**Manuel Garrido**

**Fiscal Nacional de Investigaciones Administrativas**

## Introduction

Argentina's representative democracy is undergoing an intense legitimacy crisis of the state institutions. In many cases, these institutions are not able to act as mediators of the "public interest" or as entities capable of processing and streamlining social demands, leaving spaces that, many times, are filled with large private organizations and the individual interests that make use of public and state resources.

These elements imply risking the capacity of sustaining the State, its representatives and citizenship within one sole social fabric. The cause, apparently, is the absence of the necessary answers to the needs of the ones delegating the power. The consequence is a greater gap between the actors that must find the form of representation and the political forces that are supposed to represent them.

To this scenario we must add an alarming situation in terms of corruption. In the ranking of countries produced by the Corruption Perceptions Index developed annually by Transparency International, Argentina went down from position 57 in 2001 to position 97 in 2005 (out of 159 countries). The oscillation of Argentina's scores developed since 1995 (between 2.8 and 3.5 in a score where 10 is the most transparent and 1 is the most corrupt) shows that the country is trapped in a sack of structural corruption.

Given this situation, through Poder Ciudadano we have been developing citizen participation and corruption control tools for sixteen years. In many cases, the execution thereof, by articulating them with a set of actors from diverse fields, has enabled us to generate impact on specific public policies.

One of the fields we have gained influence on is public contracting. It is no secret that Latin American and Caribbean governments are great purchasers of goods and services. Those governments' expenditure is believed to reach 15% of the GDP. This would mean around 250 billion dollars per year in the region. However, apart from being huge purchasers, Latin American governments are dreadful payers. Estimations show that governments overpay even 40% above the market price.

Therefore, the "**Transparent Public Contracting Programme**" of Poder Ciudadano is intended to create practical tools for citizens to monitor public contracting and has two key components. On the one hand, it should allow **public hearings** to be held, where the authorities in charge calls upon the citizens, businesspersons, experts and officers, in order for them to express their opinions about the terms and conditions of the contracts. Although the decisions taken during this process are not binding upon the calling authorities, these authorities commit themselves to preparing a report with the reasons why the issues addressed in the hearings were omitted or included. On the other hand, the execution of **integrity pacts**<sup>1</sup> whereby the

government and all the companies bidding for a contract agree to mutual control so as to prevent bribes between bidders and the State.

The following are some cases of the participation of Poder Ciudadano through the “**Transparent Public Contracting Programme**”:

- ◆ **Mendoza Case:** In 1996, the government of the Province of Mendoza submitted an IT services bid to a public hearing. Both the contents of the bidding terms and conditions and the opinions of the interested parties were dealt with.
- ◆ **Line H Case:** The bidding process for the construction of Line H of the subway system was addressed. The works would require an investment of 1.2 billion dollars. Three public hearings were held from October 1998 to April 1999.
- ◆ **Morón Case:** During the year 2000, a bid was called for the garbage collection service and to include, in the bidding terms and conditions, an integrity clause which would be binding between the government and the companies. In this regard, a public hearing was held and modifications to the bidding terms and conditions were proposed, which saved 13 million dollars to the Municipality of Morón in respect of the contract signed in 1997 for 32 million dollars and a duration of four years.
- ◆ **Morón Case II:** During 2003, Poder Ciudadano was an observer in the public hearing held to deal with the process of renegotiation of the cost structure for the above-mentioned garbage collection contract.
- ◆ **National Ministry of Education, Science and Technology Case:** In 2003, Poder Ciudadano engaged in the process of acquiring 3.315.000 school texts for schools throughout the country. The tools employed in this case were: a) active discussions about the bidding terms and conditions; b) submission of affidavits in order to avoid conflicts of interest between the parties to the selection process; and c) execution of an integrity pact.
- ◆ **National Ministry of Education, Science and Technology Case II:** In 2004, Poder Ciudadano engaged in the process of purchase of 2.450.000 books for students of levels “EGB 1”, “EGB 3” and “Polimodal”, and libraries of 5.900 schools. Like the previous process, the tools were: a) active discussions about the bidding terms and conditions; b) submission of affidavits in order to avoid conflict of interest between the parties to the selection process; and c) execution of an integrity pact.

We think that with this programme all parties have **benefits**:

- **Citizens**, because they are given the chance to gain access to some decision instances of public contracting which were alien to them before. Within this context, they address issues that,

although they are not binding, cause the administration to answer questions and account for decisions.

- **The private sector**, because a transparent market is created with new rules for both the State and the bidders.

- **The public sector**, because all the interested parties propose ideas to enhance efficiency in the administrative and political governance; transparent contracting is guaranteed to public opinion.

Therefore, in 2005, thanks to the support of the British Embassy in Argentina, we succeeded in broadening the objectives of the “**Transparent Public Contracting Programme**”. Precisely, we intended to go beyond the implementation of the programme in particular cases and generate a space for public and private sectors which also inspire strategies and measures related to transparency and promotion of institutional legality.

In this new stage of the “**Transparent Public Contracting Programme**”, we grew into two kinds of activities: a) as far as practice goes, we continue and go deeper into our participation in national and provincial contracting, and b) regarding theory, we are studying the public contracting national system thoroughly.

The theoretical activities planned for said programmes include the composition of a risk map of national public purchases, based on the perceptions of experts from all the interested private sectors. The risk map is a tool that allows the analysis of the problems of a system starting from the detection of weaknesses, failures or vulnerabilities, and the allocation of the available resources to neutralize and/or remove these deficiencies.

Thanks to the kind of map used in this case, the vulnerability detection in the national purchase system makes it possible to propose changes of deficient points from the point of view of the very actors of the system.

When we speak of vulnerabilities, we refer not only to the ones affecting transparency but also the ones that make the State's purchase system inefficient. The core objective is to identify the location of the vulnerabilities that prevent the “administration from buying properly”.

In this regard, it is important to make it clear that this work does not contain the opinion of Poder Ciudadano about the public contracting system, but it is a study that considers the experts' perception – from the public and private sectors – focusing on the general aspects of the process. Furthermore, it is confined to the National Public Administration, regardless that many elements may be applied on other levels of the government.

Apart from enquiring into the vulnerable aspects of the system, we are interested in providing elements to transform and/or remove said aspects, which will be carried out in the months

following the publication of this material, by means of concrete political proposals that may improve the system.

In this sense, we intend to create a tool that may generate transparency in public administration, breaking that manichaeism that connects the latter with a dichotomised vision whereby the civil society per se is seen as a “righteous” environment as opposed to an inefficient State. We intend to recover the *political practice* as an activity that transforms society, where citizens and organizations of civil society play an active role in improving the standard of living through its own actions.

## A. Methodological aspects of the risk map of public contracting

### I. The “risk map” tool

This project was intended to develop a qualitative/descriptive study, whose main objective was to create a map of the risks of the national public contracting system<sup>2</sup>, from the view point of the actors of the system itself.

The risk map is a tool that allows the analysis of the problems of a system starting from the detection of weaknesses, failures or vulnerabilities, and allocate the available resources to neutralize and/or remove deficiencies.

Thanks to the kind of map used in this case, the vulnerability detection in the national purchase system makes it possible to propose changes of deficient areas from the point of view of the actors of the system.

There are different kinds of risk maps, depending on the type of analysis performed, the features of the risks that represent problems and the elements employed for the detection thereof. Generally speaking, they can be divided according to the dimensions covered:

- **Objective – Quantitative Maps:** They map risks that are measurable objectively and mathematically.
- **Subjective – Qualitative Maps:** They map perceptions and statements of the actors involved in the operation of a system, or affected by the impact of the consequences thereof.

Developing these maps led to defining the notion of risk in the form of vulnerabilities of the national public contracting system. We considered not only the occurrence of phenomena harmful to **transparency** and **efficiency** of public contracting, but also the vulnerability of the system in terms of the effectiveness of public purchasing.

### II. Methodological specifications

The elaboration of this risk map was proposed as the main objective:

*- To detect the presence of risk factors (vulnerabilities) in the process of public contracting from the perception of strategic actors of the national purchase system.*

In order to accomplish this objective a **perceptual risk map** was used, which focuses on the representations of the strategic actors of the national purchase system, and analyses the ideas

and perceptions of the agents of the system they work into and on the basis of which they focus their everyday actions.

The access to these perceptions is essential since, like in every social relation, to arrange and understand reality, individuals start from a series of objective data which are given some sense according to the meaning conveyed. This general approach shows that objectivity and subjectivity are one when looking for the decisions and causes of an action, without this being a perceptual error of the individuals, but the basic structure of social behaviour in general.

Out of the different possibilities available, the work with experts was chosen. These *strategic actors* or *key informants* of the national contracting system were selected because their points of view allow a privileged approach to the system and its dynamics. This vision is important not only because of the occupational training they have or the positions they fill, but, mainly, for the expertise of the daily development of their activities.

Every risk map requires the idea of **pondering** the weaknesses of the system, i.e. the relevance of certain risks over others as the case may be, its level of impact, its costs and the possibilities of solution. In the case of subjective maps, the pondering of the risk factors is carried out from **emerging categories**, i.e. starting from the importance the experts consulted attach to each matter.

Thus, the existence of risk factors has been conceived according to *system vulnerabilities associated to transparency and efficiency features in general terms*, which led to inquire into dimensions such as existence, incidence and “what ought to be” in respect of these emerging risks in the form of problems for the development of purchases in the National Public Administration. The vulnerability level of each variable is shown as follows:

- **Red:** High vulnerability
- **Orange:** Medium-high vulnerability
- **Yellow:** Medium vulnerability
- **Green:** no vulnerability

Therefore, the decision was not to propose a previous sample of transparent and efficient contracting beyond the generality of these terms, expecting definitions from the actors themselves for each and every notion.

In this sense, and as shown in the following chart, a scheme was proposed as a guideline for mapping, which is divided into logical and time-related *stages* of the national public contracting processes, and *variables* within them that may allow to follow the general course of purchases in the National Public Administration within the current legal framework.

<b>Stages</b>
Planning
Drawing up of Bidding Terms and Conditions
Selection of bidders
Signing of contract
<b>Variables</b>
Purchase planning
Training of participating civil servants
Discretionary abilities of officers
Access to public information on contracting
Citizen participation
Process control and penalties upon irregularities / errors

All these elements were defined previously by the researchers in order to enable, during the course of the field work, definite answers to the questions asked by the interviewees out of the variables (see *Glossary*).

*Selection strategy of the cases and structure of the sample*

The sample for the selection of cases applied to the risk map had the following structure:

<b>I. Goods and services</b>
Public sector
Controlling public sector
Private sector
<b>II. Public Works</b>



Public sector
Controlling public sector
Private sector
<b>III. Multilateral financing organisations</b>

The selection of cases for this study was performed starting from *intentional or theoretical sampling* of the strategic actors of the national system of public contracting. This kind of sampling enables the researcher to select the interviewees according to the criteria of conceptual relevance that allow recognition of information that is meaningful for the research.

This approach revolved around a parallel task of case selection, collection of information and analysis of categories and emerging properties of the field work. In this way, new cases were introduced to the sampling by *theoretical saturation* of the categories and properties in question. This saturation is achieved when no new information arises from the central themes of the research and, thus, the categories of analysis can be considered “saturated” and the central properties have been validated from the actors’ view point.

At the beginning of the mapping, the central group for the research would consist of: *a) public officers with diverse levels of experience in purchasing departments, budget and control of public procurement of goods and services, and b) businesspersons of the private sector connected with areas of public procurement of goods and services* – for being the sector that carries out the largest amount of national public operations. Once the critical mass of interviews was obtained, the preliminary analysis of information was carried out. The number of interviews was determined by theoretical saturation.

In a second stage, there was a selection of cases that *maximised the differences with the reference group*. To achieve this, the work involved agents – both public officers and businesspersons – from the area of public works and procurement linked to financing from multilateral credit entities.

The first group was introduced because of, among other features, the different legal framework for purchasing goods and services, the amounts handled and special performance dynamics. The second group was introduced in view of the specifications of the uses of international funds and, especially, due to its gradually increasing incidence on public purchasing year after year both in the country and the provinces.

In this way, the categories were “chased” in groups with supposedly different problems from those of the central group related to the public purchase of goods and services. The theoretical

saturation criteria was applied again in order to stop the introduction of new cases. The cases of the two last groups, although less significantly on the whole, provided the theoretical saturation necessary for the original objectives of the research.

One of the peculiarities of this research is that working with strategic actors required overcoming two main selection difficulties, *accessibility* and *availability*, usual reverse side of these important persons.

The access to these respondents always requires interpersonal contacts in order to carry out the interview. Once this difficulty is sorted out, a second obstacle arises: due to their schedules, they have little time for the meeting. The first snag is restrictive: it is very difficult to introduce these agents into case selection. Once this barrier is dealt with, time unavailability is overcome more easily. In this case, there has been a lot of positive response and readiness to provide information.

The field work comprised 40 (forty) thorough interviews, out of which 65% concerned the sector of goods and services. This stage took 4 (four) months.

In order to collect information, there was a *guideline to follow up issues during the in-depth interviews* with the experts. These guidelines were used only for the interviewer not to lose the thread of the theme during the conversation and to enable subsequent comparison between different information. Most of the interviews were recorded, except for those who rejected this method, so notes were taken down during the conversation.

Then, the interviews were transcribed literally so as to maximise the value of the information in this stage of analysis. As for non-recorded interviews, memos were drafted and added to the group of interviews to analyse.

Once the information was collected, the strategy was aimed at analysing the material procured from the coded opinions of the respondents, following a double strategy:

- **Up – down:** The statements were coded according to a scheme of stages / variables posed at the beginning of the research, in positive and negative perceptions. Thus, the 7 variables of the original scheme turned into 14.
- **Down - Up:** A strategy of detection of emerging categories of interviews was added to the previous scheme, whereby the dimensions and categories introduced by the respondents themselves during the interviews were coded and labelled according to the sense they provided. In this way, a 28-category scheme was added to the previous 14 categories.

All the information was handled with the program *Atlas ti*, specially designed for qualitative analysis, which allows the researcher to manage the data in different levels, always in qualitative terms, i.e. stressing the sense over quantification, although the latter is also possible.

The program works in three different levels: coding of information, linking the information to the conceptual maps and theoretical construction out of previous developments. This enabled the analysis of the respondents' statements in different dimensions from the codes created in the first stages of the analysis.

One of the main contributions of this programme to this research was the possibility to use its *network* creation tool (conceptual networks) to analyse what the respondents think about the different vulnerability nodes of the national contracting system. These *networks* enabled us to visualise clearly the relations between the categories and their burden as system vulnerabilities.

The presentation of the risk map is the following: a) general introduction; b) the central part of the work, including all variables in three fields: general considerations, vulnerabilities and consequences – in all cases, we begin by describing the core aspects of the goods and services procurement process and then the special features that distinguish the process intended for public works exclusively; c) annex related to financed purchase by multilateral credit entities, and d) conclusion.

**Karina Kalpschtrej**

**Methodology Analysis**

## B. Perception of planning<sup>3</sup> according to the experts

*Buying badly brings about the destruction of all goods*

Public work expert from the private sector.

### I. General aspects

The experts' opinion on this stage/variable stresses that vulnerabilities and their negative consequences spread all over the contractor selection process and its final results (execution and performance of the contract).

According to the rules governing the matter (or the "*ought to be*" rule), purchase planning should be done together with the drawing up of the annual budget<sup>4</sup>. Besides legal reasons, it is logical and convenient that both projections be related, since the targets foreseen in the annual budget must be supported by the goods and services to be acquired. So, it is fundamental for the whole process and pivotal for good management, not to purchase just because, but to purchase according to the needs of the National Public Administration, which, in turn, must be planned on the basis of the citizens' needs and demands.

Therefore, as regards both the use of public funds and results and satisfaction of needs, public purchase planning is essential in all state process.

In order for the planning of a purchase process to be efficient, in the National Public Administration there must have excellent coordination between: a) the substantive areas (where the purchased goods will go); b) the purchase department (it receives the needs of all the substantive areas of an entity and is in charge of carrying out the purchase process; and c) the Financial Administration Service (that draws up and executes the annual budget of each entity and is the link with the Ministry of Economy).

Experts of the public sector mentioned that purchase planning must be connected to financial planning, as regards payments:

"It is a central issue. So the contractor knows exactly there is a certain payment date, that he/she can collect the payment on said date. So the contractor, aware of the payment date, can organise his/her financial situation. Otherwise, it would be a mystery".

### II. Vulnerabilities

#### ORANGE LIGHT

Almost unanimously, experts from the public and private sectors, expressed that the *ought-to-be* rule is not applied in the National Public Administration.

The following are the vulnerabilities pointed out by the experts in this stage of the process:

1. **The rules governing the planning of public procurement are not complied with.**
2. **The State does not have a general planning policy** for the long or short term, and, more so as regards procurement in the National Public Administration.
3. **The budget is often drawn up without a serious study of the real needs of the entities.** According to the experts, many entities draw up their budget very close to the deadline, copying the previous one and increasing the percentage in order to obtain a higher amount.

In times of economic instability, this situation worsens due to the unpredictability of the variables that come into play and the negative effects said variables can bring about. For instance, in times of inflation the dramatically sustained increase of prices requires that estimated costs be corrected constantly. Otherwise, the resources assigned would not be enough to meet the needs planned.

4. **When the amounts for procurement are included in the budget, the details of the goods and services to be acquired are not broken down.** It only contains general figures for specific items (lines of the budget). If entities drew up a “procurement plan” and said plan was included in the budget, it would be a valuable tool to accomplish a good planning, but not all purchase departments perform this kind of planning.

If entities do not have an annual procurement plan, audits can hardly rely on the information of the entities audited. This vulnerability is closely related to the *Control* variable.

5. **The already scarce or weak annual planning is affected by the uncertainty of the time of completion of the procurement process.** This aspect is related to the vulnerabilities of other two variables addressed in this research: *discretion* and *training*. Contracting times are often delayed because of the existence and waste of many time-outs<sup>5</sup> during the process.
6. **Lack of continuity of political processes hits public contracting constantly.** Politicians hardly ever do planning beyond the duration of their terms of office or the time they believe will hold office. This makes it hard to try to implement long-term policies.

An expert summed up these ideas as follows:

“What is the main idea of the lion’s share of the politicians? They have little interest in the issues to be settled beyond their term of office. In general, they

take into account the period they believe they will hold office; therefore, they are interested in the things they will do during that period, what gets done after that doesn't matter".

7. **There is no conviction in the National Public Administration of the advantages of good planning** in terms of procurement or its incidence on the results of public processes and the economy in general.
8. **Weak flow of information and communications between the areas involved.** Many times, substantive areas provide inaccurate information that is not checked and, thus, the budget is allotted incorrectly. This idea is described with the words from an expert of the public sector:

"In the State, the planner is always isolated from the rest of the organisation and receives information (needs) unknown to him/her, not necessarily shared by him/her; that information is just another *input* and there is no chance to influence on the analysis in order to suggest a better way to meet the *needs detected by the substantive areas*".

### III. Consequences

**An improvised procurement budget, resulting from deficient planning, ends up being an enormous cost for the National Public Administration and, hence, for all citizens.** During the execution of the annual budget, the budget items planned are constantly modified in order to be adjusted to the emerging needs and in that way cover current demands or necessities. In practice, many of these modifications stem from ideas of the officers and not from real needs.

A case in point is that lack of planning leads to increasing purchases at year end so as not to lose the allotted budget items. Under these circumstances, purchases are carried out in a hurry, which has adverse influence on the price and quality of the goods and services procured.

Paradoxically, deficient planning affects the private sector because it makes the National Public Administration purchase with urgency, civil servants use discretion more and **the National Public Administration loses its power to negotiate with bidders.**

At the same time, however, deficient planning causes **serious difficulties for the private sector to plan its production according to the needs of the National Public Administration.** In this way, the private sector does not know the National Public Administration's procurement plan early enough and cannot prepare its resources in advance, allocate investment or place bids for tenders of direct purchases. This is vital since potential bidders are ruled out from a procurement process, and the attendance rule<sup>6</sup> is breached.

Deficient planning hampers timely satisfaction of the needs of the National Public Administration, leads to the acquisition of low-quality goods and services at high prices. All this has a negative impact on the results of the public administration. These facts show the close relation between *planning* and *performance of the contract*, i.e. between the beginning and the end of the process, since the more planning there is, the more chances there are to perform an effective, transparent and efficient process.

Poor communication between the entities of procurement planning does not allow the possibility to reduce costs through **bulk or consolidated purchase**. These are set forth by the law<sup>7</sup>, for example, in the case of ordinary goods (paper), but to that end, it is necessary for entities to coordinate and plan purchases, which does not happen at present.

These vulnerabilities in public procurement planning cause inefficient processes and, mainly, lack of transparency, as it is not possible to learn publicly and in advance how the public funds will be allocated.

#### **IV. Special considerations on public works**

##### **IV.1. General Aspects**

When asked about the process of the public works in particular, experts pointed out the aspects that differ from the processes taking place in the case of procurement.

Public works require strategic planning in line with society's needs, in the case of works undertaken in the short run (to meet immediate needs) and works that may come up in the long run (state programmes on a global scale for social development).

Importance lies in that the State should play an active role in planning public works, not only through an annual contracting plan but also by formulating strategic long-term policies.

Preparation and evaluation of work projects are essential and must be carried out with a global vision, considering that infrastructure projects take up significant preparation time. This means that project evaluation must determine which is the correct alternative in each case, without disregarding the potential environmental, social and economic impact of the future works and high productivity levels (efficiency).

Furthermore, experts pointed out that projects must be interrelated according to production chain. In the case of the energy sector, for instance, it is necessary to note the chain from the beginning to the end, i.e. from the exploitation of the primary goods until the final rendering of the service. Coherent and consistent investment should embrace the whole sector.

Due to the great influence of public works on society's economic development, planning must be open to actors from the public, academic, private, industrial and commercial sectors, and to

civil society organisations that can act as spokespersons of citizens. This kind of exchange should define the country's political strategy in the long term.

Finally, experts of the public sector held that the financing of the works must be ensured:

“The State has little financing power and, in general, the issue of public works is a financing issue. The contractor is afraid of committing himself to a work that will end up growing twofold, or thirty percent and which the State cannot afford. The contractor seeks protection and ends up being very expensive”.

## IV.2. Vulnerabilities

### ORANGE LIGHT

Experts from the public and private sectors are critical of the current situation and, apart from the vulnerabilities mentioned in the case of good and service procurement, they detect certain weaknesses in this stage of the process of public work contracting:

1. **The State did not exercise its strategic planning power as from the privatisation process.** With reference to the reform of the Argentine State in the early 1990s, experts held that a whole structure of consolidated planning was lost, which resulted in a tremendous loss of human resources (the best leading figures of the Service chose to work in the private sector – See *Training*) as well as with regard to incidence capacity of the Civil Service over market operation (either as policy planner or as regulating body).
2. **The lack of previous studies has a negative influence on planning and leads to the intensified use of unfinished projects to carry out tenders.** The lack or deficiency of previous studies substantially increases the chances of starting public tenders with unfinished projects (“underprojects”) and, therefore, unforeseen costs may arise in addition to the ones set forth in the tender document, so the efficiency of the project is affected (see *Control*).
3. **A rather unpredictable and volatile economy impacts negatively on the financing policy of works and on the chances of its development.** So, if a project is not executed at the time it was planned, there may be contingences that make estimated costs change and a new evaluation of the project may be necessary due to the new circumstances.



### IV.3. Consequences

**Deficient or underproject planning influences final results negatively.** It leads, for instance, to useless investment or to allocate investments to sectors that will then not be able to use them to full capacity for not having a supply chain or a foreseen destination for the final work. Consequently, there is no chance to develop the whole market related to the works, which results in partial investments.

At the same time, the National Public Administration ends up paying overprices. The price paid for badly designed projects of public investment is very high. Due to the above-mentioned vulnerabilities, there are constant adjustments out of contingencies that could have been prevented. The experts even mentioned that sometimes buildings are completed and cannot be used due to structure defects caused by design or supervision errors (see *Control*).

In addition, experts pointed out that deficiencies in previous studies bring about delays in public investment because bids are called for upon the basis of incomplete projects:

**“Buying badly brings about the destruction of all goods.** If I buy something inadequate, I have to throw it away or redo it. That entails costs that are perhaps higher than simple bribery, which is not justifiable either. These are big issues because, when works are performed without previous evaluation, the contractor then claims all the aspects not included in the project or in the terms of the tender”.

(Highlighted by us).

Although sometimes it is impossible to avoid starting a bidding process without a finished project, the generalised use of this methodology implies vulnerabilities in the process that will hinder efficiency or, if the worst comes to the worst, effectiveness (results) of the contracting process.

Finally, experts pointed out that the lack of strategic forecast within the National Public Administration prevents companies from furnishing themselves in advance with materials and human resources. This vulnerability grows in the case of public works since professional training is not an easy and immediate task. If we want to demand high quality from the market, the market needs to stay ahead of demand and not be forced to prepare its offer in view of the requirements or needs that arise suddenly.

**Lack of planning in this sector also discourages public tenders and leads to direct contracting for urgency reasons.** (see *Discretion*).

## C. Perception of civil servants' training according to the experts

*The issue of corruption can be tackled with the way the bidding terms are presented and drawn up.*  
Public work expert of the public sector.

### I. General aspects

Training is necessary to perform any kind of duties, both in the public and the private sector.

Training of Civil Servants is essential to carry out transparent, effective and efficient procurement processes. The importance of adequate training of civil servants acting in procurement processes has been pointed out by experts.

So as to obtain positive results as regards contracting, the National Public Administration must have employees that have the right technical qualifications and **that have been trained before their performance in the area**. Training the public servants that perform tasks in those areas should be much more important than what it is at present for the objectives of the National Public Administration. Drawing up the bidding terms and conditions, activating the public purchase process, controlling that the contractor renders the service and negotiating constantly with suppliers are tasks that require specific knowledge, capacity and experience.

**Positions which involve more responsibility in the matter should be filled by public tender**; the Civil Service must employ the most highly qualified people.

As well, **the employment stability of the civil servant must be respected**. Political sectors must respect the civil service career; there must be a group of technically qualified civil servants with stable positions which do not depend on the current government. Administrative technical tasks must be respected so as to ensure the continuity of processes and achievement of the long-term objectives, since it takes a long time to grab the learning process specific to procurement.

Incentive policies for agents must be implemented by means of specific rewards that encourage training. A Civil Service that identifies and rewards good civil servants, both technical-administrative, political ones and public agencies, promotes better individual and collective performance.

Like in planning, experts agree that the National Public Administration is far from doing what *ought to be done* in terms of training.

### II. Vulnerabilities

#### ORANGE LIGHT

The following are the vulnerabilities pointed out by the experts:

1. **In general, training level is very low.** The National Public Administration does not implement an adequate policy aimed at enhancing the resources needed to meet current needs.
2. **The most important procurement positions are never filled by public tender.** Although it is advisable that civil servants gain experience through everyday training during their term of office, this practice is more frequent than it should be since civil servants start working in the procurement areas without previous training.
3. **There are not civil servants who remain in the procurement area and can pass on experience and methodologies.** Many times, this makes the National Public Administration unable to draw up the bidding terms and conditions or carry out a process owing to the lack of qualified human resources. Furthermore, in general, the private sector offers higher salaries than the State so bidders sometimes have more qualified professionals.
4. **The already poor training is not focused on practical matters;** it only considers rules and regulations and is about aspects that do not benefit performance of public entities. Furthermore, the scarce communication between entities and agencies hampers mutual enrichment through exchange and comparison of experiences (see *Planning*).
5. **Standardised bidding terms and conditions are prepared by the least qualified civil servants.** Although minor contracting entails standardised goods, these contracts are very important due to their volume. When these responsibilities are delegated to civil servants who are not yet qualified for that task, there are more risks of having defective bidding terms and conditions. Among the examples given by the experts there are copies of old bidding terms and conditions that drag on original defects, and even cases where civil servants consulted suppliers from previous bids as regards how to draw up the bidding terms and conditions. This vulnerability becomes worse when appropriate control fails or they occur in larger procurement processes.
6. **Political civil servants are unaware of the implications of a selection process for State contractors.** It is very common to find political civil servants that have not had an administrative career or even professional studies. Experts from the public sector observed that this fact promotes uncertainty as to what technical tasks these political agents are supposed to perform. As they have no (basic) idea about procurement processes, the limit between their own tasks and the technical ones blurs away.

### III. Consequences

**These vulnerabilities spread all over the process and affect different aspects, such as the quality of the bidding terms and conditions, the compliance with the applicable rules, transparency, costs and results.**

By way of an example, the existence of processes in which the previous bidding terms and conditions are repeated prevents the National Public Administration from having updated information as to the quality of procurement. This gives bidders substantial advantage because many times there is a huge knowledge gap between the public and private sectors as regards the object of the contract. For instance, bidders can influence on the characteristics of the product or offer faulty goods that are not detected by the State on time because they are not dealt with in the bidding terms.

Besides, we must always consider that negotiation must always be present when contracting so the civil servant must be qualified to face that situation.

Deficient training has negative effects on processes and on the principles of equality, attendance, publicity and transparency. An expert from the private sector stated:

“... It is difficult for a public agent who does not know the market to be able to invite a greater number of bidders to the process”.

On the other hand, deficient bidding terms and conditions promote strong pressure on the judiciary to defects that would render the process invalid. Many times this pressure is supported with the argument that efficiency and transparency (the latter being construed as respect for the principle of legality) are incompatible. It is evident that this issue is closely related to variables *discretion* and *control*, since this political pressure entails misuse of power by the managing sectors, and passes unnoticed to control<sup>8</sup> systems.

Training on matters that do not benefit the entities cause, on the one hand, civil servants' disappointment with said training, and, on the other hand, misuse of public funds since training does not concern the responsibilities of the civil servant. Besides, this lack of training leads to hiring private consultants to draw up the bidding terms and conditions, which requires higher costs during the process.<sup>9</sup>

Finally, “political pressure” often impacts negatively on procurement processes, especially when the technical administrative staff do not have career civil servants, with stable positions. In practice, many positions requiring technical qualification should be filled by career civil servants, but instead are filled by people who carry out political duties (see *Discretionary powers*). One expert stated the following about this issue:

“Politicians are not completely certain about what positions they should fill and, in

general, this uncertainty moves the boundaries into positions that should be filled with career civil servants”.

#### **IV. Special considerations on public works**

##### **IV.1. General aspects**

Regarding public works in particular, experts pointed out that, due to the close ties between the civil servants of both areas (public works and procurement of goods and services), many civil servants take part in both processes.

Training on this matters should be even more technical than the one for the procurement process and the National Public Administration must have qualified staff for the different stages of the procedure, especially to analyse the feasibility of the projects and the bidding terms with technical specifications. For example, when the contract is being performed, the surveyor plays an essential role so he/she must be qualified, reasonable and competent (see *Control*).

Apart from that, there are processes with high-complexity technical specifications and it would be excessive to expect the National Public Administration to be able to cover that demand with its own resources. That is why in some cases it is reasonable and even advisable to resort to expert consulting.

##### **IV.2. Vulnerabilities**

###### **ORANGE LIGHT**

For this variable, experts observed certain specific weaknesses in the processes of public work contracting, besides the ones pointed out in the case of procurement of goods and services:

1. **The National Public Administration is not aware of how the market functions and finds it difficult to estimate costs and draw up quotations.** The experts held that, in general, costs and value of works are fixed by the private sector. Although currently the National Public Administration tries to exert influence on the private sector, the latter still is concentrated and centralised. This point is related to the *discretion* variable and, within it, to the existence of organised bidder cartels.
2. **After the process of State reform in the early 1990s the National Public Administration lost many valuable human resources.** It is very common to see executive positions filled with former civil servants.
3. **The knowledge gap favourable for the private sector may have a bad influence on the final quality of the work.** Either because bidding terms and conditions have been drawn up wrong (in the case of a civil servant) or due to the businessperson's ability (who is more qualified), the private sector holds an advantage when it comes to preparing bids (technical or financial). An expert from the private sector made the

following remark:

“The civil servant customarily adjusts the offer to the lowest price, without regard that the private sector must defend its offer by reducing costs and quality accordingly”.

4. **The National Public Administration draws up obsolete bidding terms and conditions which are also hard to frame within the current characteristics of the market**, many times due to lack of training and updating on technological development. The bidding terms and conditions show weaknesses in civil servants’ training on technical and legal aspects regarding economic and financial grading (legal and technical bidding terms).

### IV.3. Consequences

Apart from the consequences mentioned in the case of procurement of goods and services, the most notorious one, comparing *what ought to be* during a public work bidding process and the vulnerabilities mentioned by the experts throughout the interviews, is that **the National Public Administration has neither enough qualified staff nor enough civil servants specialised in the different areas of public work contracting.**

Badly prepared projects, deficient drawing up of bidding terms and conditions or out-of-date quotations damage public work contracting processes in several ways.

For instance, it is difficult to chose the best contractors of the National Public Administration and the **equality** principle is affected, so, after the award of the contract, the terms may be “adjusted” or modified. This fact or “adjustment” is closely related to the variables of *control* and *discretion*.<sup>10</sup>

Likewise, these “adjustments” cause the National Public Administration additional unplanned costs. For example, operating costs necessary for work completion and the cost for not accepting the best bid owing to deficiencies in the project or in the bidding terms and conditions, which also affects the quality of the works.

#### D. Perception of discretion according to the experts

*Lack of transparency is always connected with improperly restrictive rules that grant the enforcing officer the power not to apply them, to apply them less strictly or to hold the solution in his hands.*  
Expert from the private sector.

#### I. General aspects

“Discretion” is understood as the possibility of a civil servant to choose between two or more different and equally valid options. In this way, at the time the decision is taken, the civil servant puts in his/her judgement and discernment, adopting one of the options previously defined by the applicable rules.<sup>11</sup>

As regards *what ought to be* in connection to this variable<sup>12</sup>, here are some general guidelines, which should always exist in order to avoid irrational or abusive exercise of discretionary powers, according to the expert perceptions

The pre-established terms of the processes must be respected, both when selecting and performing the contracts. Urgent direct contracting (there is not enough time to call for bids) should be reduced as much as possible. Necessary measures must be taken to avoid this extreme situation. (see *Planning*).

All bidding terms and conditions (preliminary bidding terms, general terms, special terms and technical conditions) must be published on the websites of public entities, regardless of the size of the contract. As it can be seen, this variable is also connected to *Access to Information* and also, in general, to the principle of process transparency.

Bidding terms and conditions must specify clearly the selection criteria for a more convenient bid, either for its price or quality, or the combination of the two. They must also determine clearly the points that respond to objective easily-proven criteria.

Although it is necessary that civil servants exercise discretionary powers in certain moments of the process, since it is not possible or convenient to promote an absolutely automatised process with no space for civil servants to make decisions on their knowledge and qualification, discretionary decisions must be duly accounted for<sup>13</sup>. **The terms of the procedure and the decision-taking that allow the exercise of discretionary powers must necessarily be transparent and must be founded on appropriate grounds.**

Serious studies must be conducted on the feasibility of the product to be purchased in order to minimise improvisation; the goods purchased must be really necessary and they must arrive on time at the appropriate areas.

Discretion is also present in the decision on or against purchasing goods. That is why the main objective of contracting must never be neglected: satisfaction of needs. Furthermore, the total cost of the goods or services must be considered; not only the price to pay but also quality and potential costs.

Feasibility studies also offer reference prices that tend to avoid overprices. These are some examples: be aware of new producers' associations, consortiums, groups or suppliers of the industry and consult them to collect information. The National Public Administration needs to be up to date on market operation so as to keep up with the constant changes, such as companies sold, mergers, new cartels or agents, and make sure everyone attends, guaranteeing diversity of bidders. Once more, this variable is related to the *training* of civil servants.

So the bidding terms and conditions may be drawn up wrong, as a result of the bad training of a civil servant, or they may be purposefully drawn up benefit a specific contractor. Therefore, the correct preparation of the bidding terms and conditions is crucial to ensure the compliance with the basic principles of contracting and an efficient and transparent contracting process.

Besides, the National Public Administration should be aware of the existence of organised cartels of bidders, which gather the bids and fix the price and the awardees of a contract. That is why the National Public Administration must have the appropriate tools to prevent cartel formation and its influence on the results of the contracting process. Although experts have admitted this is a complex issue, they have also listed some ways to fight this cartels. Many experts have highlighted the importance of the preparation of the bidding terms and conditions; some others have suggested conducting a study on the sector to be contracted and inviting more bidders so as to diversify them as much as possible. Finally, some respondents consider that a tool that may be used to combat cartel formation is direct contracting, which offers the possibility to select a determined group of bidders outside the cartel to take part in the contracting process.

**Legislation should reduce discretionary margins and should stay in line with the current state of affairs, so as to prevent circumstances that further lack of transparency.**

## **II. Vulnerabilities**

### **RED LIGHT**

These are the vulnerabilities detected by the experts:

- 1. In general, there are high levels of discretion.**
- 2. There are discretionary decisions not duly grounded during the process and, mainly, the constant modifications of said decisions.** The National Public



Administration's right to modify the terms of a contract (*ius variandi*) is exercised deficiently. Although it is a right of the Civil Service (prerogative), it should be exercised under duly justified circumstances and not because the project has errors or ambiguities. In practice, *ius variandi* is exercised to rectify a previous error.

3. **Unclear limits and terms of the existing relation between the civil servants and the agents of the private sector taking part in the bidding process.** Like in the *planning* variable, politicians usually make plans according to how long they expect to hold office.

In some cases, the influence of the political sector affects the self-determination that must exist within the National Public Administration (technical bodies).

In many cases, politicians intend to deal with unjustified demands whose deadlines go against administrative times, essential for the efficient and transparent performance of the procurement system.

4. **The terms and conditions of the process are usually distorted.** The failure to comply with the terms foreseen affects the whole process negatively. Sometimes, contracts for goods and services provide for terms and conditions other than the ones set forth in the bidding documents due to the excessive time elapsed from the preparation thereof and the signing of the contract.

In some cases, the time elapsed between the publication of the bidding terms and conditions and the submission of bids is too short for the complexity of the goods, so the number of bidders decreases; in other cases, the exact opposite occurs and the efficiency of the contracting process is affected. This vulnerability goes against the publicity and attendance principles of public contracting.

Less economically important contracting processes are negatively affected in two situations. On the one hand, the bidding terms and conditions are prepared by the least *trained* civil servants, which entails many inconveniences (*see Training*). On the other, the smaller the contracting process, the less transparent the selection process, which undermines the tasks of control over its characteristics, such as suppliers invited, selection criteria, etc. (*See Control*).

5. **Deficiency in the specification of selection criteria leaves room for unadvisable subjectivity when choosing the most convenient bid.** This is a key point, from where we can detect whether or not a contracting process is being manipulated. The use of selection formulas must be handled carefully so as not to break the equality principle and allow participation of all possible bidders. The value of every part of the equation (pondering) is usually used to direct the contracting process towards a particular bidder or, in the same way, to remove other bidders from the process.

6. **Excessive demand of formal requirements** that become a barrier to the process, and have nothing to do with technical specifications of the goods or services to be contracted. On some occasions, requirements are so difficult to fulfil that only one bidder qualifies. This is another way to manipulate a contracting process. The following anecdote gives an example of how semantics can disqualify a bidder:

“A bidder told us that the bid he made said “a truck that can **hold** XX kilos” and the bidding terms and conditions said “a truck that can **support** XX kilos”. “holding” and “supporting” are not the same. Rejecting the term “hold” meant moving on to the next bidder, whose bid was much more expensive”.

7. **Low motivation for decision-taking**, either as regards selecting the item to be purchased or the technical specifications of the bidding terms and conditions. It is surprising that some respondents said that they are not obliged to provide grounds for their decisions, which shows a cultural and frequent vulnerability in the contracting processes of the National Public Administration.

8. **Direct contracting generates space for discretion broader than public bidding.** Sometimes there are mechanisms to avoid public bidding and operate through direct contracting, such as splitting quantities to lower amounts.<sup>14</sup>

Although it is generally agreed that the process of public bidding is perfectible and maintains certain levels of discretion, the respondents agreed that direct contracting presents higher levels of discretion, as the civil servant is more free to “manoeuvre”, especially taking into account that for a process of direct contracting the Civil Service is obliged to invite three possible bidders.

Although three is the lowest number of bidders that can be invited to a direct contracting, civil servants do not invite more so the principle of attendance is impaired

9. **Existence of organised cartels of bidders.** Most of the experts admitted the existence and influence of organised cartels of bidders that affect contracting processes. The fact that the National Public Administration is not deemed a good payer and the market does not have diversified enough suppliers lets suppliers get organised to be awarded the bids and distribute them among themselves.

The method to detect the presence of supplier clubs in a public bidding process is not too complex: a certain number of bidders attend a contracting process, all of them submit an expensive bid and with a similar value, except for the one whose bid has a lower price and finally obtains the contract. Afterwards, the same bidders attend different contracting processes changing the awardee of each selection process.

### III. Consequences

**Misuse of discretionary powers**, plus the lack of planning and training, leads to inefficient, non transparent, sometimes irregular contracting, from the point of view of legislation.

Inefficiency is shown in the National Public Administration's bad purchases. This is seen in many ways; failure to meet deadlines, goods disposed of and services rendered in undue times, increase of costs (or when lower quality is accepted) or misuse of human resources.

The general notion that the most convenient bid is the cheapest one, from the *discretion* point of view, connotes the misuse of the discretionary powers by the civil servant, since the rules lets him/her choose with criteria other than economic one, such as quality. When adjusting prices, many times the Civil Service ends up buying a problem, since sometimes bidders lower prices very much in order to win the contract, or they speculate about using lower-quality materials for the works. Therefore, besides good training, the civil servant must have the tools to make adjustments considering both technical quality and economic specifications.

**"Flexible" times** make the contract signed have different conditions from the ones of the contract offered in the bidding terms. On the one hand, the principle of opportunity is not met: the goods are unusable at the time of delivery. On the other, initial terms and conditions are modified owing to changes in the economic situation. This issue is closely related to contracting and permanent renegotiation and modification of the terms of the contracts after the award thereof.

Besides, deficient advertising impairs the attendance principle because it reduces the number of bidders. When attendance is limited the process is no longer transparent because there are arbitrary barriers for certain bidders. So we can reach the same conclusion expressed by one expert from the private sector:

"The hindrance to free attendance is reversely proportional to the transparency guarantee on the selection of the contractor".

Besides, **the existence of organised cartels substantially increases costs for the Civil Service and reduces the quality of the products**. As regards the private sector, cartels have direct negative impact on attendance and, regarding the Civil Service, cartels make prices go up considerably. An expert from the public sector points out:

"The existence of company cartels directs the process and sets the prices. The prices are not fixed by the market or competition."

Furthermore, when an organised cartel submits a bid, it is probably in collusion with a civil

servant.

**These vulnerabilities undermines society's trust in the persons who administer public funds.**

#### **IV. Special considerations on public works**

##### **IV.1. General Aspects**

Just like in the case of procurement of goods and services, *discretion* is one of the most vulnerable variables of the bidding process for public works. The use of discretionary powers by civil servants during a public work process can occur in different ways, from the decision to start the process or the decision that promotes hiring consultancy, etc.

As regards the selection of the contractor, the requirements for the bidders, qualification and adjudication criteria must be accounted for and in line with equality and transparency principles and, as expressed in *Training*, considering the total cost and quality of the work.

In the case of public works, the use of discretionary powers must be more conscientiously taken care of, since this kind of work is more linked to political interests than the procurement of goods and services. Some experts mentioned that the political sector often makes public announcements on works to be executed in election times in order to get votes.

##### **IV.2. Vulnerabilities**

###### **RED LIGHT**

Apart from the vulnerabilities that occur in a process for public works, experts pointed out the following special weaknesses:

1. **Natural deadlines in a bidding process for public works are usually altered.** This vulnerability stems from several situations, out of which the experts mentioned two: a political one and another intrinsic to the National Public Administration. Regarding the former, political times differ from natural times in a bidding process. Issues alien to the process and independent from the requirements of the work, such as election times, usually have a bad influence because political sectors exerts pressure for natural times to be shortened, sometimes excessively. The second cause is that, in general, pre-established times are not met owing to the excessive bureaucracy a procurement process has to undergo.
2. **Very volatile decision-making due to political changes.** In general, changes of civil servants imply stopping the projects to start over according to the policies of the new

authorities, without considering the global situation of the entity under their charge. This vulnerability is greater when the matter is not governed by previously defined State policies or objective criteria establishing beforehand the actions to be taken by the National Public Administration (see *Planning*). Furthermore, on many occasions, projects or processes are stayed suddenly for reasons alien to the bidding process. Some projects, upon starting over, become outdated so alternative solutions are sought to adapt the bidding terms to current circumstances.

3. **Unclear selection criteria.** Although this issue shares the vulnerability with procurement of goods and services, it is necessary to consider that it causes significant damage during bidding processes for public works. The amounts and execution times are greater and the formulas included in the bidding terms are more complex than in the case of goods and services, depending on the kind of work planned.

Again, the cheapest bid is not always the most convenient one. It is necessary to count with the best quality of rules and conditions, which will enable the civil servant to account for the election of bids, which at the beginning are not the cheapest ones but the least costly for the public treasury, on the basis of the total result of the work.

The contracting conditions offered by the National Public Administration do not always allow bids from the best companies of the private sector. Experts said this is a sensitive issue:

“... If standards are changed a lot, just a few can make contracts with the National Public Administration”.

Legislation many times differs from reality and, due to the fact that there are no clear boundaries to reduce discretion, it creates non transparent spaces. This concept can be summarised with this statement from an expert of the private sector:

“This issue has a basic aspect, which is legislation. All the rules that provide for the Executive Power's discretion are always dangerous for transparency. Any rule that blocks reality, that goes against supply and demand and the natural laws of the economy, always hampers transparency, promotes corruption and all aspects of non-transparency... in that case, it is common for the private sector to seek protection; everybody knows what that is: the civil servant that signs the cheque in the State is extremely valuable”.

### **IV.3. Consequences**

In the case of public works, excessive cutting down of times has more harmful consequences than in the case of goods and services, since preparation of projects and bidding terms is extremely complex. Reducing times directly affects contracting costs and quality.

Ultimately, cutting down of original times set forth by the law, means reducing planning time, time for feasibility studies or bidding terms preparation. When the natural times of a bidding process for public works are not met, one of these stages is being underestimated.

When a work with poor bidding terms and previous studies defects starts to be carried out, its technical aspects are very likely to be adjusted and, therefore, the economic ones as well, due to unplanned contingencies. This situation not only brings about additional costs for the National Public Administration but also violates the equality principle, since, in general, work modifications exceed the limits foreseen by the law (20%) and, in that case, the final work is not in line with the bidding terms and conditions.

## E. Perception of the access to information according to the experts

*All that brings information closer to people is positive;  
all that brings people closer to discussion is positive,  
because it makes civil servants be more transparent.*

Expert from the public sector.

## I. General aspects of goods and services and public works

The National Public Administration has the legal obligation to provide unlimited access to public information.<sup>15</sup> This is an essential tool to ensure that its activities are widely known.

Among other things, access to information promotes active citizens and the control of their representatives' performance. It lets citizens appropriation of "res publica" by controlling public policies, in this case public contracting.

At the same time, access to and publicity of administrative acts enables the analysis of transparency in public contracting and is closely related to all the stages of the procedure, since it requires going over all the records.

With regard to the procurement system, the use of the Internet is more widely used every time in order to optimise resources and facilitate services (National Procurement Office, supplier records, presenting legislation), since it is easy to access, cheap and offers fast, updated information. Although this is not the only way for the National Public Administration to make its activities and processes public, it gets the Civil Service and citizens closer to each other and, thus, it should always be used in all the stages of the processes.

The provisions of Executive Order 1023/01, Section 9 state the above:

**"TRANSPARENCY. All stages of public contracting shall be carried out within a transparent context that shall be based upon publicity and spreading of the activities that arise from the application hereof, the use of information technology to enhance efficiency during processes and facilitating society's access to information related to the administration of the State as regards contracting and real participation of the community, which will enable society's control over public contracting".** (Emboldened by us).

## II. Vulnerabilities of goods and services and public works

### YELLOW LIGHT

Generally speaking and according to expert perception, **there is no appropriate access to**

## **information on public contracting.**

The vulnerabilities described by the experts are the following:

1. **Practice differs a lot from legislation.** Legislation provides for unlimited access to administrative processes, while in practice this situation is not confirmed. When information is requested, civil servants in general place obstacles that obstruct access to information on the proceedings.
2. **The organisation of the National Public Administration is customarily reluctant to provide the public with information.** In practice, the petitioner is requested to account for the likelihood of the interest invoked. According to the experts, this is related to a deeply-rooted frowned-upon culture within the civil service.
3. **There are few entities that have updated information on their purchases on Internet websites.** It is curious that respondents did not mention the important role of the National Procurement Office in this regard, since all purchase departments should submit the information on the processes to the entity. Not all the projects are published on the official websites, for consultation purposes. Unavailable information includes public work projects, **the work planning of which cannot be accessed**, which is clearly a violation of the rules that demand unlimited access to administrative processes.
4. **There is no public, unlimited access to contract performance.** This does not allow citizens to control the performance of the work.

### **III. Consequences of goods and services and public works**

A restricted access or any obstacle in the access of information leads to scarce or zero knowledge of the grounds or purposes of state decisions. This is closely related to the *discretion* variable, since the civil servant chooses not to show his/her proceedings without appropriate reasons, and this impairs transparency.

Strictly speaking, when it is impossible or difficult to gain access to information on proceedings, there is more space for discretion, processes can be bent, controls of contract performance can be deviated, and also, the rules of the game specified in the bidding terms can be modified.

Besides, similarly to what was described in the consequences of the *discretion* variable, deficient publicity goes against the attendance principle, since it reduces the number of bidders because they do not have access to the necessary information about the procurement processes carried out by the National Public Administration.



Furthermore, access barriers to information are closely related to the *control* variable, because they reduce the possibilities to control (both by the Civil Service and citizens) proceedings and assign duties.

## F. Perception of citizen participation according to the experts

[...] *I consider it essential. Without citizen participation there is no planning, there are no State policies.*

[...] *The more people are listened to, the easier it is to work things out, because people are ultimately the ones who work things out.*

Expert from the private sector.

### I. General aspects of goods and services and public works

Citizen participation is an essential tool in planning, in public contracting control and in public policies in general. It must be understood as citizen's work individually or through civil society organisations.

The National Public Administration must encourage citizen participation in public contracting processes in order to make procurement processes transparent and guarantee the satisfaction of real needs. For that purpose it has diverse tools that promote participation, such as public hearings, participatory budgets, citizen recommendations or initiatives. These tools are applied easily because they are not expensive to the National Public Administration and they are so versatile that they can be applied in different fields.

As regards public contracting, experts highlighted the convenience of citizen participation in at least three stages, whenever possible: a) planning (detection of needs); b) drawing up of bidding terms and conditions (level of quality of goods and services), and c) performance (control over the process and results). In the case of public works, citizen participation is much more important than in the case of goods and services, because the social impact of the works is direct, immediate and closely related to economic and cultural development of society.

Ideally, citizens should be interested in "public affairs" and the National Public Administration should promote this kind of inquisitiveness in citizens and be open to queries from them.

This *ought to be* possible since the legislation does not provide important restrictions therefor.

According to the experts, to get positive results, participation must occur on the basis of social responsibility and without holding up administrative processes. Experts tend to think that citizen participation is to be carried out professionally, starting from civil society associations, with coordination y without hindering the process.

### II. Vulnerabilities of goods and services and public works

**YELLOW LIGHT**

The vulnerabilities described by the experts are the following:

1. **The National Public Administration does not promote citizen participation as regards public contracting.** This general idea can be summarised in this comment from an expert from the public sector:

“... in general, civil servants believe that the least people get to know their work, the better (they pass unnoticed). In general, politicians, in turn, demand transparency but in practice transparency bothers them because it brings about criticism and they take criticism personally...”.

2. **There is absolutely no citizen participation during the planning of public contracting.** The National Public Administration does not consult the citizens about planning of existing needs.

“There is no participation with respect to planning, and I am not sure it is necessary. But there is no participation in preparation either, nor during the procedure”.

Experts mentioned, however, that in small communities some instruments, such as the participatory budget, have been used successfully, causing the citizens to participate in the drawing up of the municipal budget through their demands and needs. Even in some local constitutions the participatory budget tool is expressly regulated.

3. **There is no citizen participation in drawing up bidding terms and conditions.** As regards drawing up of bidding terms, there are some elements to promote citizen participation, such as public hearings for discussion purposes, but they are seldom employed and generally in municipalities and not nationwide.
4. **There is no citizen participation in the performance of contracts or in the control throughout the process.** Experts stressed the importance of social control during the last stage of the procurement process, i.e. in the performance and results of the contract (management control). Citizens do not allow for social control as an alternative to fighting against omissions or irregularities of the National Public Administration. According to the experts, citizens are not normally aware that the National Public Administration’s expenditure is the counterpart of their taxes and that they are entitled to control the legality, effectiveness and efficiency of the administration.

### **III. Consequences of goods and services and public works**

It is interesting how some public sector areas give up promoting participation in public

contracting processes of sectors alien to the National Public Administration or potential bidders. Some experts interviewed even think that this kind of intervention is self-defeating or inconvenient. The following is an example of this idea from an expert of the public sector:

“Efficient purchases as opposed to transparent purchases. Citizen participation causes delays, makes contracting less efficient”.

However, other actors of the public sector and most actors of the private sector pointed out that not ensuring citizen participation in planning implies not considering potential input from them and, ultimately, reduces the chances of the Civil Service to detect the real needs to be met.

Little citizen participation, either through civil societies or otherwise, lets the Civil Service carry out processes that do not comply with suggested transparency standards and prevents citizens from learning about the results of the public administration.

**Lack of social control over public administration and over legality, efficiency and effectiveness of the use of public funds connotes violation of the transparency principle,** which the law relates to social control (Executive Order 1023/01: section. 3, sub-section c) and section 9, first paragraph in *fine*):

“TRANSPARENCY. All stages of public contracting shall be carried within a transparent context that shall be based upon (...) and real participation of the community, which will facilitate social control over public contracting”.

## **G. Perception of control according to experts**

*The State does not control. It is common within the State to find that what has been purchased is not one hundred percent in line with what was expected.*

Expert from the public sector.

### **I. General aspects**

In a democratic regime, like our country's, it is unconceivable to imagine the performance of National Public Administration under no public control (both internal and external) and also social control, the latter being understood as control by citizens individually or through civil society organisations.

In particular, public and social control over public contracting issues must be carried out meticulously, since this is the way that the National Public Administration acquires the goods and services needed to perform its duties and, thus, meet the needs of society.

Since the enactment of the Financial Administration Act ("Ley de Administración Financiera" - LAF)<sup>16</sup> the control system of the National Public Administration has been implemented upon the basis of two completely different control axes: the internal one, by the National Executive Power, through the National Supervisory Committee ("Sindicatura General de la Nación"); and the external one, by the National Auditing Committee ("Auditoría General de la Nación"), an entity that assists the National Congress in technical matters concerning the supervision of the activities of the National Public Sector.

The internal control system is complemented by the internal auditing units created in each jurisdiction or entity in order to share the control over the decisions of each chief officer.<sup>17</sup>

Therefore, it is important for controlling agents to fill stable positions and that political pressures do not affect their independent discretion while investigating and preparing reports.

Besides, controlling bodies must have a defined structure, which means coordinating supporting areas, in which the organisation lies. These areas should not be subject to political changes.

Furthermore, internal control should be used rather as a consultation body for civil servants, much more for those who handle resources, since the information that these bodies may offer is highly valuable to avoid mistakes.

Also, in every control organisation, even in purchase departments, previous controls and past mistakes must be recorded. Experts on this issue said that it is convenient to have this kind of records for current civil servants to be able to observe previous mistakes and prevent them from happening again; for instance, previous decisions of the legal system as regards public

contracting.

It is also important that purchase departments keep records of what is purchased, why and what for. These methods are provided for by the law.

Furthermore, it is convenient to impose social control over the performance of the National Public Administration which, externally, watches the use of public funds. (see *Citizen participation*).

Social control is necessary and compulsory to safeguard a transparent public contracting process. Section 9 of Executive Order 1023/01 sets forth:

“TRANSPARENCY. All stages of public contracting shall be carried within a transparent context that shall be based upon publicity and spreading of the activities that arise from the application hereof, the use of information technology to enhance efficiency during processes and facilitating society’s access to information related to the administration of the State as regards contracting and real participation of the community, **which will enable society’s control over public contracting**”. (Emboldened by us).<sup>18</sup>

The stages of a purchase process must be controlled before drawing up the bidding terms and award, which must include not only the legal and formal issues, i.e. a technical control focused on contracting matters.

Raising objections, if done positively by bidders, is favourable and necessary because it makes the National Public Administration go over the records by cross-controlling of bidders, who are the ones qualified for contracting issues.

## II. Vulnerabilities

### RED LIGHT

According to the experts, **control is poor or insufficient**, even in the few cases where it is applied. In consequence, the following vulnerabilities were detected:

1. **Internal auditing does not include control over planning and existence of annual purchase programmes.** Planning is defined by experts as a stage that is hardly ever controlled. In the case of public works, planning is vital for the success of the work (see *Planning*).
2. **Not all external audits (regulated by the National Public Administration) include controlling public contracting processes.** The contracting matters are not always

included in the annual auditing plan carried out by the National Auditing Committee over the entities of the National Public Administration.

3. **There is no previous control over the preparation of the bidding terms beyond the legal and formal issues**, unless a public consultation is carried out when civil servants believe the bidding terms are too complex and require the previous opinion of the persons who could be interested in the subject-matter of the future contract. In this case, a consultation project is published on the website of the National Procurement Office.<sup>19</sup>

Previous control was highlighted by the experts; for example one expert said the following:

“The control problem is previous to the selection of the bidder. (...) the bidding terms must be drawn carefully. The key element of a contracting process is provided by the bidding terms; the basis of everything is there. The bidding terms will define whether the contracting process will be competitive and whether the products to be purchased are correct”.

4. **Owing to poor control, there are no records of the errors detected, so there are no mechanisms to encourage learning.** So current and future actions cannot be enhanced. This fact is related also to lack of continuity in management and successive changes of political authorities and managing civil servants.
5. **There is practically no control before decisive actions are taken and the control that comes afterwards is not immediate**, and, generally, the results of the process are never analysed. That is to say that control never comes on time and ranges from inefficient to ineffective.
6. **The Internal Auditing Units have many flaws:** a) biased internal auditors because they can be removed discretionally by a superior and the position is never filled through bidding; b) the control is exercised subsequently<sup>20</sup> and c) its decisions are not binding.

In this sense, experts in control expressed the following:

“Internal auditing has a problem, and that is selection of staff, especially the internal auditor. That problem stems from a defect in Act 24.156. Who appoints the auditor? The highest political authority of the Institution. What degree of autonomy can auditors have to question the actions of the highest authority who appointed them? Because they can also be removed by said authority. Not even the SIGEN (National Supervisory Committee), which is the governing body, has a significant role in the appointment of the auditor”.

7. **No independence of legal services due to “pressure from the political sector”.** Positions are not filled through bidding processes that guarantee the stability that provides security to resist political pressures.

8. **There is almost no control over the performance of the contracts.** Therefore, contractors are seldom fined and few guarantees are executed. There is no control of management by objectives, which has a negative impact on meeting the original needs of the bidding process. An expert of the public sector described this situation with the following example:

“The State has to get used to executing guarantees, cancel the contractor and collect the guarantees. Many problems would be solved if this was done in all cases. I have had cases in which I was offered some other stuff instead of what was agreed upon and my answer was “You deliver the goods or the guarantees are executed”. And when you say this, everyone delivers the goods, the services, everything in due time and manner. No more problems. We have to enforce the law; it’s pure and simple”.

9. **No control over the time when goods reach the substantive areas.** Sometimes, this is because the civil servant does not take a decision. This is an important fact since timeliness is a key factor of satisfaction of needs.

10. **Poor control over the responsibilities of the civil servants.** This leads to the absence of sanctions. In this way, the principle of responsibility of public servants, set forth in Executive Order 1023/01 (Section 3, sub-section e) and section 9) is broken.

11. **Inefficient control through bidders` opposition (objections).** This method is not applied well because, in general, bidding terms set forth the obligation to pay for guarantees to raise an objection. There are also records of objections raised with the sole purpose of delaying or blocking the process.

However, many experts from the public and private sectors, stressed the importance of this kind of control and its benefits:

“Objections are in favour of the Civil Service; it represents the control by a third party for the Civil Service not to do something that is wrong”.

12. **The National Public Administration does not have an efficient penalty system for suppliers and contractors.** Experts said that many penalised companies submit their bids in new processes with a new company name or jurisdiction.

13. **Social control does not exist in administrative contracting.** There is no participation in any stage of the procurement processes, both from citizens individually and from the



civil society, that controls whether the activities of the National Public Administration are lawful, effective, efficient and transparent.

### **III. Special considerations on public works**

#### **III.1. General aspects**

Regarding the systems of public and social control over public works, the experts interviewed held that, besides the considerations on procurement of goods and services, in this case the stage when the works are carried out must be specially considered. This stage differs in both cases and it is very important when carrying out works, since public works are long processes that must be controlled from beginning to end, ensuring that all terms and conditions set forth in the contract are strictly complied with.

Also, the role of the construction inspector is essential and he/she must be well trained to perform his/her duties (see *Training*).

#### **III.2. Vulnerabilities**

##### **RED LIGHT**

Apart from the vulnerabilities mentioned by the experts in the control of the procurement of goods and services process, which apply to public works, these were also mentioned:

1. **No control over planning of public works.** There is no citizen control on need detection or over the use of public funds either. This hinders the effectiveness of the works, i.e. whether or not real needs are being met.
2. **No control of management by objectives.** there is no evaluation of the works reaching the original objective, or meeting the needs planned. That is to say, the usefulness of the works is never controlled. Some experts mentioned the cases of works that were never used and were abandoned.

### **IV. Consequences of goods and services and public works**

Control is closely related to the rest of the variables and all stages of the procurement process. It is so important that experts (both from the public and private sectors) agree that **lack of control leads to high levels of incompetence within the National Public Administration and misuse of discretionary powers.**

In this context the procurement process is inefficient and non transparent, control is imposed only over formal aspects but seems to be significant. Anyway, the ultimate objective of public contracting should never be disregarded: satisfaction of needs and compliance with the principles of contracting (see Executive Order 1023/01, sections 3 and related ones and *Glossary*). Among these principles, it is worth mentioning that any process must be transparent and efficient (quality and costs).

Therefore, when only formal aspects are controlled, the substance of the process is neglected. **The process is not controlled.** An expert from the public sector illustrated this situation in the following:

“In these cases you can’t see the woods for the tree”.

It is not uncommon for the National Public Administration to purchase things that are not needed. On some occasions, companies present bids taking advantage of errors or omissions in the bidding terms in order to win the contract on the price and then they adjust costs by offering low-quality goods or services. This is also related to the above-mentioned *discretion* variable: the civil servant is not used to contracting on quality, but only on prices, disregarding the global cost. Controlling formalities and overlooking the above-mentioned issues, which leads to contracting low-quality goods or services, violates the efficiency principle and promotes misuse of public resources.

The National Public Administration ends up ruling out the best bidders of the market to buy at the lowest price and disregarding global costs. This has negative consequences both on standardised goods (such as pens or paper) and higher complexity ones (such as health and IT-related ones, etc.) and public works as well.

There is no control over the performance of the work either. Deficient control can be a decisive factor and make the purchase ineffective. In other words, irregularities in the provision of the goods or services, and the controls that must detect those irregularities are deficient, not only the purchase will be proven useless but also public and economic resources will have been wasted.

On the other hand, the strong pressure on the civil servants in charge of controlling, mainly internal control bodies (the Internal Auditing Unit, the National Office of Legal Affairs, etc), affects independent decision-making necessary to guarantee control under the law.

When lack of control is usual, there is absolutely no capacity to evaluate the processes that were carried out badly, the performance of the civil servants and the results.

If records are not kept there is no learning for the future and the few controls that detect irregularities are not registered, mistakes are repeated. Something similar occurs with civil servants’ penalties. Within an environment that works as described above, it is impossible to

imagine penalties imposed on the civil servants liable for damages to the State because of errors or omissions during public contracting processes.

Furthermore, lack of penalties on bidders encourages bidders to rule out the possibility of getting penalised for breaching of contract, and, on the other hand, increases the level of discretion of civil servants.

Finally, it is important to consider that **the absence of social control over public contracting processes leads to breaching the transparency principle.**<sup>21</sup>

## H. Conclusion

The general result of all the interviews is that in most cases the **National Public Administration does not buy properly**. We have interviewed well-known experts of the public and private sectors, both in goods and services and public works and, surprisingly, there are very few differences between their perceptions on public contracting. Mainly, they agreed that the National Public Administration is a bad purchaser. Inefficient purchases, waste of time and human and financial resources and, besides, sometimes the need is not even satisfied.

This situation is caused by the vulnerabilities detected by the experts in each variable. All these vulnerabilities have different degrees of importance and promote individually or jointly the increase of risks of less transparent and efficient public contracting.

On the other hand, this risk map also makes the negative consequences of **these vulnerabilities affect all actors**: the National Public Administration, the private sector and society, the direct and indirect target of all public contracting.

Thus, it is necessary to work from all sectors in order to eliminate them and minimise their harmful effects. In this sense, it is essential to focus on training civil servants in all the applicable variables. An interesting contribution of the experts' perception is that training should involve political civil servants.

At present, the National Public Administration has the idea that enhancing transparency and reducing the discretionary margin of procurement processes leads to a slow and inefficient process. This notion makes the National Public Administration choose the shortest and least transparent path. This is strengthened by the conviction among civil servants that they will not be controlled or held liable for irregularities or results when performing their duties.

However, civil servants that had the experience of carrying out a transparent process understand that those cases have positive effects that substantially improve all the aspects of the contracting processes. In other words, they had the chance to prove that respecting the law and transparency principles in public contracting leads to better results.

Regarding the existence of organised cartels and all the negative consequences dealt with in the *discretion* variable, experts pointed out something very important: **civil servants have tools to eliminate this vulnerability and it is necessary to promote the political will to do it**.

In effect, sometimes, publication and spreading of the bidding process for a greater number of potential bidders are important tools to break up cartels. Another option could be direct purchase and choosing a supplier outside the cartel.

In this sense, it is a pressing need to work on reducing the intense discretion used by technical

and political civil servants in the diverse stages of public contracting. Actually, the interviews showed that both types of civil servants overuse discretionary powers.

With respect to all these matters, we can see that *access to information* and *citizen participation* can substantially enhance contracting processes. Poder Ciudadano has especially had positive experiences (mentioned in the Introduction) through the use and promotion of the Access to information and Citizen participation tools. Therefore, it is surprising how these variables are disregarded by the actors involved (public and private sectors and even the citizenship).

This work also showed that it is necessary to work on far-reaching aspects, such as the drawing up of the bidding terms. **The control variable is a fundamental aspect that must be worked on intensely** from within all the sectors involved, in order to revert the current vulnerabilities mentioned by the experts. Among them, we can highlight the control over all stages and variables, mainly citizen and administration controls that, as described above, are absent.

**The National Public Administration must always bear in mind that the lawfulness and transparency of its own activities are not only an obligation but also a right of the citizens.** In Poder Ciudadano, we support these principles and try to build a bridge between the National Public Administration and citizens in the course of these functions.

## ANNEX I

### **Perception of the contracting process with financing from multilateral credit entities according to experts**

In our country, like in many others, national and provincial administrations borrow money from multilateral credit organisations to finance different projects that include contracting process for the procurement of goods and services or to carry out public works.

The multilateral organisations are:

- World Bank (WB)
- Inter-American Development Bank (IDB)
- UN Development Programme (UNDP)

Pursuant to Argentinean legislation, when a public contracting process is somewhat financed by this kind of entities, that process is not governed by local laws but by the rules of the international entity involved.

In fact, pursuant to the provisions of Executive Order 1023/01, Section 5, subsection c), the national legislation on public contracting shall not be applied to the contracts entered into *with foreign countries, international public law entities, multilateral credit organisations, those financed totally or partially by said entities, without prejudice of the application of the provisions hereof as the case may be and the supervising power over this kind of contracts conferred to controlling bodies by Law 24.156.*

This financing may be used for general development projects that require contracting processes in order to achieve the objectives, or for various individual contracts.

Consequently, these entities have their own rules governing contracting. Every one of them, in their different ways, makes every endeavour to enforce the general principles of contracting (equality, attendance, publicity, transparency, etc.).

This body of rules and processes can be studied over the same variables analysed in this work with respect to public purchases (planning, drawing up of bidding terms, training, discretionary powers, access to information, citizen participation and control).<sup>22</sup>

Regarding these variables, the experts mentioned the following features, which are analysed in this work.

## I. Planning

**Although planning** of public contracting is an exclusive function of the State and these internationally financed processes do not replace it, in any of these cases, planning is ordered according to the objectives presented by the administrative divisions. These projects must further development and require the approval of the main figures of the financing entities, who assess the feasibility of each individual project.

In this sense, the experts interviewed said the following:

“Our work is project-oriented and starts from a basic instrument, the project document. That is to say, each task (...) requires a project document signed by (...) one party and the entity that will execute the project, that is generally a government body or a NGO, or eventually, a system agent. That project document may set forth the objectives, the activities, the budget and the contracts to be made. In other words, procurement planning is included in the initiative itself, it is part of the very project”.

“Contracts come and go (...); you already know what they want done; they are not done in isolation but within the execution of the whole programme”.

Thus, whichever is the State entity submitting the financing or development project, it must do the planning in a way different from the way it does in the ordinary development of its specific activities: When submitting the project, the objectives to be met must be defined. Procurement may involve an item within the project or, in some cases, they may be the subject-matter of the project itself (when financing is requested only for that particular contracting).

As these are all-embracing projects, it is interesting to point out that their approval – in the case of the WB for instance – does not imply acceptance of all its components, but a *no-objection* decision. This subtlety may be summed up with the following words of an expert:

“(...) these approvals are known as non-objections. Actually, the letter says: “The IDB does not have any objections to the contracts”. It is subtle, but it is not really an approval (...), it has no objections because it does not object to the rules”.

In general, experts express that it is very difficult to have deficient planning because that would mean a bad design of the project submitted at the beginning and, therefore, its rejection by the multilateral organisations. In this sense, the State or the entity that presents the project supports it by means of previous studies.

## II. Training

These entities usually have staff that are conversant with their own rules, generally described in proceedings manuals, and, in some cases, through special training programmes on contracting. The execution of projects financed by multilateral credit organisations often includes contracting technical consultants, who are hired in the same way as goods: calling for bids; in some cases under the same rules and in others, under specific regulations for this type of contracting.

“...all multilateral organisations have training programmes on contracting. Many times, when dealing with small-amount operations or there is no local operating capacity, they request that a performance agency be hired to take care of most parts of the bureaucratic stages of the loan”.

“Because, usually, it is appointed by means of consultancy agreements, contracts of services or other, which also tend to solve a problem”.

One of the vulnerable aspects related to this variable, according to the experts, is poor training of the civil servants who must apply the rules of the multilateral credit organisations to be granted these loans. Although in general international regulations do not differ substantially from the local rules, training of local agents is still insufficient according to the respondents.

This situation was described as follows:

“Training of civil servants, for procurement under both local and international regulations, is poor. This issue should be particularly dealt with”.

Many programmes include, apart from hiring external consultants specialised in these matters, internal training projects for the staff involved. Now, real training is not considered by the experts as a guarantee that knowledge will be passed on to all civil servants involved in the processes, since in general experience is not put across to local agents in a systematic and permanent way. This is one of the most criticised training issues. The following interview illustrates this:

“There are negative effects; the fact that, from the organisational point of view, there is disjointed bureaucracy related to the projects [financed by multilateral credit organisations] (...) that is not properly integrated into the organisations. When the project is completed, all the knowledge is lost...”.

“The all-time critic to international organisations is that they come, do their work and then they go, taking experience away with them; or that they hire foreign consultants”.



This shows contracting of external consultancy in a different way. On the one hand, it is important to guarantee the proper design and execution of the projects and the use of the funds invested, but, in turn, due to lack of systematic transfer of knowledge locally that enables learning for future applications, these consultants in many cases make up for faults in local training. Therefore, this is one of the major recommendations from the experts:

“[Multilateral financing entities] should defend the processes of transfer of technology more strongly, by means of the so-called soft transfer, which involves learning and training processes for human resources ...”.

### III. Discretion

With respect to **discretion**, experts find differences with the vulnerabilities described for local processes. In this way, they refer to diverse stages where this variable is found.

In general, experts agree that this kind of process aims at furthering attendance and transparency at all levels. There are several elements, such as pre-established or standard bidding terms for procurement processes, tax exemptions applied to certain goods and process detection mechanisms given objections, as in the case of IDB.

In the case of standard bidding terms for procurement processes, all respondents agreed that it is positive:

“There are standard bidding terms. Some time ago every multilateral organisation used to have its own set of standard bidding terms and then they realised they should standardise them. In fact, there is a Joint Procurement Committee of the WB and the IDB in charge of standardising procurement rules (...) and unifying processes that ultimately are almost identical. So there is a standard bidding document that has been drawn up in accordance with the procurement manual...”.

“[The entities] hand in a disk containing the sample of the bidding terms we use. With those samples you can do your job according to the kind of contracting process you are working on. They have bidding terms for consulting companies, for IT, for public works, you name it (...). With standardised bidding terms you do not have much space to move. There is not much room for discretion because when you don't stick to the rule, you have to account for it very well”.

There are some not so positive aspects, such as objections from bidders: in general, these processes are not open since bidders cannot have access to the bids of competitors or object to them. When objections are raised, the outcome is known at the end of the process.

The following statement seems a paradigmatic perception of the respondents when asks about objection systems:

“In general, IDB’s processes protect the bidder much more, because any objection, in any stage, suspends the process. The thing is that it places a large number of obstacles on the way because the process is free of charge and quite informal, and anyone can raise objections in all stages just to delay it. This is the bad side; it is good from the bidders’ point of view because it offers protection, but the result has this negative side...”.

In the case of IDB, this statement shows how a positive aspect of discretion, being allowed to stop a process considered arbitrary, can be used negatively as a mechanism that hinders the smooth flow of the whole project.

Another feature to consider is, according to the experts, that the decisions of the boards of directors of these entities refer only to the compliance with their own rules, which cannot be appealed to local courts, so the right of access to justice and defence of bidders is not completely respected, since there is no process of legal revision parallel to the bidding process. This brings about unadvisable levels of discretion in the selection of State contractors; there is no appropriate publicity in this stage of the process.

In all other respects, this indecisiveness also affects the civil servants involved, since they must comply with local rules and with the rules in force for international entities as well. An example of this, when the UNDP is the performing entity, it carries out the processes and signs the contracts. This entity is not governed by the transparency rules enforced within the national public sector.

This ambiguity also occurs in the case of the tax exceptions applied to goods imported during the processes. No matter the percentage of the loan over the whole project, when these entities come into play, imported products are exempted from taxation, so costs are reduced 15%-30% because they are acquired through diplomatic franchise by the executing agent – this can be the case of the UNDP – and then assigned to the borrower (local administration). Some experts pointed out the following:

“... they want all the countries they deem eligible to attend. So during a bidding process they say: “Just compare prices but don’t pay attention to taxes”.

“The intention is to reduce costs because import duties and taxes are levied upon imported goods, except when the performing agency is the UNDP, which is outside every jurisdiction, all its purchases are through diplomatic franchise.”

This point, deemed positive, can show negative aspects when permitting a significant level of discretion, and escaping accounting rules that should otherwise be applied.

According to the experts, in practice, negative discretion shows whenever the times in a contracting process are extended, due to, among other reasons, the number of actors involved in the bureaucratic steps needed to approve the different stages.

Just like in the national system, experts admit to the possible existence of organised supplier groups that make their bids in this kind of processes and find poor or no resistance to their harmful actions (high costs, lower quality of services, etc.).

#### **IV. Access to information**

The early stages of the process are published (projects, bidding terms, etc.) but, just like when contracting under local legislation, in practice, it is almost impossible for citizens (non-bidders and with no economic interests in the contracting process) to have access to the information of the no-objection process carried out within multilateral organisations.

The interviews showed the following:

“[The organisations] try to publish their information, but they do it without much detail. There is no access to the important paperwork. All big operations are published, all purchases are published because the law demands it; what would be impossible or very difficult to know about is the no-objection process. Let’s suppose the borrower submits some specification and sends it to the Bank for its no-objection. The Bank rejects it because it considers the specification favours a potential bidder; the borrower sends it back and the Banks rejects it again, and so on. It’s hard to know...”.

This situation gets worse when the performing entity is the UNDP since it is a different jurisdiction from that of the National Public Administration and national rules do not apply, which make civil servants provide the information requested by citizens.

“In the case of multilateral organisations, the problem is that there is no applicable jurisdiction, i.e. all processes can be carried out, not the processes whose publicity is determined by the contract, but... If one citizen were interested in gaining access to the bidding terms and conditions out of self-interest, he/she could have many difficulties to so do, because there wouldn’t be anyone to claim...”.

## **V. Citizen participation**

Citizen participation before the start of the processes is not regulated nor is it habitual, except for the cases of environmental issues, where the interested community has been heard (although these examples occurred with provincial purchases with this type of financing). The interviews produced the following:

“Public hearings have been called when consequences could have important impact on society, on environment. In other words, the fact that sometimes loans have a pre-condition such as holding public hearings or consultations to analyse the environmental impact is not part of the rule but it is customary, only when the impact is noticeable...”.

Experts point out there is no possible citizen control of the results of the processes either.

## **VI. Control**

In general, entities confine themselves to complying or not with their own rules and controlling the application thereof, which govern the contract through local the entities involved. As one of the experts put it, substantial control of the projects is not attributable to these financing entities:

“The State should be in charge of that kind of control, of planning investment. The IDB cannot take over the control mechanisms of the State, or of public control”.

In this sense, experts agree that the control imposed by entities focuses mainly on disbursement or execution control:

“They carry out the main control over execution, controlling the disbursement pace (...) a good execution means spending money on schedule”.

“They are dealing with an investment programme and the investment is made. All technical, maintenance, follow-up issues are under the charge of the executing ministry”.

Control, then, is mainly intended for the use of funds, through certain metrics that show how objectives are being achieved, but, according to the experts, there are differences between the use of the goods and services hired and the funds allocated according to the needs to be met.

There is no control over the necessity of all contracting processes, such as consultant agreements, because those variables are considered to have been analysed and accounted for within the sphere of the national entities during the original design of the project. Among the consultants that may be hired to monitor these processes there are external consultant that can make controls before payment. These concepts can be summarised as follows:

“External auditing is performed *ex ante*. What does that mean? No payment is approved without its intervention, not only with regard to the payment itself but also during the very process of evaluation of bidding terms, selection, etc.”.

“It is auditing in the legal sense; what is to be controlled is the use of funds and the follow-up of legal proceedings; for example, the National Auditing Committee or the auditing company assesses the project by analysing its status, reviews procedures and evaluations.”.

This special control over the use of funds is justified by the experts because multilateral credit institutions – except for their boards of directors, that are essentially political – operate like banks and their main task is to lend money and recover it: once they accomplish their mission there is no real interest in the result of the contracting process.

Regarding the consequences of the control, even before the selection of an investment project, respondents agreed that the position of these entities is limited to choosing or rejecting projects depending on compliance or non-compliance with their standard requirements. One expert said the following:

“The bank has a set of rules on fraudulent actions, bribery, etc. The penalty in those cases is to declare the operation ineligible. That means: `we will not put money there. If you want to put your money there, it’s your problem, but we will not`.”

In the case of current projects, the penalty is based on the detection of financing flows, when the objectives described in the documents without objections are not fulfilled. Some experts expressed the following:

“The disbursement is reverted. A counter-entry is made and eventually the borrower is obliged to give it back, out of the next disbursement or disbursements from other operations.”.

In this sense, experts said that penalties are not aimed at rectifying or correcting the failure to comply because:

“They perform formal controls. They are not focused on the responsibility of a civil servant in case of omissions or deviations from the procedure. The

consequence or the penalty would simply consist of rejecting the percentage to be financed by the bank”.

In this respect, it is worth mentioning that in all these processes the State is the obligatory opposite party, and is in charge of developing deeper controls, as the respondents put it:

“Well, if a breach of process is detected and can be corrected (...) the person who knows about it is obliged to report it. If there is evidence of a possible illegal act, the opposite party, the Ministry of Foreign Affairs, is obliged to report it. If a consultant breaches the contract, because consultants are not the State’s employees but independent professionals, it has to be reported through the appropriate channels or directly through legal proceedings.”

## Abbreviations and Acronyms

AGN: Auditoría General de la Nación (“National Auditing Committee”)  
APN: Administración Pública Nacional (“National Public Administration”)  
BID: Banco Interamericano de Desarrollo (“International Development Bank”)  
BM: Banco Mundial (“World Bank”)  
DGAJ: Dirección General de Asuntos Jurídicos (“National Office of Legal Affairs”)  
LAF: Ley de Administración Financiera (24.156) (“Financial Administration Act”)  
ONC: Oficina Nacional de Contrataciones (“National Procurement Office”)  
OMC: Organismos Multilaterales de Crédito (“Multilateral Credit Entities”)  
OSC: Organización de la Sociedad Civil (“Civil Society Organisation”)  
PC: Poder Ciudadano  
SIGEN: Sindicatura General de la Nación (“National Supervisory Committee”)  
TI: Transparencia Internacional (“Transparency International”)  
UAI: Unidad de Auditoría Interna (“Internal Auditing Unit”)

## Glossary

**Access to information:** Freedom of any individual to investigate, receive and spread public documents and/or information related to public contracting.

**Training:** Previous specific tuition of civil servants competent in the different stages of public contracting.

**Control and penalties:** The former is related to the ways and degrees of surveillance applied to the system of State contracting and to the performance of civil servants involved. The latter refers to the punishment that arises from control tasks and is closely related to the capacity of the National Public Administration to correct mistakes for the future.

**What ought to be:** In this work, what ought to be in a contracting process refers to the provisions of the governing legislation and, at the same time, to what is deemed to be correct by the experts.

**Discretion:** Possibility provided for by the law to the civil servant to choose among different and equally valid options. Closely related to the obligation of the civil servants to account for their decisions.

**Effectiveness:** This term refers to the achievement of a predetermined objective. In this case, a contracting process is effective when the initial objective is attained: meeting needs.

**Efficiency:** This term refers to the achievement of a predetermined objective using as few resources as possible. In this case, a bidding process is considered efficient if the need is met having used as few resources as possible (human resources, time, money, etc.).

**Political Civil Servant:** an officer with managerial duties.

**Civil Servant:** an employee hired through any means, who works for the National Public Administration.

**Citizen Participation:** Influence of citizens and the civil society on the design, performance and control of public policies.

**Planning:** Importance given by the State to programming the contracts of government administration. The period starts from the detection of the need to be met and ends when the bidding terms start to be drawn up.

**Transparency:** Executive Order 1023/01, Section 9. All stages of public contracting shall be carried out within a transparent context that shall be based upon publicity and spreading of the activities that arise from the application hereof, the use of information technology to enhance efficiency during processes and facilitating society's access to the information related to the administration of the State as regards contracting and real participation of the community, which will enable society's control over public contracting.



## **Poder Ciudadano is a member of the following international networks**

Transparency International (TI) is the only global non-partisan, non-governmental organisation leading the fight against corruption. It brings civil society, the private sector and governments in a broad worldwide coalition. Through its national chapters and its International Secretariat, TI tackles the different sides of corruption, both inside the countries and in within the framework of economic, commercial and political international relations. TI's goal is to understand and address both sides of corruption: the corrupt and the ones permitting corruption. Furthermore, TI's national chapters endeavour to enhance transparency and realisation of the reporting principle. For that purpose, TI watches the performance of some key entities and exerts pressure on the non-partisan adoption of necessary reforms.

[www.transparency.org](http://www.transparency.org)



In 1994, large sectors of the inter-American civil society started the creation of a network with the purpose of promoting citizen participation, complementing and going along with the democratisation of Latin America. At the same time, the governments of the hemisphere, within the framework of the Summit of the Americas, appealed for preserving and strengthening the democracies of the continent through economic prosperity, democracy and human rights. Thus, in 1995, Red Interamericana para la Democracia (RID) was founded. The six founders were: Partners of America (United States); Asociación Conciencia y Fundación Poder Ciudadano (Argentina); Corporación Participa (Chile); Instituto de Investigación y Autoformación Política (Guatemala) and the Political Science Department of Universidad de los Andes (Colombia). Since then, the RID turned into the hemisphere's largest civil organisation network; it has more than 250 members in 24 countries promoting citizen participation in the region by means of cooperation, training and spreading of information.

[www.redinter.org](http://www.redinter.org)

Acuerdo de Lima is a Network of Civic Movements of Latin America and the Caribbean, created on September 15, 2000 in Lima, Peru, by a group of civil society organisations from different countries in the region, committed to strengthening democracy, and which agreed to come together to promote the exchange of experiences, offer a mutual support system for political and technical electoral matters and develop joint activities and projects.

[www.acuerdodelima.org](http://www.acuerdodelima.org)



**THE  
INTERNATIONAL  
BUDGET  
PROJECT**

The International Budget Project – IBP – of the Center on Budget and Political Priorities (CBPP) helps non-governmental organisations (NGOs) and researchers with their endeavours to analyse budgeting policies and enhance budgeting processes and entities. The project is specially interested in helping with applied research relevant for the current political debates, and with the investigation of the effects of budgeting policies in marginal and impoverished sectors. The ultimate goal of the project is to cause budgeting systems to respond more efficiently to the needs of society and, therefore, be more transparent and responsible towards the public.

[www.internationalbudget.org](http://www.internationalbudget.org)



Fundación AVINA is a network of civil society and business leaders that encourages initiatives for Latin America's sustainable development. Sustainable development is a feasible option for improved human dignity, through which current needs are met reconciling them with the needs of future generations. AVINA seeks to link leaders of civil society with those of the private sector, because when they work together they achieve long-term solutions for their communities.

[www.avina.net](http://www.avina.net)



Justice Studies Center of the Americas (JSCA) is an autonomous intergovernmental entity whose mission is to support the countries in the region in their processes of judicial reform. Its headquarters are in Santiago de Chile and its members are all the active members of the Organization of American States (OAS). It was founded in 1999, through a resolution of the General Assembly of the OAS, in compliance with the mandates that focused on the necessity to strengthen the judicial system and justice administration as a pivotal issue for governance and economic development.

[www.cejamericas.org](http://www.cejamericas.org)



Red Puentes is an international alliance of civil society organisations committed to Business Social Responsibility and supported by Agencia de Cooperación al Desarrollo, NOVIB and public funds of Holland. Its mission is to contribute to developing and strengthening of the BSR from the civil society approach. This alliance comprises 21 organisations of 5 countries: Argentina, Brazil, Chile, Holland and Mexico. In Argentina, it was originally made up by SES, El Otro and Geos, and in 2004 Fundación de Ambiente y Recursos Humanos (FARN) and Poder Ciudadano were introduced into the network. [www.redpuentes.org](http://www.redpuentes.org)

### **Talleres Gráficos Manchita**

Poder Ciudadano chooses to work with Talleres Gráficos Manchita, a member of Fundación Pelota de Trapo. For more than thirty years, in the districts of Avellaneda and Florencio Varela, this foundation carries out a series of programmes aimed at children and young people living in poverty and abandonment. For Pelota de Trapo work also means education, cultural development, joy to live, self-esteem. The printing house is at the same time a school where they learn printing skills and produce excellent printed material.

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## List of publications by Poder Ciudadano (1989-2006)

- *Revista Poder Ciudadano*. Our own monthly magazine (March – December), from 1991 to 1997. (there are single issues).
- *Control de la corrupción. ¿Qué puede hacerse?* Forums of Citizen Interest. 1992.
- *Los ciudadanos y sus representantes. ¿Cómo mejorar una relación deteriorada?* Forums of Citizen Interest. 1993.
- *Banco de Datos de políticos argentinos 2*. 1995.
- *Cuando el poder perdió el juicio. Cómo explicar el “Proceso” a nuestros hijos*. Luis Moreno Ocampo, Buenos Aires, Planeta, 1996.
- *Nuevas herramientas para la acción ciudadana en defensa de los derechos del medio ambiente*. Citizen Participation and Control Programme, 1997.
- *Herramientas de acción ciudadana para la defensa de los derechos de la mujer*. Citizen Participation and Control Programme, 1997.
- *La copia y la coima: Cómo cambiar un estilo*. Buenos Aires, Editorial Troquel, 1997.
- *Acciones de fiscalización y control ciudadano de la gestión pública*. Network for Democracy of Latin America and the Caribbean, 1998.
- *Aulas sin fronteras: Experiencias educativas innovadoras que promueven la participación y mejoran la convivencia*. Oscar Rasori et. al., Buenos Aires, Grupo Editor Aiqué, 1999.
- *Banco de Datos de legisladores de la Ciudad de Buenos Aires*, 2000.
- *Día Internacional: Experiencias exitosas en el campo del presupuesto participativo*. Buenos Aires, 2002. Printed by Manchita. (Available also in digital format).
- *Presupuesto Participativo. La experiencia de Poder Ciudadano 2001-2003*. Buenos Aires, 2003.
- *Manual sobre el monitoreo cívico del Consejo de la Magistratura*. Printed by Manchita, 2003.
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- *Índice Latinoamericano de Transparencia Presupuestaria. La experiencia de diez países*, 2003: informe de Argentina.
- *¿Quién es quién? Banco de Datos de candidatos presidenciales, 1995, 1999, 2003*.
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- *Primer diagnóstico de independencia judicial*, 2003.
- CD card del *Monitoreo de la cobertura de medios*, 2003.
- *Procedimientos consultivos para la adquisición de textos académicos*. Ministerio de Educación, Ciencia y Tecnología - Fundación Poder Ciudadano. Capítulo Argentino de Transparencia Internacional, enviado para la publicación en “Caja de Herramientas para el control ciudadano de la Corrupción” de Transparencia Internacional, 2004.
- *Sociedad civil y presupuesto participativo. La experiencia argentina*. Foro Internacional sobre Presupuesto Participativo, Congreso de la República de Perú, Lima, Perú, 2004.

- *Manual de incidencia del Foro del Sector Social.*
- *Manual de acción colectiva por la justicia. Derecho de interés público, 2004.*
- *Manual de monitoreo de medios en períodos electorales.* Buenos Aires, La Crujía Ediciones, 2004.
- *Manual de periodismo Social. Para que nuestra información sea noticia.* Infocívica, 2004.
- *Monitoreo cívico del gasto en propaganda política. Manual para ONG.* Impreso por Manchita, 2004.
- *El Congreso bajo la lupa 2004.* Printed by Manchita, March 2005.
- *¿Cómo monitorear instituciones legislativas? Propuestas para la ciudadanía y las organizaciones de la sociedad civil.* Printed by Manchita, June 2005.
- *Herramientas para la participación ciudadana.* Printed by Manchita, September 2005.
- *El congreso bajo la lupa 2005.* Printed by Manchita, March 2006.

<sup>i</sup>This publication has been prepared by Fundación Poder Ciudadano and shows the results of its field research. The findings and conclusions are the exclusive responsibility of the authors and not the sponsors.

<sup>1</sup> The integrity pact is a tool offered by Transparency International and developed by Poder Ciudadano as the Argentinean chapter of this organization.

<sup>2</sup> The terms “purchase” and “contracting” will also be used interchangeably.

<sup>3</sup> For the purposes of this work we will use the terms “planning” and “programming” interchangeably. Furthermore, due to its characteristics, this is the only stage that will be analysed in particular, as well as the rest of the variables (see *Methodological aspects*).

<sup>4</sup> Executive order 1023/01, Section 6. PLANNING OF PROCUREMENT CONTRACTS. Each jurisdiction or entity shall frame their plan of procurement contracts subject to their activities and the credit granted pursuant to the Budget Act of the National Public Administration.

(Section replaced by Executive Order 666/2003, Section 3. Validity: from the day following publication date in the Official Gazette, and shall be applicable to contracting processes that, despite its previous authorisation, have not been called for yet).

*Executive Order 436/00*. Section 4 — PLANNING OF PROCUREMENT CONTRACTS. Each performing programmes and projects unit shall frame its plan of procurement contracts subject to its activities. When said activities, trading conditions or other circumstances require so, said planning shall be framed for periods longer than ONE (1) year. However, planning and performance shall be in keeping with the credit granted under the Budget Act of the National Public Administration.

<sup>5</sup> Periods when the administrative file does not move on to the following stages because certain steps hinder swiftness. For example, a document awaits the signature of a civil servant.

<sup>6</sup> Executive Order 1023/01: Section 3 — GENERAL PRINCIPLES. *The procurement process shall be governed by the following general principles, taking into account the characteristics thereof:*

a) *Reasonable projects and efficiency of contracting in order to satisfy public interest and the result expected*

b) *Promote **attendance** of interested parties and competition between bidders.*

c) *Transparency during procedures.*

d) *Publicise and communicate proceedings.*

e) *Accountability of the agents and civil servants who authorise, approve or manage procurement contracts.*

f) *The interested parties and the bidders shall be treated equally.*

*From the beginning of the proceedings until the completion of the performance of the contract, all procurement-related matters shall be construed in strict observance of the above-mentioned principles. (Highlighted by us).*

<sup>7</sup> Executive Order 436/00: Section 37 — METHODS. *Selection processes included in these Rules may be carried out following the below-mentioned methods, or combinations thereof, unless otherwise provided for [...] e) Consolidated.*

*Section 42 — CONSOLIDATED CONTRACTING. Consolidated contracts may be entered into when TWO (2) or more public entities as mentioned in Section 1 hereof require the same services. In this case, the contracting process shall be unified in order to obtain better conditions than individually.*

<sup>8</sup> Political pressure on the judiciary will be dealt with in *Control*.

<sup>9</sup> Consultancy services of good and service procurement will also be dealt with in *Discretionary powers*.

<sup>10</sup> Executive order 1295/02 provides for the methodology of price adjustment in public work contracts.

<sup>11</sup> In opposition, regulated powers are those whereby the rules do not allow the civil servant to chose between several options and set forth in advance how to proceed.

<sup>12</sup> Sometimes, it is necessary to deduce *what ought to be* in connection to this variable in opposition to what experts consider a vulnerability.

<sup>13</sup> Strictly speaking, all decisions taken by the National Public Administration must be supported. Section 7 Administrative Procedure Act No. 19.549 (“LNPA”), subsection e). The following are essential requirements of the act of public administration:

e) it shall be well founded; the reasons for the act shall be expressed clearly, as well as the precautions set forth in subsection b) hereof.

<sup>14</sup> Executive Order 1023/01, section 25, subsection. d) DIRECT CONTRACTING. Selection through direct contracting shall occur in the following cases:

1. *When, under the rules, no other selection process could be followed and the assumed amount of the contract does not exceed the maximum set forth in the regulations. (Pursuant to Executive Order 436/00, the maximum is 75.000).*

2. *Scientific, technical or artistic works that must be performed or acquired by a specific and sole company, person or artist. The need to require the services of that specific person shall be accounted for. These contracting processes shall provide for the own and exclusive liability of the contractor, who shall under no circumstances be an employee of the State.*

3. *Contracts of procurement of goods and services that are sold or rendered exclusively by persons authorised to do so or that are held by only one specific person, as long as there are no convenient substitutes. When the contracting process is governed by these provisions, the proof of said exclusivity shall be included accordingly in the proceedings in the form of a technical report. In the case of goods, the exclusive manufacturer shall submit the documentation that proves the exclusivity of sale of the goods manufactured.*

*The brand name itself does not imply grounds for exclusivity, unless evidence is found for the inexistence of appropriate substitutes.*

4. *When the bidding process has no bidders or fails, a second calling shall be performed, with changes in the Bidding Terms and Special Conditions. Should this bidding process also fail, the process for direct contracting set forth herein may be carried out. (Section replaced by section 6 of Executive Order 666/2003 (“Decreto N° 666/2003 B.O.”) of March 25, 2003. Valid from the day*

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next to publication date in the Official Gazette, and it shall be applicable to contracting processes that, despite its previous authorisation, have not been called for yet).

5. When well-founded emergency or time reasons created by objective circumstances prevent any other selection process in due time, which shall be duly evidenced in the proceedings, and shall be approved by the chief authority of each jurisdiction or entity.

6. When, through extraordinary and non transferable powers, the NATIONAL EXECUTIVE POWER declares the contracting operation secret for security or national defence reasons.

7. In the case of machines, vehicles, equipment or engines to be repaired, and the previous dismantling, transportation or examination thereof would be more expensive if another contracting process was carried out. Direct contracting shall not be used in the case of ordinary maintenance repair of said items.

8. Contracts entered into between the jurisdictions or entities of the NATIONAL STATE or by the latter and provincial, municipal bodies or the Administration of the City of Buenos Aires, and partially government-owned companies or corporations, as long as the subject-matter of the contract is security, logistics or health services. In these cases, it is expressly forbidden to sign sub-contracts for the subject-matter of the contracts. (Section introduced by section 1 of Executive Order 204/2004 of February 23, 2004. Valid from the day next to the date of publication in the Official Gazette, applicable to contracting processes authorised from that date on.)

9. Contracts entered into between jurisdictions and entities of the NATIONAL STATE and National Universities. Valid from the day following the date of publication in the Official Gazette, applicable to contracting processes authorised from that date on. (Section introduced by section 1 of Executive Order 204/2004 of February 23, 2004. Valid from the day next to the date of publication in the Official Gazette, applicable to contracting processes authorised from that date on.)

10. Contracts that, after the preparation of a report from the MINISTRY OF SOCIAL DEVELOPMENT, are signed with individuals or artificial persons registered with the National Registry of Local Development and Social Economy, with or without state financing. Valid from the day next to the date of publication in the Official Gazette, applicable to contracting processes authorised from that date on. (Section introduced by section 1 of Executive Order 204/2004 of February 23, 2004. Valid from the day next to the date of publication in the Official Gazette, applicable to contracting processes authorised from that date on). (Paragraph repealed by Executive Order of February 23, 2003, that abrogates Executive Order 2508/2002.)

<sup>15</sup> Although Argentinean legislation does not have a national law that governs the exercise of the right to public information, this right is guaranteed by the National Constitution in several international treaties. Section 75, sub-section 22 of the Constitution grants constitutional hierarchy to international treaties that deal with this right clearly (Universal Declaration of Human Rights, Section 19, American Convention on Human Rights, Section 13, sub-section 1; International Covenant on Civil and Political Rights).

In the field of the National Executive Power, access to information is governed by Executive Order 1172/03, named "Better Quality of Democracy and its Institutions", especially through the general Regulations on Access to Public Information (see [www.poderciudadano.org](http://www.poderciudadano.org)).

<sup>16</sup> Act 24.156, published in the Official Gazette on October 29, 1992.

<sup>17</sup> Law on the Financial Administration and Control Systems of the National Public Sector. Drawing commission for the institutional texts and comments of Title VI, "The Internal Control System of Act 24.156", created in resolutions No. 25/02-SGN and 41/02-SGN, pages 19/20. Prepared under the supervision of the National General Syndic, Mr. Julio R. Comadira.

<sup>18</sup> Section 9 of Executive Order 1023/01 (see Glossary).

<sup>19</sup> Executive Order 1023/01, section 8: OBJECTIONS TO THE BIDDING TERMS PROJECT. **For complexity reasons and at the discretion of the authorities, the call for bids shall consider a period before the publication of the call, for interested parties to raise objections to the bidding terms project** as set forth by the law (emboldened by us).

Executive Order 436/00, Section 10 provides: **PUBLICITY AND SPREADING OF THE BIDDING TERMS PROJECT AND SPECIAL CONDITIONS. For complexity and amount reasons, a previous stage shall be started before the call to receive the objections to the bidding terms project and special conditions.** In those cases, the authorities shall order the publication of at least one (1) notice in the Official Gazette and at the same time on the official website of the NATIONAL CONTRACTING OFFICE, under the charge of the BUDGET SECRETARY of the TREASURER'S SECRETARY of the ECONOMY MINISTRY, pursuant to the provisions of Article II, Chapter One hereof.

Within three (3) days after publication in the Official Gazette, notices shall be served upon the associations of producers, manufacturers and businesses of the industry and upon the local associations through which interested parties may be notified. These notices may be served through any means and service shall be recorded in the file.

The notices and communications shall contain the information set forth herein in Section 17, sub-sections a), b), c) and e) and the deadline to raise objections to the bidding terms project (emboldened by us).

<sup>20</sup> However, it is possible to interpret that the rule allows for control after decision-taking but before the action is taken (it is a matter of interpretation of the Financial Administration Act).

<sup>21</sup> See Glossary and Executive Order 1023/01, section 3, sub-section c) and section 9, mentioned above.

<sup>22</sup> In the case of the IDB, contracts must even be approved internally by the National Congress, although at present they are approved by the President, in the course of the powers granted by Act 25.918.