Fighting bid rigging in the procurement of public works in Argentina

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Foreword

Robust public procurement policies aim to achieve value for money. Governments across the OECD are determined to design public procurement procedures that promote competition and reduce the risk of rigging bids. The Recommendation of the Council on Fighting Bid Rigging in Public Procurement and the Guidelines that this Recommendation includes are pioneering instruments that help countries in achieving those goals.

The OECD has been working closely with governments and public bodies to encourage and facilitate the implementation of the Recommendation and Guidelines. Against this background, Argentina sought the OECD´s support to improve the procurement practices and step up its fight against bid rigging in the public works sector. Public works are used to build and maintain public infrastructure, which is key to a country's economy and social well-being. Firms derive much of their competitive edge from their ability to use modern infrastructures, and society´s development depend on good infrastructure for citizens.

This review shows that the recently adopted competition regime in Argentina is in line with international good practices on effective cartel (and bid rigging) enforcement. The report contains recommendations to public procurement entities on, first, the design of tenders for public works, and, second, actions to improve detection of bid rigging. The first set of recommendations aim at preventing bid rigging through an optimal design of tender processes. The second set of recommendations aim at detecting bid rigging during and after the tender process, and alerting the competition authority on possible manipulations of the procurement process.

The implementation of the recommendations and the increased awareness of the negative impact of bid rigging, together with the effective enforcement of the competition law by Argentina's competition authority, will help Argentina fight bid rigging in public works and achieve better procurement outcomes. The benefits generated will profit Argentina´s taxpayers and the overall economy in the form of savings and better delivery of infrastructure projects.

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Abbreviations and acronyms

ADIFSE	Administración de Infraestructuras Ferroviarias Sociedad del Estado (Argentinian Rail Infrastructure Administration State Company)
AGCM	Autorità Garante della Concorrenza e del Mercato (Italian Authority for the Defence of Competition and the Market)
ANC	Autoridad Nacional de Competencia (National Competition Authority)
CADE	Conselho Administrativo de Defesa Econômica (Brazilian Administrative Council for Economic Defence)
CAMARCO	Cámara Argentina de la Construcción (Argentine Chamber of Construction)
CIBD	Certificate of independent bid determination
CIPPEC	Centro de Implementación de Políticas Públicas para la Equidad y el Crecimiento (Centre of Implementation of Public Policies for Fairness and Growth)
CNDC	Comisión Nacional de Defensa de la Competencia (National Commission for Protection of Competition)
CNMC	Comisión Nacional de los Mercados y la Competencia (Spanish National Authority for Markets and Competition)
COFECE	Comisión Federal de Competencia Económica (Mexican Competition Authority)
DNV	Dirección Nacional de Vialidad (National Directorate for Roads)
IMSS	Instituto Mexicano del Seguro Social (Mexican Social Security Institute)
INAP	Instituto Nacional de Administración Pública (National Institute of Public Administration)
LPA	Ley de Procedimientos Administrativos (Law of Administrative Procedures)
OA	Oficina Anticorrupción (Anti-Corruption Office)
ONC	Oficina Nacional de Contrataciones (National Contracting Office)
SFP	Secretaria de la Función Pública (Mexican Ministry of Public Administration)
SIC	Superintendencia de Industria y Comercio (Colombian Superintendence of Industry and Commerce)
SIGEN	Sindicatura General de la Nación (General Office of the Comptroller)
SIGO	Sistema Informático de Gestión de Obra (Electronic System of Works Management)
UIA	Union Industrial Argentina (Argentinian Industrial Association)
UET	Unidad de Ética y Transparencia (Ethics and Transparency Unit)
UIA	Unidad de Auditoría Interna (Internal Auditing Unit)
UTE	Unión transitoria de empresas (temporary association of companies)

Executive summary

In 2017, the National Commission for Protection of Competition (Comisión Nacional de Defensa de la Competencia, CNDC) and the OECD agreed that the organisation would conduct a review of Argentina's procurement of public works at the federal level using the OECD Recommendation and Guidelines on Fighting Bid Rigging in Public Procurement.

Public works are used to build and maintain infrastructure and are key to the growth, productivity and development of a country's economy. Procurement of public works is particularly challenging because of its magnitude, budget implications and technical complexity.

Argentina spends a significant portion of public resources on contracting public works: ARS 232 billion were budgeted for 2018, 40% of which was allocated to transport infrastructure; ARS 215 billion are budgeted for 2019.

The report contains recommendations to align Argentinian federal public-works procurement regulations and several related procurement practices with the OECD Recommendation and Guidelines on Fighting Bid Rigging in Public Procurement.

Key recommendations include:

Designing procurement procedures based upon appropriate information

- Entities procuring public works in Argentina should base their tender design on sound market intelligence.
- Entities procuring public works should communicate and exchange information that is relevant to the design of tenders and the execution of contracts.

Maximise participation of genuine competing bidders

- Argentina should undertake a reform of the National Registry of Constructors, including creating an electronic version of the Registry interoperable with contrat.ar; ensuring that registry data are easily accessed by procuring entities; and establishing transparent decision-making for companies' registration and certification. The National Contracting Agency Office (Oficina Nacional de Contrataciones, ONC) is developing new regulations for the registry that should take into consideration the issues identified in this report.
- Contracting bodies in Argentina currently follow divergent approaches on tender processes and requirements. Standardised procurement procedures for public works should be put in place for all contracting entities.
- Argentina should set clear criteria to assist procurement officials determine the pro-competitive nature of joint bids and subcontracts.

Improve tender terms and contract-award criteria

- Argentina should limit as much as possible the awarding of contracts that are not fully defined, for example, awards on the basis of provisional technical specifications and budget.
- Argentina should consider defining tender specifications in terms of functional, performance-based requirements, if market research identifies it as a suitable solution.
- Argentina should use value for money, and not price-only, as a contract-award criteria for public works, as such a criterion can reward innovation and cost-cutting measures.
- Argentina should adopt clear regulations limiting the ability of the public administration and a contractor to modify public works contracts once they have been awarded.

Transparency, disclosure and integrity in submitting bids

- Argentina should avoid publishing information about the identity of bidders and the total price and prices per item of offers during the tender process and for a period of time after the contract has been awarded. The winning bidder would still be announced.
- Argentina should adopt regulation on the treatment of abnormally low prices to limit the risks that they may entail without discouraging genuine competitive prices.
- Argentina should promote the submission of a certificate of independent bid determination for all public tenders.

Raising awareness of the risks of bid rigging

- Argentina should develop and implement a comprehensive, long-term programme of capacity building for procurement officials on public procurement and fighting bid rigging.

Detecting and punishing collusive agreements

- Argentina should establish anonymous and confidential procedures to report suspicions of bid rigging.
- Argentina should consider developing a bid-rigging screening tool.
- Argentina should create a register of companies convicted for having infringed competition law.

Part I. Introduction and overview

1. Introduction and scope of the project

1.1. OECD's work on fighting bid rigging

Bid rigging is a form of collusion: businesses that should be genuinely competing to win a contract secretly conspire to raise prices or lower the quality of offered goods or services during a bidding process.

Studies show that bid rigging in public procurement can increase prices by 20% (Smuda, 2015[1]). This percentage can be even higher in certain cases. For example, the Mexican Competition Authority (Comisión Federal de Competencia Económica, COFECE) calculated that during the period 2003-2006, the Mexican Social Security Institute (Instituto Mexicano del Seguro Social, IMSS) overpaid by 57.6% for insulin as a result of collusive practices in the pharmaceutical sector.[1] Every year across the world, bid rigging costs taxpayers billions of dollars, damages the outcomes and integrity of public procurement procedures, and has a negative impact on public services and national economies.

Prevention and detection of bid rigging in public procurement are crucial to ensuring that procedures are competitive, and that the public sector has genuine opportunities to achieve value for money.

The importance of fighting bid rigging in public procurement is such that in 2009, the OECD developed Guidelines for Fighting Bid Rigging in Public Procurement ("Guidelines") (OECD, 2009[2]), and then, in 2012, a Recommendation ("Recommendation") (OECD, 2012[3]), which calls on governments to assess their public-procurement laws and practices – at all levels of government – in order to promote more effective procurement and reduce the risk of bid rigging in public tenders.

Based on good international practices, the Guidelines offer non-binding advice to public institutions on how to reduce the risk of bid rigging through effective tender design, as well as how to detect collusive practices during the tender process. They identify a number of market characteristics that can facilitate bid-rigging schemes, and include two checklists. The first, whose main objective is prevention, deals with the optimal design of tender processes to reduce the risk of bid rigging. The second includes advice on how to detect bid rigging during and after the tender process by identifying suspicious pricing patterns and bidder behaviour, as well as statements that should alert procurement officials to possible manipulation of the procurement process.

The Recommendation and Guidelines have become global reference documents, and have helped countries assess the pro-competitiveness of their procurement laws and implement improvements. They have served as the basis of many national strategies to fight bid rigging, and guidelines on pro-competitive tender design, as well as of advocacy and training programmes for public procurers on bid-rigging risks and tender design. They have also been used to develop bid-rigging detection tools (OECD, 2016[4]).

The OECD has supported various public entities in Mexico, Colombia, and now, Argentina in the process of reviewing their public-procurement regimes and practices and bringing them more in line with the Guidelines.[2]

1.2. Scope of the project

In late 2017, the Argentinian competition authority National Commission for Protection of Competition (Comisión Nacional de Defensa de la Competencia, CNDC) and the OECD agreed that the organisation would conduct a review of Argentina's procurement of public works at the federal level in light of the Guidelines. While previous OECD "fighting bid rigging" projects have looked at the public procurement of goods and services, this is the first time that the OECD has undertaken a competition review of procurement of public works.

Public works are used to build and maintain public infrastructure, which is one of the backbones of a country's productivity and inclusiveness. Firms derive much of their competitive edge from their ability to use modern infrastructures, and societies depend on good infrastructure to ensure equal opportunity and equal access to services for citizens (OECD, 2017[5]).

Procurement of public works is particularly challenging for the public administration because of the size and cost of the projects, their technical complexity, and the multiplicity of stakeholders involved in the project cycle.

Argentina spends a significant portion of public resources on contracting public works: ARS 232 billion budgeted for 2018, 40% of which was allocated to transport infrastructure. ARS 215 billion are budgeted for 2019.[3]

It is timely and relevant for Argentina to undertake a project on the procurement of public works. This OECD review began in late 2017 and since summer 2018, public works have been the centre of media and public attention due to the investigation of the *cuadernos* case (see Section 9.1).

This report analyses the federal regulatory framework for the procurement of public works in Argentina and certain salient procurement practices followed by those public entities in charge of contracting the majority of the country's public works: the National Directorate for Roads (Dirección Nacional de Vialidad, DNV); the Ministry of Transport (Ministerio de Transporte); and the Ministry of Interior, Public Works and Housing (Ministerio del Interior, Obras Públicas y Vivienda).

The OECD conducted desk research and, in February 2018, sent a questionnaire to relevant stakeholders to seek information on: the procurement landscape; procurement planning; tender design and how tenders are conducted in practice; monitoring of procurement procedures; competition guidance on procurement and competition training of procurement officials; bid-rigging reporting mechanisms and enforcement against bid rigging. The following stakeholders replied to the questionnaire: DNV, CNDC, the National Contracting Office (Oficina Nacional de Contrataciones, ONC), the Anti-Corruption Office (Oficina Anticorrupción, OA), the Embassy of Brazil, and law firms (Estudio Ymaz; Marval, O'Farrell Mairal; Bomchil; Beccar Varela).

The OECD interviewed stakeholders representing public-sector buyers, private-sector advisors, policy bodies and civil-society actors, in a six-day fact-finding mission between 20 and 28 September 2018. Further interviews were conducted on 12 December 2018. Interviewed stakeholders were: CNDC; the Ministry of Transport; the Ministry of the

Interior, Public Works, and Housing; DNV; the Argentine Rail Infrastructure (Administración de Infrastructuras Ferroviarias Sociedad del Estado, ADIFSE); ONC; OA; federal judges and prosecutors; the Argentine Chamber of Construction (Cámara Argentina de la Construcción, CAMARCO); General Office of the Comptroller (Sindicatura General de la Nación, SIGEN); the Argentinian Industrial Association (Union Industrial Argentina, UIA); the World Bank; Centre for Implementation of Public Policies for Fairness and Growth (Centro de Implementación de Políticas Públicas para la Equidad y el Crecimiento, CIPPEC); the Secretary of Institutional Strengthening (Secretaría de Fortalecimiento Institucional); Deputy of the City of Buenos Aires Hernan Reyes; law firms Estudio Ymaz, Marval, O'Farrell Mairal, and Bomchil; economic consultant Marcelo Celani; and academic Mario Rejtman Farah.

In December 2018 and March 2019, the OECD and the CNDC, with the participation of international experts from Spain, Brazil, Italy and Mexico, organised four workshops on fighting bid rigging for CNDC and procurement officials. The workshops were based on the Recommendation and the Guidelines and aimed to train an audience of, mostly, non-competition experts on the costs and risks of bid rigging and to recommend good practices on: how to design tenders that minimise the risks of bid rigging; how to identify possible instances of bid rigging in the procurement process (red flags); and what to do when bid rigging is suspected.

The OECD also prepared training materials to support Argentina in building a regular training programme on fighting bid rigging (see Section 9.2).

The assessment in this report does not consider policy changes that would facilitate the fight against corruption in public works. Collusion and corruption are two distinct issues. Collusion is a horizontal relationship between bidders participating in public procurement and does not require the involvement of a procurement official. Corruption involves a vertical relationship between one or more bidders and one or more procurement officials, who may receive bribes or rewards in exchange for designing the procurement process or altering the outcome of the process to favour a particular firm. However, corruption and collusion sometimes happen at the same time and have a mutually reinforcing effect. Fighting bid rigging may, therefore, assist the fight against corruption by increasing competition and making corruption less likely to either happen or be undetected if it occurs.

Recommendations in this report need to be adopted flexibly and dynamically to be effective in the fight against bid rigging. No single recommendation is likely to be applicable to all tenders or in all cases. Bidders that have colluded in the past (or decide to do so in future) can be expected to react to policy changes and explore new, more inventive and secretive ways to collude. Market conditions will inevitably change over time and recommendations that are valid under certain circumstances may need to be revisited.

Public entities contracting public works should therefore be vigilant and adapt their procurement strategies and processes to new market situations and market players' behaviour. In order to do so, institutional knowledge of how to make procurement more competitive and avoid the risks of bid rigging is essential. To that end, the OECD training materials should be used over time to build procurement officials' capacity to fight bid rigging.

Although targeted at public works, certain recommendations in this report could be applicable or adapted to fit the procurement of goods and services.

2. Overview of procurement of public works in Argentina

This section provides an overview of the regulatory framework for the procurement of public works at federal level. It mentions those public and private entities with a governing or decisive role in the procurement process of public works (including the ONC, OA, CAMARCO, and SIGEN). Finally, it represents the entities in charge of contracting the majority of the public works in Argentina and some of their contracting practices.

2.1. Legal framework of procurement of public works

The main legislation governing public works at federal level in Argentina is Law 13.064 enacted in 1947 (Public Works Law).[4] Delegated Decree 1023/2001 regulates more operational aspects of the contracting procedure of public works (Contracting Regime Decree).[5] The recently adopted Decree 1169/2018 (Decree on the Governance of Public Works)[6], and Laws 18 875 and 27 437 (Laws on Compre Nacional and Compre Argentino)[7] on national preference procurement rules are also relevant.

The **Public Works Law** applies to public works funded by national funds (Fondos del Tesoro de la Nación, Article 1). Public works that are not financed by national funds are subject to provincial or municipal legal frameworks depending on the funds' origins. Argentina is composed of 23 provinces, the Autonomous City of Buenos Aires, and more than 2 100 municipalities, each with its own rules for public-works contracting. The Public Works Law is the backbone of the overall regulatory framework for public works at federal level and has inspired public-works regulations at provincial level.

Public works under the Public Works Law may only be contracted and executed by entities that have been formally designated by the executive branch following the adoption of a decree (Article 2). The Ministry of Interior, Public Works, and Housing is a formally designated entity that may in turn designate departments within the Ministry to contract and execute public works (Decree 283/2016). The Ministry of Transport is designated to contract and execute public works falling under its area of competence (Decree 375/2016).

The Public Works Law regulates the tender process for contracting public works and the execution of public-works contracts (see Section 3). However, the Public Works Law does not lay out the details of the tender process, which leaves contracting entities a level of discretion on how they conduct tenders. This report concludes that, in many cases, this has resulted in a fragmented landscape of public-works procurement, with tenders designed and run differently depending on the contracting entity.

The **Contracting Regime Decree** is not specific to the contracting of public works; it also regulates the contracting of goods and services. Its general provisions on transparency, corruption, e-procurement, selection procedures, and types of public tenders (Articles 1 to 28) are applicable to public works as long as they do not contradict the Public Works Law.

The Decree on the Governance of Public Works was adopted in December 2018 and introduces substantial changes to the public-works regime. The ONC became the governing body for the procurement of public works, and was entrusted with the task of creating a governance programme for public-works procurement, which will include an assessment of the current regime, the identification of areas for improvement, and proposals for procedural or regulatory modifications in line with international standards (Article 4). The Decree on the Governance of Public Works foresees debarment sanctions to bidders in public-works tenders that have violated competition law (previously only applicable to the procurement of goods and services).

The **Compre Nacional** and **Compre Argentino** laws regulate the public administration's obligation to purchase national products from national companies.[8]

2.2. Bodies involved in public works

According to Article 23 of the Contracting Regime Decree, the **ONC** is the governing body for procurement. It is part of the Ministry of Modernisation, and in charge of establishing the rules, systems and procedures governing procurement at federal level, offering capacity building to public officials and administering compra.ar,[9] the e-procurement system for goods and services, and contrat.ar,[10] a similar system for public works. The ONC does not conduct procurement processes, with the exception of certain framework agreements for goods and services. The ONC manages the National Registry of Providers (Registro Nacional de Proveedores del Estado), an electronic register interoperable with compra.ar that collects information about companies willing to sell goods or provide services to the public administration.

The ONC was initially created to oversee the procurement of goods and services only. Since December 2018, the ONC has also taken over the management of public works and control of the **National Registry of Constructors** (Registro Nacional de Constructores), previously under the supervision of the Ministry of Interior, Public Works, and Housing.[11]

The **OA**[12] is Argentina's anti-corruption body, and develops programmes to prevent corruption and promote transparency in public procurement. It is also in charge of handling corruption complaints from third parties and investigating acts of corruption, including conflicts of interest or other infringements of the Ethics Law.[13] The OA may also initiate criminal complaints for crimes against the public administration.

SIGEN was established in 1992[14] and is the internal auditing body of the executive branch. It co-ordinates internal control systems at national level and a network of Internal Auditing Units (Unidades de Auditoría Interna, UIA) within different entities of the government; develops rules for internal controls and internal auditing; and ensures compliance with technical standards. Procurement projects are subject to the supervision of the UIA, which act in co-ordination with the SIGEN. Each UIA reports directly to the SIGEN and to the higher authority inside its agency when there is a lack of compliance.

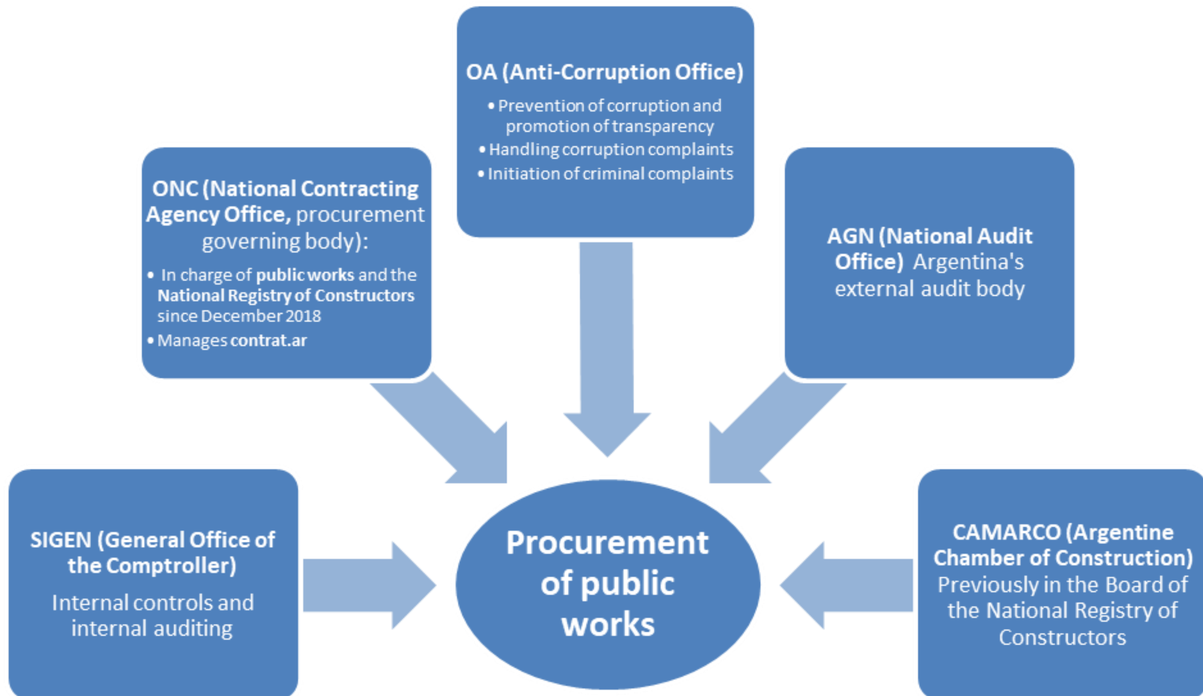
SIGEN can only control procurement procedures after they have been held, though in practice it tries to correct irregularities during the tender processes. During the OECD fact-finding mission, SIGEN reported that public works are a priority in 2019.

The **National Audit Office** (Auditoria General de la Nación, **AGN**) is the country's external auditing body. Under parliamentary control and overseen by a bi-cameral commission, it has autonomy and full discretion to undertake audits. In the past, it has audited infrastructure projects, including road, energy and water projects.

CAMARCO, the construction industry's chamber of commerce, represents construction companies in Argentina. Created in 1936, it has over 1 300 partner companies and branches in every province. It sits as a member on a number of public-works commissions on which the public administration also sits, such as the Commission for Recalculating Prices of Public Works (Comisión de Control y Seguimiento del Régimen de Redeterminación de Precios de Contratos de Obra Pública y de Consultoría de Obra Pública), the Co-ordination Commission of Public Works in the Ministry of Interior (Comisión de Concertación y Coordinación Operativa de la Obra Pública y Vivienda Federal) and the Follow-up Commission of Public Works in the Ministry of Transport (Comisión de Seguimiento

Operativo de la Obra Pública de Transporte).[15] CAMARCO has also played a crucial role in the management of the National Registry of Constructors, and is a member of its board.[16]

Figure 2.1. Bodies involved in public works



2.3. Ministries in charge of public works

At ministerial level, two ministries tender and execute most of the public works: the **Ministry of Transport** and the **Ministry of the Interior, Public Works, and Housing**. **DNV**, a decentralised agency of the Ministry of Transport dealing with the construction of national roads, is also a significant procurer of public works in Argentina. The present report reviews the public-works procurement practices at these entities.

The **Ministry of Transport** is in charge of the national policy on air, rail, automotive, river and maritime transport.[17] Public works run by the Ministry of Transport are tendered and executed by the Secretariat of Transport Works (Secretaría de Obras de Transporte), the Undersecretariat of Contracting and Execution of Works (Subsecretaría de Contratación y Ejecución de Obras de Transporte) and the Undersecretariat of Supervision and Control of Works (Subsecretaría de Supervisión y Control). Over the past few years, the Ministry of Transport has conducted a certain number of procurements for public works. They included storm-drain infrastructure and urban-transportation systems in various Argentine cities, as well as works in ports and airports.

The **DNV** has its own budget and is in charge of the execution, maintenance and conservation of national roads and highways. In 2016, the internal Ethics and Transparency Unit (Unidad de Etica y Transparencia, UET) was created within the DNV. This unit, the result of a co-operation agreement between the OA and the DNV, reports to the General

Administration of the DNV – its highest authority – and is co-ordinated by the OA. The UET has three functions:

Ensure that processes are in line with public policies on integrity, ethics, transparency and prevention of corruption, and if necessary, conduct investigations. The unit has a special complaints line for corruption practices within the DNV.

Provide concrete advice on technical issues and opinions on cases related to problems of integrity and transparency.

Provide capacity building to employees and suggest reforms to practices and regulations.

The **Ministry of the Interior, Public Works and Housing** is in charge of public works and housing policy at the federal level.[18] The ministry is currently managing three national plans that include or relate to procurement: the National Plan of Architecture and Urban Renovation; the National Water Plan; and the National Housing Plan. The departments inside the ministry that conduct public works are:

1) Secretariat of Infrastructure and Water Policy, which designs, co-ordinates and implements the National Water Plan.
2) Secretariat of Territorial Planning and Co-ordination of Public Works, which plans and designs public works for water infrastructure projects, sewers, storm drains and flood defences, and renovation of green spaces.
3) Undersecretariat of the Co-ordination of Federal Public Works, which is in charge of developing housing infrastructure projects. Until December 2018, it was in charge of the National Registry of Constructors.

3. Tender procedure for public works in Argentina

The public-works procurement regime in Argentina is not comprehensive. Neither the Public Works Law nor the Contracting Regime Decree regulates all aspects of the tendering and execution public works. Public entities in charge of procuring public works have regulated aspects of the bidding process by adopting their own general terms and conditions (*pliegos generales*). As a result, there are now approximately 30 different sets of general terms and conditions in Argentina and procurement practices can differ substantially from one public entity to another. The ONC was only appointed as a governing body for the procurement of public works in December 2018 and has not yet had time to adopt measures to streamline tender practices.

This section describes the tender process as regulated in the Public Works Law and the Contracting Regime Decree and, where relevant, the procurement practices adopted by the Ministry of Transport, the Ministry of Interior, Public Works and Housing and the DNV.

When public entities run tenders and execute public-works contracts, a certain number of steps must be undertaken on contrat.ar, the e-procurement platform for public works set up and maintained by the ONC. The obligation to use contrat.ar was introduced gradually during 2017,[19] and by spring 2019, most public entities conducting tenders and executing public works contracts were using the system. Companies must be registered in contract.ar to bid for public works. The registration procedure is simple, consisting of electronically submitting a security-level-three tax identification.[20]

In general, all procurement processes can be broken down into three distinct stages: 1) pre-tender; 2) tender, including the tender award; and 3) post-award.

3.1. The pre-tender phase

3.1.1. Programming the tender

The pre-tender phase is used to define the characteristics and parameters of the procurement process: from establishing the entity's needs to deciding the most appropriate tender methods.

According to Article 6 of the Contracting Regime Decree, each public entity in Argentina plans its own public works by developing a **contracting programme** adapted to its activities and to the resources assigned to it in the National Budget Law.

Based upon this programme, each entity then develops a works-specific **project** (a pre-tender document), which contains the estimated budget, the general tender terms (*pliegos de bases y condiciones generales*), the specifications for the particular works (*pliegos de bases y condiciones particulares*) and the contract's terms of execution. The contracting entity is under no obligation to conduct market research, though it can do so.

For complex or big-budget contracts, the Contracting Regime Decree provides that the draft tender terms may be published for consultation with the market before the publication of the call for tenders. In these cases, market players have the opportunity to comment on the draft of the tender before the tender is launched.

3.1.2. Types of procurement procedure

The procurement procedures available to contract public works are:

1) public tenders (open to any interested candidate)
2) private tenders (in which only selected bidders are invited to participate, but offers from other bidders are also considered)
3) direct contract awards to a specific supplier.

In general, the Public Works Law requires the use of public tenders. The law establishes that private tenders and direct awards may only be used under certain conditions, such as:[21]

1) when the value of the contract is below the limit fixed by the executive[22]
2) in emergency cases in which there is no time to organise a public tender
3) when the contract is for unforeseen extra work indispensable to work already in progress
4) public works affecting national security.

Data contained in contrat.ar show that public tenders have been widely used for procuring public works since January 2017. Only 1 out of the 55 contracting processes for public works registered in the e-procurement system until March 2019 has been awarded directly and none through private tenders.

The public tender may be organised in **a single or multiple phases**. In single-phase tender processes, the evaluation of bidders and the assessment of the bids are done at the same time. In multiple-phase processes, the evaluation of bidders, their business and technical backgrounds, financial capacities, guarantees and past performance, and the evaluation of

bids are carried out in two or more phases.[23] In general, the procurement for public works is conducted in two phases; a first phase during which technical aspects are evaluated and a second phase during which financial offers are considered.

Public entities can also determine whether their tenders will allow the participation of non-Argentine bidders. Tenders can be:[24]

1) **national**, allowing only participation of bidders with a registered legal address in Argentina
2) **international**, when the characteristics or the complexity of the works demand the participation of foreign bidders not registered in Argentina.

Tenders are generally national. International tenders need to be authorised by a justified resolution from the minister in charge.[25]

Tenders for public works may use different systems of price quotes.

1) **Unit measurement**
   The tender would specify the units required for the work and the estimated price per unit of each work item (i.e. part of the project). This allows the quantity of units to be calculated and readjusted in relation to the finished work.
2) **Lump sum**
   The bidder offers a total fixed amount for all the works necessary to complete the contract.
3) **Mixed flat rate and unit measurement**
   The offer indicates the total amount for the works and a detailed breakdown per item on the basis of unit prices.
4) **Cost based**
   In cases of justified emergency or convenience, the contracting entity will pay the costs actually incurred by the constructor, plus a percentage in terms of profit.

3.1.3. Contract award criteria

Article 18 of the Public Works Law states that contracts are awarded to the "most convenient" bid (*propuesta más conveniente*) that complies with all the conditions for participation in the bidding process. Article 15 of the Contracting Regime Decree specifies that this means that the contract must be awarded to the "most convenient offer for the contracting body, taking into account the price, quality, suitability of the bidder and other conditions of the offer".

3.2. The tender phase

Article 10 of the Public Works Law establishes that a public tender starts with the **publication of the call for tenders** in the Official Gazette of Argentina and on the contracting entity's official website. Call for tenders are also published on contrat.ar. The deadline for tenders varies according to the work's estimated budget. Public entities may use longer deadlines, or shorter ones in cases of emergency.

The tender terms and documents necessary for the preparation of the bids, such as site maps, and budgets, are available for **consultation** on contrat.ar. Although not established in the Public Works Law or the Contracting Regime Decree, some general tender terms of public entities provide that during this consultation period, interested parties may ask for

clarifications regarding the tender terms and documents. The contracting authority will publish on contrat.ar all clarification requests and responses. At DNV, requests for clarification may be anonymous. Pursuant to Article 14 of the Public Works Law, once the consultation period is over, interested parties may **submit bids** and a guarantee (in cash, bank bond or insurance policy) of 1% of the work budget at the place and on the date indicated in the call for tender. The guarantee is returned after the contract award unless a bid was withdrawn during the tender process or the winning bidder refuses to sign the contract, in which cases the guarantee will be forfeited.

Bidders willing to submit a tender for public works should be registered in contrat.ar and the National Registry of Constructors. Bids are now submitted electronically in contrat.ar. Some tenders in contrat.ar allow bidders to submit some of the documents physically at the premises of the contracting entity.

Once submitted, bids are kept sealed until they are opened.[26] The **opening of bids** is a public act, and minutes of the event, which identify all bidders and the total amount of the individual offers, are published in contrat.ar.[27] For national-only tenders, only the bids submitted by companies registered in the National Registry of Constructors will be opened. This does not apply to international tenders as not all bidders will be registered in national registries. The Ministry of Interior, Public Works and Housing provides for a three-day **consultation phase** after the opening of bids. During this period, bids can be reviewed by other bidders and their defects can be challenged through available legal remedies.

The evaluation committee is in charge of **assessing bids.** If the lower offers are similar, the Ministry of Interior and DNV may provide for an additional phase in the process that allows those bidders to improve their bids. At the DNV, the bidder submitting the lowest offer and all bidders that submitted offers no more than 5% above the lowest bid are invited to make a new offer.

Some public entities' tender terms and conditions (notably, the Ministry of Transport and the Ministry of Interior, Public Works and Housing) provide that once the tender-evaluation committee has analysed all offers, it issues a **pre-award resolution**, which contains a recommendation on the winning bid. This decision may be appealed before the public administration. The contract-award decision can also be challenged before the public administration in the first instance and, thereafter, before the courts (see Sections 3.4 and 7.5).

Article 5 of the Decree on the Governance of Public Works adopted in December 2018 provides that bids may be excluded if there is a strong indication that bidders have co-ordinated their bids, or if within the three-year period before bidding, a company was sanctioned for infringements of competition law.

3.3. Post-award

The successful bidder submits a financial contract performance bond of 5% of the amount of the agreement. Contracting public entities monitor the execution of works and may impose sanctions if any delays are attributable to the contractor. The contracting entity holds the performance guarantee until the works have been definitively delivered. It may also terminate the contract under certain circumstances, such as fraud from the contractor or long delays in the execution or initiation of the works.

3.4. Appeals system

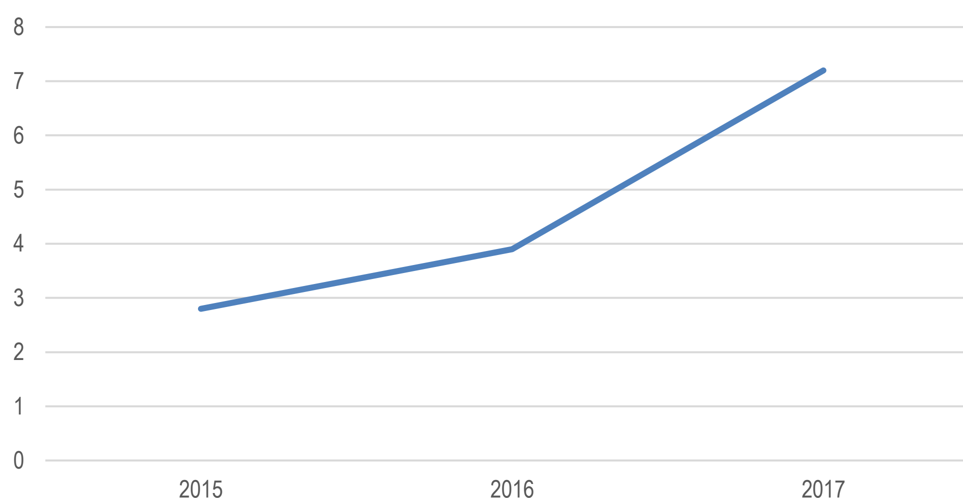
Bidders may challenge decisions issued during the tender process (such as the disqualification of their offer at the opening of bids or the pre-award decision) within specified time limits, through complaints (*impugnaciones*). The contract-award decision must deal with and decide on these complaints.

Specifically, the Law of Administrative Procedures 19 549 (Ley de Procedimientos Administrativos, LPA) and Decree 1759/92, which establishes the framework for the challenge of administrative acts (*recursos administrativos*), provides that administrative acts (the contract award is such an act) must be challenged, first, before the public administration, either before the entity that took the decision (*recurso de reconsideración*) or the entity's supervisor, i.e. a higher-level entity or person within the public administration (*recurso jerárquico*). If the administrative complaint is rejected, bidders may lodge a further appeal before the competent Minister or Secretary (*recurso de alzada*). After administrative complaints have been exhausted, bidders may challenge harmful decisions before the competent courts.

4. Anti-cartel enforcement and advocacy in Argentina

Competition law plays a major role in the prevention, detection and punishment of bid-rigging schemes. Competition-law enforcement became a political priority in Argentina with the change of the government in 2015 (OECD, 2017[6]). At that time, the structure of the CNDC, the Argentine competition authority, was reinforced with the appointment of new commissioners. CNDC's budget doubled from 2015 to 2017[28] and the authority has regained powers that had been transferred to the Secretary of Commerce in 2014. This process culminated with the adoption in 2018 of a new competition law (Greco, Quesada and Volujewicz, 2019[7]; OECD, 2017[6]).

Figure 4.1. The CNDC budget, 2015-2017 (USD, millions)



Source: OECD internal database on general competition statistics (OECD Compstat).

4.1. CNDC and its enforcement and advocacy actions

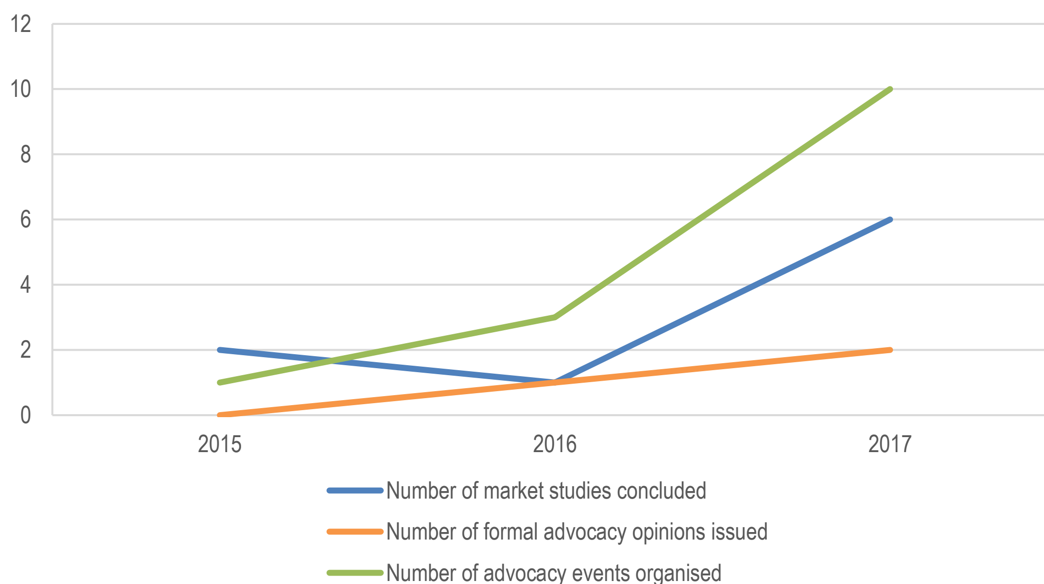
The CNDC was established in 1980 under the Secretary of Commerce of the Ministry of Production. The authority carries out investigations, and final competition enforcement decisions are taken by the Secretary of Commerce based on CNDC's recommendations. (OECD, 2006[8])

Since 2005, the CNDC has not conducted any bid-rigging investigation into public works, but has prosecuted two bid-rigging cases relating to the purchase of goods and services. The first, from 2005, concerned the purchase of liquid oxygen by hospitals in the city of Buenos Aires; the total amount of fines imposed was ARS 70.3 million.[29] In the second case, prosecuted in 2015, the CNDC imposed total fines ARS 20 million for a 2005-2007 bid rigging scheme around the purchase of medicinal gelatines by public hospitals (OECD, 2016[9]). On 16 April 2019, the Federal Court of Appeals in Civil and Commercial Matters annulled this last decision, as it considered that the breach had been prescribed.[30]

In addition to competition enforcement, the CNDC can carry out market studies and market investigations, organise advocacy events, and issue opinions (OECD, 2017[6]).

Since the creation of a competition-advocacy unit within CNDC in 2016, CNDC's advocacy activities have increased overall, as shown by Figure 4.2. As mentioned in Section 9.1, anti-bid-rigging advocacy efforts have focused on training procurement officials, giving occasional advice on the design of tenders, and the evaluation of public procurement regulation at provincial level.

Figure 4.2. CNDC advocacy initiatives 2015-2017



Source: OECD internal database on general competition statistics (OECD Compstat).The new competition law

In May 2018, a new competition law (the "2018 Competition Law") and implementing Decree (the "Implementing Competition Decree") were adopted.[31] The new competition regime brought Argentina closer to international good practices and supported effective enforcement against cartels (Rossi, 2018[10]).

The new regime requires the creation of a new independent national competition authority, the Autoridad Nacional de Competencia (ANC), comprising a decision-making body (the Competition Defence Tribunal with five members appointed through an open merit-based selection process); an investigatory body (the Anti-competitive Conduct Secretariat); and a merger unit (the Economic Concentrations Secretariat). Until the ANC is functional, the Secretary of Commerce of the Ministry of Production will be in charge of enforcing Argentina's new competition law with the technical assistance of the CNDC (Greco, Quesada and Volujewicz, 2019[7]).

The new law also introduced per se illegality for hardcore cartels (including bid rigging), identified by article 2 as "practices absolutely restrictive of competition" (Rossi, 2018[10]). Hardcore cartels are anticompetitive agreements or practices between competitors that aim to fix and raise prices, restrict supply and divide or share markets, thereby causing substantial economic harm (OECD, 2019[11]). As per se illegal, cartels may not be justified by efficiencies, and it is not required to prove actual or potential damage to condemn and impose sanctions against them, just that they have occurred. This reduces the evidentiary burden and makes it easier to secure a conviction in a hardcore cartel case (Whish, 2018[12]).

The previous competition regime dated from 1999 (the "1999 Competition Law") was partially modified in 2014.[32] It did not qualify bid rigging as a per se anti-competitive conduct and required proving damage to the "general economic interest" to prosecute the conduct and impose a sanction. There was no leniency programme (OECD, 2006[8]).

The introduction of the cartel leniency programme was among the most important achievements of the 2018 Competition Law. The Implementing Competition Decree establishes the basis of the programme, but gives the power to adopt the implementation process to the Competition Defence Tribunal. According to the law, the first cartel participant that applies for leniency and co-operates with the competition authority will obtain full immunity from financial penalties. The second applicant may benefit from a 20% to 50% fine reduction. Companies that provide additional evidence of a cartel in another market can obtain a supplementary reduction of the fine imposed for their infringement in the first market (so-called "leniency plus"). Although the process of implementation of the leniency programme has to be adopted by the new Competition Authority, a "temporary" procedure for leniency application has been adopted and companies can already benefit from the programme.

All beneficiaries of the leniency programme benefit from criminal immunity for competition violations. While Argentine competition law does not provide for criminal penalties, Article 300 of the Criminal Code states that price fixing is punishable with six months to two years in prison. So far, there have been no Article 300 cases.

To increase deterrence and strengthen competition enforcement, the 2018 Competition Law provided for larger financial penalties of up to 30% of the turnover for the relevant product during the previous fiscal year, multiplied by the duration of the infringement (up to a limit of 30% of the total turnover in Argentina of the economic group of the companies involved during the previous fiscal year), or up to double the illegal profit made by the company from its illegal conduct. If the sanction can be calculated using both methodologies, the highest fine will be imposed[33] (OECD, 2016[9]; Greco, Quesada and Volujewicz, 2019[7]).

The 2018 Competition Law provides that companies that have engaged in bid rigging can be suspended from the National Registry of Providers for a period of up to eight years, effectively stopping them from bidding for any public contracts during that period (Greco, Quesada and Volujewicz, 2019[7]). The competition authority may also disqualify

individuals who have engaged in anti-competitive conduct for a period of 1 to 10 years, a sanction also available under the previous competition regime. Leniency recipients are not exempted from these sanctions.

Other important changes brought by the 2018 Competition Law include the creation of a new court specialised in competition law within the Federal Court of Appeals in Civil and Commercial Matters (Cámara Nacional de Apelaciones en lo Civil y lo Comercial Federal). This addresses the previous lack of clarity regarding which court would act as an appellate body in antitrust issues (OECD, 2017[13]).

CNDC can conduct site inspections (dawn raids) of companies suspected of having infringed competition law, including bid rigging. According to Article 30 of the 2018 Competition Law, a raid may only be conducted if the targeted company agrees to it or a search warrant is issued by a court. So far, dawn raids, which are an extremely effective investigative tool, have been used in only a few cases. The perception is that they are difficult to carry out and resource consuming as well (Whish, 2018[12]).

Part II. How to align public works in Argentina with the OECD Recommendation and Guidelines on fighting bid rigging

5. Designing procurement procedures based upon appropriate information

The Public Works Law is not comprehensive about how tenders should be planned and designed. Contracting entities are not required to conduct market research. As explained in Section 3.1.1, the legal provisions only require public entities to develop a contracting programme based upon the resources assigned to them by the National Budget Law for the activities that they have to perform. For complex or very expensive contracts, Article 8 of the Contracting Regime Decree allows the publication of draft tender terms for consultation some time before the publication of the call for tenders.

Against this background, public entities have developed different methods of gathering information in order to plan and design their tenders. Often tenders are designed on the basis of historical internal information from previous tenders and executed works, as well as information in the National Registry of Constructors.

During the OECD fact-finding mission, the DNV reported that, to prepare tenders, it looks at local construction markets to avoid overloading them with work assignments, and aims to have a balanced geographic distribution of works. The DNV reported that it adjusts bidder admissibility requirements to increase participation. For example, DNV requires bidders to have previous experience of up to 70% (instead of 100%) in two similar projects. In minor projects, it has reduced the financial and capacity requirements. DNV reported to the OECD that these initiatives have had an impact on prices. The prices of bids opened during 2018 were 19% lower than the updated official budget.

Private-sector representatives told the OECD that many tender documents, across the public-works sector, suffer from technical deficiencies, leading to frequent modifications both before works begin and during their execution. Poorly designed projects create uncertainty, which discourages serious bidders from tendering, as they are not able to calculate their project costs and their return on investment accurately. In addition, technical defects in tender terms can and do, according to interviewed stakeholders, lead to contract extensions and price increases.

5.1. Build market intelligence

Market intelligence is information on the characteristics and behaviours of specific goods or services or sectors of economic activity. In procurement, that information helps identify cost-effective purchasing opportunities, develop strategies that meet buying needs, and design competitive tenders. Market intelligence has two aspects:

1) **internal**: understanding contracting needs;

2) **external**: understanding supply solutions and capacity, and identifying market trends, which is also referred to as market research or analysis (OECD, 2016[14]).

Internal market intelligence helps the procuring entity understand its needs and is key to informed decisions about tendering out work, and ensuring that the market analysis focuses on the correct industry sector.

External market research helps the procuring entity understand supply solutions and capacity, and, on this basis, design tenders that are technically accurate and can foster competitive bidding and reduce the likelihood of collusion among the bidders.

The types of decisions that benefit from internal and external market intelligence include technical specifications of works; budgets; whether the works should be grouped into a single or multiple lots; specific tender procedures – public tender, private tender or direct award – or quoting format, i.e. whether by unit measurement, flat rate, mixed or costs; and whether the tender should be national or international.

External market research should identify, at least:

1) contractors present in the market, new entrants or new potential entrants and their location, size, capabilities, available capacity, and previous performance
2) available construction materials and techniques (including the latest innovative solutions)
3) local conditions of supply and demand, which should inform the tender design, including the composition of lots or contract awards by geographical zones
4) international developments, such as innovative or different construction techniques implemented abroad;
5) market characteristics that could make bid rigging more or less likely, such as the presence of active industry chambers; levels of transparency in the bidding market; supplier numbers; and barriers to new entry.

The elements of external market analysis are detailed in Box 5.1.

The OECD recommends that public entities in charge of public works build market-intelligence capacity and, as part of it, run a thorough market investigation before designing their projects. This could be regulated by the Public Works Law or the Contracting Regime Decree, for more clarity and to stress the importance of market intelligence for planning public works and their procurement. A regulatory amendment concerning market analysis could require:

1) the allocation of appropriate resources and time
2) specifying the information that should be gathered and which sources are acceptable
3) a standard market-analysis procedure
4) dialogue between public entities procuring public works.

Box 5.1. Elements of supply-market analysis

Supply market analysis provides a **strategic understanding** of:

- How a market works
- The direction in which a market is heading, including technological developments
- The competitiveness of a market
- The capability, capacity and performance of a market
- Information on key suppliers, market shares and risks of collusion
- How markets can be developed better to meet customer requirements
- How pricing works in the market – i.e. its cost structures and recent price trends
- The market's risks are and how to prepare to mitigate them
- The probability, or not, of market failure.

The outputs of market analysis for tender procedures include:

- Planning and budgeting the procurement activity
- Designing tender documents that match public entities needs with suppliers' available solutions, including relevant and correct specifications, and evaluation and award criteria
- Choosing the correct procurement procedure and strategy, both in terms of how the market currently operates and its future in relation to new entrants or innovative technology
- Structuring public tenders to obtain healthy competitive bids
- Procuring without negatively affecting the supply base.

Key outcomes are:

- Improved value for money
- Identification and management of supply-related risks
- More and fairer opportunities for suppliers.

The benefits of supply-market analysis increase in proportion to the degree of business risk and expenditure on goods or services.

Source: (OECD, 2016[14]).

5.1.1. Allocate appropriate resources and time to market research

In view of the complexity and technical nature of public works, market analysis should be embedded in the procurement processes. It should be allocated sufficient time and undertaken by teams of public officials with suitable professional backgrounds and experience, who (on their own or as a team) understand both the requirements of the procuring units (and therefore know the "internal" demand market), as well as market conditions (and therefore know the "external" supply market).

A growing trend in OECD countries is to entrust market research to category managers who are familiar with specific products and certain sectors of economic activity. The Italian central purchasing body, Consip, appoints one category manager for each procurement (see

Box 5.5. This person also participates in all market-analysis research activities and meetings with suppliers (OECD, 2016[14]).

The OECD recommends either creating specialised market-analysis departments inside the contracting entities or ensuring that public procurers have sufficient resources and support to conduct market analysis through existing structures. Teams in charge of market research should be allocated the necessary budget, IT capabilities, and staff knowledgeable about market developments and innovations in materials and construction techniques.

In the case of the Ministry of Transport and the Ministry of Interior, Public Works and Housing, and assuming there is sufficient budget and organisational capacity, these units could be brand new.

In the case of the DNV, existing structures could be extended to cover market analysis. Since 2016, the DNV's Planning Unit has been in charge of planning its needs and establishing its priorities, by, for example, conducting "internal" demand research. This unit is dedicated exclusively to these tasks and is independent of those units running the tender process and executing the contract. This unit could also be devoted to conducting market analysis, and reinforced with adequate resources to conduct "external" supply research.

When creating a market-analysis unit, thought should be given as to whether market intelligence actions should be undertaken by an in-house team, an external advisor, or a combination of the two. It is common practice to hire external consultants to do specific parts of a market analysis, especially when public buyers lack the correct expertise (OECD, 2016[14]). External consultants should be recruited competitively and required to sign confidentiality agreements and to report any conflicts of interest (see Box 5.2).

Box 5.2. Use of external consultants at IMSS

The Mexican Social Security Institute (Instituto Mexicano del Seguro Social, IMSS) has used and continues to use external advisors at the market-analysis stage. Initially, external consultants took a prominent role in the performance of market research. As IMSS has improved its market-analysis expertise and built a specialised in-house market-analysis unit, external consultants tasks have been reduced to an advisory and support role during the process of auction design (such as the products and services that should be included in each auction, as well as the composition of lots).

Source: (OECD, 2018[15]).

5.1.2. Sources of information

In Argentina, historical internal tender information is often the main source for planning new tenders. The OECD was told that this data is hardly ever centralised and digitalised inside contracting entities. Since its creation, Contrat.ar has been the only complete repository of national procurement data, but it does not include information about past contracts, and stored data are raw and require further analysis to be useful for market analyses.

Procurement entities should invest in establishing and maintaining electronic procurement databases to use in their market research. Data should be collected in a standardised and editable manner so market-analysis staff does not spend time extracting, cleansing and mapping data. With suitable software, these actions can be automated and data easily

manipulated, aggregated and analysed by the market-analysis unit to provide specific tailored information to relevant procurement teams (OECD, 2016[14]).

Historical information from a contracting authority about previously tendered and executed works is a good starting point, but requires supplementing with other sources to inform market analysis. Prior contracts may have resulted from non-competitive procedures or been affected by collusive agreements, or simply market conditions may have evolved, reducing historical data's usefulness in the market analysis by not actually reflecting genuine market conditions.

Information contained in the National Registry of Constructors is also used in Argentina, and is useful, as long as the issues identified in Section 6.1 below are addressed. Data collected from the Registry should also be standardised to make them useful for market research.

Supply information obtained from potential contractors, such as detailed in Box 5.3, can be useful. Early engagement with potential suppliers is important to understand the key issues before the procurement process begins. The consultation mechanism is provided for in the Contracting Regime Decree allows potential contractors to make observations on the draft tender project before the call for tenders is published.

The Contracting Regime Decree could require a more interactive and active dialogue at an earlier stage of the project design. This dialogue should be open to all potential contractors, so that no advantage is given to any particular company, best conducted electronically. If physical meetings with providers do need to take place, these should be held individually to avoid bringing all potential bidders together at the same place and giving them an opportunity to meet and perhaps agree on prices. Meetings should be attended by at least two procurement officials to address corruption concerns (see Section 8.2). Meetings should be organised with different types of suppliers to inform strategic options; for example, the views of small- and medium-sized enterprises (SMEs) may be different from those of big companies. Minutes of all meetings should be kept as part of the procurement file.

Designing a template for keeping an internal record on the results of consultation with suppliers is recommended and can prove valuable in the future when procuring similar works from similar markets. Box 5.3 illustrates the kind of questions that could be asked to open productive electronic or physical discussions with potential contractors (OECD, 2016[14]).

Communicating with suppliers can prove useful to receive feedback on how procurement outcomes might be achieved in terms of, for example, timescale, feasibility and affordability. This should help shape requirements so that they match the market's capability and capacity. Interaction with suppliers should also be used to gather market information on future trends, developments and innovations. The market can also be encouraged to evolve in directions that will meet future requirements (OECD, 2016[14]).

Public entities should, however, take care not to tailor tender terms exclusively or too faithfully to information provided by potential contractors during the market analysis, but use other sources, and their own judgement, to adapt tenders to market reality.

There have been cases where companies co-ordinated the information they provided during market analysis to influence a contracting entity's procurement decisions. Box 5.4 shows an investigation by the Mexican competition authority, COFECE, into the manipulation of price quotes during the market-analysis phase of the procurement of media-monitoring services.

Box 5.3. Example questions to open a dialogue with potential suppliers

1) Are you interested in this opportunity?
2) If not, why not?
3) Is the business model realistic?
4) Are the business aims realistic? Is the business attractive?
5) What do you see as the risks?
6) Can you give an early indication of cost, the major cost drivers and how can these be minimised?
7) Can you give a broad indication of the likely timescales?
8) Are there other, better approaches?
9) What added value in terms of sustainability could the potential supplier provide related to the contract's subject matter?
10) How can potential suppliers provide added value on sustainability and other issues over and above the regulations' requirements?
11) Can you share examples of good or bad practice in terms of how others have tried to secure these products or services and what we can do to ensure clarity and improve the tendering process for potential suppliers?

Source: Extract from Route 3 (Supply Market Analysis) from the Scottish government's "Procurement Journey", www.procurementjourney.scot/node/88.

Box 5.4. COFECE investigation into manipulation of quotes in market research

On 30 January 2018, COFECE announced that it had imposed fines of over MXN 7 million on three companies and several individuals for rigging public procurement procedures of media-monitoring services for a number of public bodies for the period 2012-2016.

COFECE found that the companies had agreed to: 1) manipulate the price quotes they submitted during the market-analysis stage; 2) co-ordinate their bids; and 3) strategically abstain from bidding in certain procurement procedures. One company was then awarded contracts for media-monitoring services, while the other colluding companies were rewarded with subcontracts or assignments of related services by the winner.

COFECE estimated that the collusion resulted in an average overcharge of 14.5%, which translated into damages of over MXN 3 million.

Source: COFECE press release COFECE-05-2018, www.cofece.mx/wp-content/uploads/2018/02/COFECE-05-2018-COFECE.pdf.

Other sources of information may include:

1) Similar public works conducted by other public entities in Argentina. Since 2018, much of this information has been available on contrat.ar. Regular discussions among public entities conducting tenders for public works are also recommended (see Section 5.1.4). Looking at tenders for similar public works conducted by public entities abroad can also be useful as, even if market conditions can differ, they can serve as an appropriate benchmark. Important information that could be gathered from these sources includes: tender characteristics (tender procedure, format, coverage) and outcomes (participation, offers, winning price and other terms).
2) Internet or other desk research on the industry.
3) Contract execution information, such as contract delivery, contract modifications, performance evaluation, extensions and price renegotiations, can be useful to inform and improve future tender terms. Contract execution information related to contracts awarded using contrat.ar is available on the e-procurement platform and information about the execution of contracts procured before the implementation of contrat.ar has been available on the platform since February 2018 (for example, contract for works at the Palacio Nacional de las Artes – Palais de Glace).

The market-analysis template included in the OECD Procurement Toolbox[1] (see Annex 5A OECD Template for a market-study report) is a useful tool to document and file pre-tendering information collected by procurement officials, and record the sources used.

5.1.3. Standard procedure for conducting market analysis

Argentina does not have a standardised procedure for conducting market analysis. This is because procurers have long relied on historical information, and because there is no real obligation to conduct such research, as explained in Section 5.1.2.

In addition to an obligation to conduct market analysis, Argentina might consider introducing a standard procedure for conducting it. Box 5.5. below details how Italy conducts market research for goods and services and contains several good practices that also apply to public works.

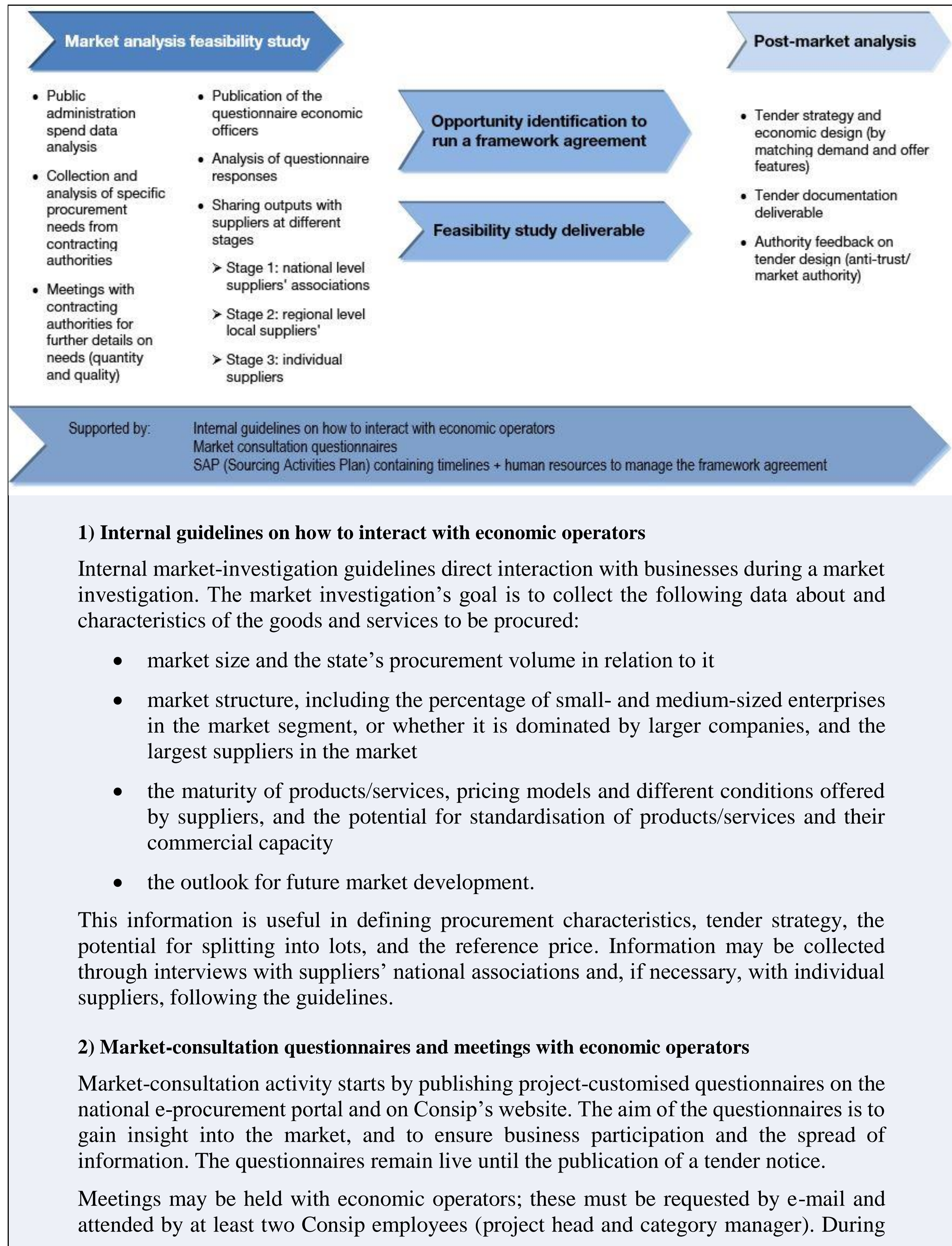
Such standardised procedures for market research used across the public administration help ensure that all research meets some minimum requirements, and information can be easily shared between procuring authorities.

Box 5.5. The market-investigation process at Consip, the Italian central-purchasing body

Consip is the Italian central-purchasing body, wholly owned by the Italian Ministry of Economy and Finance. Consip awards contracts (usually framework agreements) for goods and services used in the Italian public sector.

To improve its procurements, Consip has developed a standardised internal process for running a market analysis, including how to interact with economic operators, such as suppliers. The process, shown in the visual below, identifies the activities necessary to a market investigation when completing a "feasibility study" as a preliminary step to tender-design and tender-notice publication.

The entire process is supported by internal guidelines about how to interact with economic operators, market-consultation questionnaires, and an annual sourcing activities plan (SAP).



1) Internal guidelines on how to interact with economic operators

Internal market-investigation guidelines direct interaction with businesses during a market investigation. The market investigation's goal is to collect the following data about and characteristics of the goods and services to be procured:

- market size and the state's procurement volume in relation to it
- market structure, including the percentage of small- and medium-sized enterprises in the market segment, or whether it is dominated by larger companies, and the largest suppliers in the market
- the maturity of products/services, pricing models and different conditions offered by suppliers, and the potential for standardisation of products/services and their commercial capacity
- the outlook for future market development.

This information is useful in defining procurement characteristics, tender strategy, the potential for splitting into lots, and the reference price. Information may be collected through interviews with suppliers' national associations and, if necessary, with individual suppliers, following the guidelines.

2) Market-consultation questionnaires and meetings with economic operators

Market-consultation activity starts by publishing project-customised questionnaires on the national e-procurement portal and on Consip's website. The aim of the questionnaires is to gain insight into the market, and to ensure business participation and the spread of information. The questionnaires remain live until the publication of a tender notice.

Meetings may be held with economic operators; these must be requested by e-mail and attended by at least two Consip employees (project head and category manager). During

the meeting, Consip presents the customised market questionnaire and distributes a copy of its code of ethics. The questionnaire is then completed by all meeting participants.

During the meetings, Consip will answer questions about the project, but no additional information to that already published is provided. This is to ensure that suppliers not participating in the meeting are not disadvantaged. The tender strategy (if one exists) is not discussed and no comparison between potential bidders takes place.

3) Sourcing activities plan (SAP)

A SAP is the general framework used by Consip's sourcing division to plan and monitor its annual activity. It matches procurement phases with resources and timelines, and indicates the complexity of the procurement, the lead category manager, the starting and final month of each main phase, and the forecasted contract availability date.

According to the complexity of procurement (low, medium or high), different durations of phase implementation are estimated, ranging from two to three months for the market-investigation feasibility study phase and six to nine months for the tender strategy and complete documentation-drafting phase (post-market investigation).

The SAP is for internal use, but the estimated month of the contract availability is published on the national e-procurement portal to allow buyers and suppliers to prepare.

Source: (OECD, 2016[14]).

5.1.4. Systematic dialogue among public entities procuring public works

Proactive co-operation among public entities in charge of procuring public works in Argentina is uncommon.

The OECD recommends that entities procuring public works in Argentina seek ways to exchange information. Contrat.ar can be used as a platform on which information is posted, held and shared. The Federal Network of Contracting Authorities, gathering contracting authorities from different jurisdictions, provides a good example of useful and productive dialogue (see Box 9.5). Exchange of information among public entities in charge of procuring public works could be co-ordinated by ONC in its capacity as the supervisory body. Exchanged information could include:

1) experiences from tenders and comparison of results of different tender decisions
2) identification of suspicious bidding patterns
3) benchmarking comparison of the contractor pool participating in tenders for similar works, and prices offered
4) market intelligence
5) possibilities for joint procurement by different entities, for example, when purchasing construction material or maintenance services.

The ONC could also enable communication between procurers, on the one hand, and industry associations and chambers, on the other, to promote the exchange of ideas and help a better understanding of the requirements for a successful procurement process. These communication channels could also serve as a platform to raise the private sector's awareness about the risks and costs, including fines and other sanctions, of bid rigging (see Section 9.3).

5.2. Recommendations for action

- Entities in charge of the procurement of public works should build **market intelligence and conduct thorough market research** before designing their projects. This could be regulated by the Public Works Law or the Contracting Regime Decree.
- **Market research should be undertaken by teams with suitable professional background and experience**, which understand the requirements of the procuring unit and market conditions. Market-analysis teams should be allocated the necessary budget, IT and staff. The OECD recommends either creating specialised market-analysis departments or giving sufficient resources and support to existing structures for the proper conduct of market analysis.
- **Procurement entities should create**, extract and use electronic procurement data for market analysis. **Data should be collected in a standardised way** so that staff do not spend time extracting, cleansing, and mapping data.
- Market analysis should use a **broad range of sources of information**, including early engagement with potential suppliers; historical information; similar public works conducted by other public entities in Argentina; Internet or other desk research on the industry; and contract-execution information, such as contract delivery, contract modifications, performance evaluation, extensions, and price renegotiations.
- A **standard procedure for conducting market research** should be established to ensure that all research meets minimum requirements and can be easily shared between procuring authorities.
- Entities **procuring public works in Argentina should seek ways to exchange information**. This could be co-ordinated by ONC in its capacity as the supervisory body.

Annex 5A OECD Template for a market-study report

Box: Generic template for a market study report

Overview

When was market study conducted? ....

Were files from previous similar tenders accessed?

☐ Yes, please outline tender number..

☐ No, please outline reasons..

Was information collected using

☐ Desk-based research

☐ Solicitation from private market participants

If desk-based research was conducted, what sources were accessed? ....

If there was a direct solicitation from private market participants, how were these identified? How many were contacted? How many responded? ....

If external consultant(s) were used to estimate prices or costs, did they sign a confidentiality agreement? ....

Survey results

Market analysis (number of suppliers): ....

Supplier analysis (capability): ....

Supplier analysis (price): ....

Aside from value-for-money, were any particular criteria given as part of the market study?

☐ Environmental

☐ Social

☐ Innovation

☐ Other ....

Source: (OECD, n.d.[16]).

6. Maximise participation of genuine competing bidders

One method of enhancing competition and limiting the risks of bid rigging is to ensure that a maximum number of credible bidders take part. High rates of participation make collusion less likely, as the pool of bidders that would need to agree to a bid-rigging scheme is bigger and therefore agreement cannot easily be reached (OECD, 2009[2]). Also, a high number of genuine bidders may result in better prices (see Box 6.1).

Box 6.1. Correlation between the number of bidders and prices in the construction sector in Romania

The OECDs competition assessment review of the procurement rules applicable to the construction sector in Romania identified provisions which, had they been applied discretionarily by the contracting authorities, might have limited the number of participants in public tenders.

The OECD performed a quantitative analysis and concluded that a higher number of offers (or more offers accepted by the public authority) led to a larger discount of the award price compared to the estimated price. Also, a larger contract value and more days for preparing bids correlated with a higher number of submitted offers. By extrapolating the results of the analysis to all construction procedures in 2014, and accepting a number of factors, the OECD estimated that stimulating, on average, one additional acceptable bid in construction procurement procedures could amount to approximately EUR 418 million in total savings, while two additional offers could yield approximately EUR 871 million in savings.

Source: (OECD, 2016[17]).

More participation is encouraged by reducing the costs of participating in a tender, allowing foreign firms to participate, or incentivising smaller firms to participate even if they cannot bid for the entire contract.

6.1. National Registry of Constructors

Having an official list of contractors in which information regarding their technical and economic capacity and their performance evaluations is centralised can be helpful. It allows contracting entities to check easily whether bidders have the ability to execute a contract without the need to request additional documents, and is also a valuable resource for market intelligence.

While registries serve to lower costs for bidders and contracting authorities, and so maximise participation, it is important that they do not prevent participation: unregistered bidders (such as foreign bidders, new companies, and new entrants from another sector) should be allowed to take part in tenders.

Argentina's National Registry of Constructors certifies companies that wish to participate in public-works tenders and gathers a wide range of information about companies' technical and economic capacities. The certification issued by the Registry is valid for one year and certifies companies according to their estimated capacity, speciality and market category.[2] Decisions on whether a company can be certified are taken by a five-member board made up of the Registry's director, two senior officials from public entities that carry out public works, one member from the Buenos Aires city government, and one person from CAMARCO.

The National Registry of Constructors is not an electronic platform and companies must submit all documents physically. Other public bodies cannot access or import the

underlying data on the basis of which the registry issues certifications, and must rely on the registry certification as proof of a company's capacity to perform a public-works contract.

The ONC took over management of the National Registry of Constructors in December 2018; it was previously run by the Ministry of the Interior. The ONC is currently drafting new regulations for the Registry that will address some the issues mentioned above; until these new rules are adopted, the existing regulations will apply.[3]

The National Registry of Constructors has the capacity to become a valuable tool for both the public administration and potential bidders as it can lead to lower bidding and bid-checking costs and times. The OECD's fact-finding mission identified the following issues relating to the operation and transparency of the registration process, the decision-making body and the access to data in the National Registry of Constructors.

1) Constructors need to reapply for certification on an annual basis.
2) The decision-making process about the registration and certification of companies is not transparent.
3) CAMARCO's seat on the registry's board and its participation in the decision-making process may result in conflicts of interest.
4) Data contained in the registry is not easily accessible; public entities wishing to obtain information contained in the Registry have to submit formal requests.
5) As Contrat.ar requires contractors to register in its system, a process mandatory for participation in electronic tenders, companies may end up registering twice: once in the Registry and again in contrat.ar.
6) The Registry does not keep a record of contractor performance.

Argentina should consider ways to address these issues, such as the creation of an electronic version of the Registry that would enable electronic communications at all stages of the registration cycle and be interoperable with contrat.ar. Entities procuring public works should be able to access and import all data contained in the Registry, and so the format in which the data are recorded should allow this. The decision-making process about companies' registration and certification should be transparent. If a contractor's registration is denied, the Registry should justify its decision and allow the company to provide a solution if possible. Registered contractors should be allowed to update information contained in the Registry and not be required to file a new registration application every year. The Registry's decision-making body should not include members from the private sector or members with possible conflicts of interest.

The OECD also recommends that Argentina consider integrating the Registry in contrat.ar to avoid registration duplication. The Province of Cordoba has solved this issue by granting automatic registration on its e-procurement platform to suppliers that register on its electronic Registry of Constructors.

Efforts to streamline multiple data sources to reduce duplication have been ongoing in a number of OECD countries, such as the United States, which also uses the Contract Performance Assessment Reporting System (CPARS), a web-based, government-wide application for gathering information on contractors' performance.

Box 6.2. Consolidation of supplier information in the United States

The System for Award Management (SAM) is a free-to-use website owned and operated by the US federal government that consolidates different legacy databases and systems used in federal procurement and awards processes. It covers the following systems for supplier information:

1) Central Contractor Registration (CCR) was the federal government's primary vendor database; it collected, validated, stored and disseminated vendor data in support of agencies' acquisition processes. Only vendors registered in the CCR were eligible for federal contracts. Once vendors were registered, their data were shared with other federal electronic business systems that promote paperless communication and co-operation between systems. CCR's information and capabilities were transferred into SAM.

2) Excluded Parties List System (EPLS) was a web-based system that identified parties excluded from receiving federal contracts, certain subcontracts, and certain types of federal financial and non-financial assistance and benefits. The EPLS was updated to reflect government-wide administrative and statutory exclusions, and also included suspected terrorists and individuals barred from entering the United States. The user was able to search, view, and download current and archived exclusions. All the exclusion capabilities of the EPLS were transferred to SAM in November 2012.

Federal agencies are required to post all contractor performance evaluations on the Contract Performance Assessment Reporting (CPARS). Records on CPARS contain: federal contractors' criminal, civil, and administrative proceedings in connection with federal awards; suspensions and debarments; administrative agreements issued in lieu of suspension or debarment; non-responsibility determinations; terminations for cause or default; defective pricing determinations; termination for material failure to comply; subcontractor payment issues; information on trafficking in persons; and "recipient not qualified" decisions.

Source: https://uscontractorregistration.com/central-contractor-registration-ccr/; www.sam.gov; https://uscontractorregistration.com/about-sam/; www.cpars.gov.

6.2. Standardised general tender terms

Until December 2018, when ONC was assigned responsibility, there was no governing body overseeing public work in Argentina. Different public entities have therefore developed their own general terms and conditions – for all aspects not addressed in law – for use in tenders and contracts. This, as already discussed, has resulted in divergent tender processes and requirements across contracting bodies in Argentina.

One method of reducing bidding costs and encouraging participation in tenders is to streamline procedures by, for example, applying the same general tender terms or using a standardised procurement form.

The OECD recommends that ONC standardise procurement procedures for public works. A first step could consist of issuing general tender terms for use by all entities that contract public works. The ONC has already issued a manual of proceedings,[4] general tender terms,[5] and the minimum content of the terms containing the technical requirements of the tender (*pliegos de bases y condiciones particulares*) for the procurement of goods and services. The manual of proceedings regulates all the steps of the tender procedure from the programming of procurement to the execution of the contract. It also contains provisions on consolidation of purchases, auctions, and maximum and abnormally low prices. The general tender terms for goods and services govern the tender procedure, for instance, in

how tender decisions and acts should be notified to interested parties, formal requirements for the presentation of offers, and guarantees to lodge complaints.

Box 6.3 illustrates how the Ministry of Public Administration (Secretaria de la Función Pública, SFP), the supervisory body of public contracting in Mexico, has simplified and standardised procurement processes.

Box 6.3. SFP procurement manual

The SFP developed a procurement manual, first published in 2010, that provides a step-by-step guide for all stages of the procurement cycle (from tender planning and organisation to contract award) and standardises existing procedures in the Mexican public administration. It contains standardised procurement forms (*formatos de contratación*, FO-CONs); templates for the different acts of the procurement cycle, such as the annual procurement plan; requests for quotes; and the document containing market-research results. These templates are available in the Mexican e-procurement system, CompraNet, and SFP's online library and their use is mandatory for public entities, unless specific requirements justify the use of a different format.

Source: (OECD, 2018[15]).

6.3. Maximise participation of foreign companies

According to the Laws on Compre Nacional and Compre Argentino, the public administration has an obligation to award public-works contracts to national construction companies. A company is considered national if it has a legal address in Argentina and 80% of its staff is located in the country. While the relevant minister may authorise international bids, Argentinian laws and regulations do not set out the nature of justifications that would allow this to happen. According to stakeholders, international tendering can be justified by the size of the procured public work or by a lack of expertise in Argentina.

Laws on Compre Nacional and Compre Argentino also provide that the specifications of public-works projects should prioritise the use of national materials and products. The materials used for public works are considered to be national if they have been produced in Argentina and contain less than 40% imported inputs.

In addition, according to Article 4 of the Law on Compre Argentino, public-works contracts must be awarded to local micro-, small-, and medium-sized (MSME) companies offering national products when the contracts relate to housing or public buildings and are for an amount less than 100 000 modules (ARS 160 million[6]), and when the quote offered by the MSME company is not more than 20% higher than the estimated price.

Stakeholders reported that these restrictions do not represent a serious obstacle to foreign companies participating in public-work tenders. Company registration in the country is relatively simple and, in view of the nature of the sector, it makes sense for an international company to hire Argentinian workers, purchase national construction materials, and lease machinery in Argentina rather than importing, and so fulfil the "buy national" requirement.

Nevertheless, Argentina should consider options to relax the rules on tendering by international companies and allow for increased participation of foreign companies in public-works tenders. Public entities should be allowed to design competitive tenders that

minimise cost and maximise quality independently of whether the work is carried out by a national or international company or with national or international materials.

Argentina could consider conducting an evaluation of the impact that opening up tenders to foreign participants will have on national companies and the national economy as a whole. This evaluation will provide insights on how best to proceed with legislative modifications.

6.4. The use of contrat.ar

Contrat.ar, Argentina's e-procurement system for public works, came online in January 2017. Designed and now managed by ONC, its use has been mandatory since 20 December 2018.

Contrat.ar allows the monitoring and management of contracts for public works that have been tendered in the e-platform. Since February 2019, this has also applied to contracts tendered before contrat.ar was implemented.

Stakeholders interviewed by the OECD stated that by centralising tender and contract data, contrat.ar increased transparency and improved the timeliness of procedures. Some mentioned difficulties with adapting to the new system and a non-negligible learning curve. The ONC, the National Institute of Public Administration (Instituto Nacional de Administración Pública, INAP) and CAMARCO have acknowledged this issue and now offer capacity building on how to operate contrat.ar.

The use of contrat.ar is now widespread among the majority of bodies procuring public works. DNV reported to the OECD that it is using contrat.ar for procuring public works and SIGO (*sistema informático de gestión de obra*) for managing the execution of public works contracts, its own Internet-based registry of procurement documents. DNV is currently working with the Secretariat of Modernisation to make contrat.ar compatible with all features of its own process for executing contracts. DNV will be replacing SIGO by contrat.ar during 2019.

The adoption of e-procurement helps reduce the risks of collusion by eliminating the need for bidders to be physically present in the same location when they submit their bids. Moreover, e-procurement is likely to lower tendering costs for potential bidders, encouraging participation and increasing competition in procurement.

6.5. Joint bidding

The Public Works Law and the Decree are silent about joint bidding, but companies may bid jointly for public-works tenders when it is specifically allowed in the tender terms. As a general rule, tender terms require companies wishing to submit a joint bid to enter into a special contractual arrangement called *union transitoria de empresas* (UTE). UTE are joint ventures developed to perform a certain activity, execute a specific contract or render a service for a limited period of time. They do not involve the establishment of a separate legal entity (Davey and Gatenby, 2017[18]). Some tender terms prohibit members of an UTE from bidding independently for the same contract or a company to be part of more than one UTE presenting joint bids in the same tender procedure.

Joint bids reduce the number of bidders and may be used to implement a collusive scheme by sharing the market among participants (see Box 6.4). Joint bids may, however, have pro-competitive effects by, for example, allowing small- and medium-sized companies,

with insufficient individual capacity to respond to a large tender, to pool their capacities and jointly participate. A joint bid may also have procompetitive effects because it creates economies of scale and so reduces costs. Pro-competitive effects may also result from joint bidders combining different or complementary technologies that enable them to complete the contract in a shorter period of time or to produce new or innovative goods or services.

Box 6.4. Anti-competitive joint bidding in Norway and Spain

Bid-rigging case in Norway

On 4 September 2017, the Norwegian Competition Authority imposed fines exceeding NOK 18 million on six electricity companies for participating in an illegal bid-rigging scheme for a tender for school buildings in Oslo.

The company El Proffen / EP Contracting initiated and organised the co-operation between the five competing companies for a 2014 tender for the maintenance and repair of electrical installations. The five companies agreed on identical prices and submitted joint bids for a framework agreement.

Companies were open about their co-operation. This raised the suspicions of Undervisningsbygg, the contracting entity, which went to the Norwegian Competition Authority, which investigated and noted in its assessment that the individual companies could have submitted independent bids instead of doing it jointly. As part of this assessment, the authority compared the number of employees needed to execute the contract and the number of each business's actual employees and planned recruitment and the possibility of hiring extra manpower. It concluded that the businesses either already had the necessary capacity to submit a credible independent bid or needed only minor adjustments to be in a position to do so.

The decision was upheld by the Norwegian Competition Authority Complaints Board.

Bid-rigging case in Spain

On 30 June 2016, the National Authority for Markets and Competition in Spain (Comisión Nacional de los Mercados y la Competencia, CNMC) imposed a EUR 5.58 million fine on 4 companies and EUR 65 550 fine on certain of their executives for rigging the bids for the supply of railroad switches to ADIF, the state-owned company in charge of managing the majority of Spain's railways.

The companies agreed to share the market, fix prices and commercial terms, and to exchange commercially sensitive information. The bid-rigging scheme was implemented through the presentation of joint bids. The CNMC showed that the four companies had the capacity to bid individually. All could manufacture most of the switches and complementary parts required in the call for tenders and had actually bid individually in 2014 at the request of ADIFSE.

Source: OECD (2016), *Annual Report on Competition Policy Developments in Norway*, DAF/COMP/AR(2017)39. Norwegian Competition Authority press release, 4 September 2018. https://konkurransetilsynet.no/favourable-ruling-in-el-proffen-case/?lang=en. (Danish Competition and Consumer Authority, 2018[19]); CNMC (2016) S/0519/14 INFRAESTRUCTURAS FERROVIARIAS, www.cnmc.es/sites/default/files/958189_20.pdf.

Identifying when a joint bid is likely to produce pro-competitive or anti-competitive effects is not straightforward. Box 6.5 provides some helpful criteria. Several competition authorities have developed guidelines on the application of competition law to joint tendering. The guidelines published in July 2018 by the Danish Competition and Consumer Authority, for example, provide useful criteria to help distinguish whether a joint bid is pro- or anti-competitive, as well as issues related to information exchange in joint tenders (Danish Competition and Consumer Authority, 2018[19]).

Box 6.5. Criteria for determining whether a joint bid is pro- or anti-competitive

Pro-competitive	Anti-competitive
Suppliers are active in different (product) markets.	Each firm has the economic, financial and technical capabilities to fulfil the contract on its own.
Co-operators provide a single integrated service that none could supply independently.	Joint bidders are the strongest competitors in the relevant market.
Two or more providers active in different geographical areas submit a single bid for the whole of the contract area, producing efficiencies.	A joint bid does not produce any efficiencies.
Two or more providers combine their capacity to fulfil a contract that is too large for either individually.	A consortium allows its members to exchange sensitive information that might harm competition in future tenders.

Source: (OECD, 2018[15]).

Argentina should consider regulating joint bidding, and allow public procuring entities to require information from bidders in order to assess a joint bid's pro- or anti-competitive effects (such as an explanation of why bidders that seem in principle able to fulfil the contract are not presenting separate bids). In order to assist procurement officials, Argentina (through the competition authority) should set clear and specific criteria for determining the pro-competitive nature of joint bids (see Box 6.5).

6.6. Sub-contracting

Unlike joint bidding, sub-contracting is specifically mentioned in the Public Works Law. It states that bidders or contractors may not transfer their rights in terms of the bidding process or an awarded contract without the prior authorisation of the contracting authority and then only if the subcontracted company offers the same guarantees as the contractor.[7] The Law does not state on which grounds this authorisation should be granted, leaving the public administration with wide discretionary powers.

The pro- and anti-competitive effects generated by subcontracting are similar to those of joint bidding: companies that can perform a contract should bid against each other, not tender jointly or as contractor and subcontractor or using the subcontracting to compensate

a company in a collusive scheme, for presenting a non-genuine offer or for not bidding at all.

The OECD recommends that entities procuring public works require bidders disclose in their bids:

1) their intention to use subcontractors
2) the identity of any subcontractors
3) the reasons why subcontracting is necessary for the correct performance of the contract.

Information gathered, especially under point three, would be useful to establish whether subcontracting generates efficiencies or undesirable anti-competitive effects.

6.7. Other methods to promote bidder participation

6.7.1. Develop annual procurement plans

In Argentina, infrastructure investments are included in infrastructure-improvement programmes such as Plan Belgrano for the 10 most-northern provinces[8] or Proyecto Patagonia for the 6 southern provinces.[9] Along with the regional projects, major infrastructure plans are launched by ministries, in particular the Ministry of the Interior, Public Works, and Housing,[10] and Ministry of Transport.[11] Information about public-works projects is not centralised.

Argentina should consider developing and making public a strategic annual or a multi-year plan indicating the public works that the country is planning to undertake. This plan should include information about location of works, broad timelines, and the tendering process. Care should be taken to disclose sufficient information to engage the market, without releasing detailed information that might help collusive schemes. Box 6.6 gives an example on how to manage sensitive information in annual plans.

Box 6.6. A public version of the Annual Procurement Programme of Mexico's power utility Comisión Federal de Electricidad (CFE)

Mexico's power utility CFE has a regulatory regime requiring it and its subsidiaries to create an annual procurement programme listing the goods and services to be acquired during the year in accordance with the companies' needs and business-plan projects.

The annual procurement programme is created in two versions: a public and a confidential one. The public version contains aggregated information and no confidential commercial information and detailed information that could facilitate bid rigging. For example, the public version of the 2019 annual procurement programme of CFE contains the number of works required and the overall budget for those works for each CFE department. The document does not contain detailed descriptive information about the works, the budget for each work or information on the timeline of the procurement processes.

Source: (OECD, 2018[20]); www.cfe.mx/licitaciones/Programas-Anuales/Documents/PAC%202019%20Resumen%20para%20publicar%2012-03-19.pdf.

Argentina has recently required each of the different bodies of the public administration to develop its own annual procurement plan for goods and services. The ONC centralises this information and publishes it on compra.ar,[12] an initiative that could be adapted to public works and published on contrat.ar.

Specifying the public works that different entities in Argentina intend to procure would allow potential contractors to plan ahead and make the necessary arrangements and investments to participate in tenders, as long as only broad information is published. Detailed information can facilitate bid rigging.

6.7.2. Dividing contracts into lots

Public bodies can promote participation by smaller suppliers that might not have the capacity to bid for a single large contract by dividing it into different contract lots.

While Argentinian law already allows a contract to be split into lots as a way to encourage the participation of national companies in tenders,[13] this option should be used as a way of encouraging more bids in general. Public entities should use market analysis to decide whether dividing a contract into lots is the correct strategic option, for example, when market analysis shows that smaller companies could be credible suppliers for parts of the tender.

There is a trade-off between, on the one hand, increasing competition through higher tender participation for smaller lots, and, on the other, the potential for increased costs resulting from the smaller contracts' reduced economies of scale and costs of ensuring co-ordination between the various small projects. Box 6.7 illustrates two procurement strategies for the construction of airports: one consisting in dividing the project into lots, allowing for more competition, and the other awarding one contract for the whole project. Good market analysis can help guide the design of lots.

Box 6.7. Dividing airport infrastructure projects into lots

The overall construction project of the New International Airport of the Mexico City was divided into 21 different main lots. The exact structure and content of the lots was still subject to further aggregation-disaggregation discussions on several components, such as the different phases of the terminal construction work when the project was cancelled in January 2019. Construction projects for Washington Dulles International Airport, in Washington D.C., and the Hamad International Airport in Doha, Qatar, among others, followed the same rationale of splitting the project into lots. For example, the construction of Hamad International Airport, which began in 2004 was initially divided into 19 distinct lots and expanded to 21 lots during the construction phase.

Alternative scenarios also exist. For the expansion of Abu Dhabi International Airport, the contract was awarded to one main contractor, with several subcontractors. Although this option limited the diversity and number of suppliers and so competition, it also restrained the dilution of responsibilities that can happen with multiple and interconnected contracts, while favouring the economies of scale and scope.

Source: (OECD, 2015[21]).

Initiatives related to splitting contracts into smaller lots have been undertaken by the European Union, United States and Chile, as shown in Box 6.8

Box 6.8. Lots in public procurement

European Union

The European Union Directive on Public Procurement (2014/24/EU) encourages public procurement authorities to divide contracts into smaller or more specialised lots to facilitate bidding for smaller firms. Such division can be done on a quantitative basis by adapting the size of the individual contracts to the capacity of small- and medium-sized enterprises (SMEs) or on a qualitative basis, adapting the requirements of individual contracts to different trades or SMEs' specialities. A contracting authority must justify its decision not to split a contract into lots if this is possible. The directive also addresses overly demanding requirements for economic and financial capacity, which frequently rule SMEs out of bidding. It states that contracting authorities should not be allowed to set potential suppliers to set a minimum-turnover requirement disproportionate to the size of the contract; it should not exceed twice the estimated contract value.

United States

Regulation 19.202-1 of the US Federal Acquisition Regulation (FAR) aims to encourage small-business participation in federal acquisitions. According to FAR, "small business concerns shall be afforded an equitable opportunity to compete for all contracts that they can perform to the extent consistent with the Government's interest. When applicable, the contracting officer shall take the following actions:

1) Divide proposed acquisitions of supplies and services (except construction) into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement.
2) Plan acquisitions such that, if practicable, more than one small business concern may perform the work, if the work exceeds the amount for which a surety may be guaranteed by the Small Business Administration against loss.
3) Ensure that delivery schedules are established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the government.
4) Encourage prime contractors to subcontract with small business concerns."

Contracting officers must justify their reasons if the proposed acquisition cannot be divided into reasonably small lots, the delivery schedules cannot be established on a realistic basis to encourage small-business participation, or bundling is necessary and justified.

Regulation 19.202-3 provides that in the event of equal low bids, awards shall be made first to small-business concerns.

Chile

ChileCompra, the national online purchasing platform, establishes framework agreements for common products and services needed by the Chilean public sector. Agreements are divided into smaller regional lots so delivery across the country can be undertaken by suppliers with the capacity to deliver in their regions, while allowing bids from SMEs that can supply only smaller quantities. ChileCompra is able to divide contracts into smaller lots when suggested by its market research.

Sources: European Commission (2014), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, *Official Journal of the European Union*, L 94/65, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN; US Federal Acquisition Regulation, www.acquisition.gov/browsefar; (OECD, 2017[22]).

Splitting a contract into lots carries the risk of facilitating market allocation among bidders. Box 6.9 below provides the OECD's guidance on when to split contracts into lots and how to do it without having an adverse effect on competition.

Box 6.9. OECD checklist for protecting competition when splitting contracts into lots

When to split contracts into lots

A decision on splitting contracts into lots may be taken when the contracting authority is concerned about the risk that large bundled contracts may reduce competition. This could be because:

1) Efficient SME or specialist firms are unable to provide the full bundle of goods or services that the procurer is purchasing.
2) Where public purchases account for all or most of the market for a certain good or service, awarding the contract to a single firm may increase the market power of the chosen supplier and reduce the number of bidders in future tenders.

Before splitting the tender into lots to address these two concerns, procurers should conduct a market analysis to consider whether, given the type of product or service that they are procuring, tendering smaller lots actually is the best solution.

- For 1): are there no other methods to encourage participation by smaller specialist firms? For example, could simplifying the bidding procedure help them bid for the contract? Might they be able to form a joint bidding consortium?
- For 2): would losing bidders exit the market and so not participate in future procurements, or would they, and others, bid again the next time the contract is tendered? Similarly for future procurements, would the strength of rival bids be limited by their lack of experience or would they be able to strengthen their bids and demonstrate their experience by hiring staff from the incumbent contractor?

How to split a contract into lots without reducing competition

At the **pre-tendering stage**, the contracting authority should:

1) Provide all potential bidders with clear tender documentation including all the available and relevant information about the product or service to be procured in order to minimise any advantage to the incumbent supplier (such as electronically available and free of charge).
2) Consider dividing a contract into lots when it is understood that small or specialist firms will not otherwise participate in the bidding. For example, an additional lot should not be carved out if that lot is expected to have fewer competitors than there would be for the bundle of lots.
3) Allow package bidding when a bidder can make bids for different combinations of lots in order to obtain any cost synergies available from providing a larger bundle of goods or services. Obtaining these synergies may, for example, encourage non-local bidders to bid for packages of different lots even if they are unwilling to bid for individual lots.
4) Use award limits rather than participation limits to prevent all lots being awarded to a single firm, but only if the benefits will clearly outweigh the reduced competition for the contract.
5) Providing it does not create inefficiency, consider making the number of lots less than the number of expected bidders. This can make it more difficult for colluding bidders to agree a division of lots and so improve achieved value.

6) Providing it does not create inefficiency, consider making the lots different in size from the market share of the bidders. This can make it more difficult for colluding bidders to agree a division of lots and so improve value achieved.

7) Providing it does not create inefficiency, in repeated procurements, consider making the division into lots unpredictable (for example, by changing the size or composition of the lots). This can reduce the risk of lot division facilitating collusion.

At the **tendering stage**, the contracting authority should:

1) Refer to the competition authority any suspicious actions taken by incumbents to obstruct rivals' abilities to put together an attractive bid. The competition authority can determine whether this constitutes anti-competitive exclusionary conduct.

2) Refer to the competition authority any suspicious actions taken by bidders to rig the bidding.

3) Be aware that joint bidding may be anti-competitive in cases where bidders are capable of submitting separate bids.

Source: OECD Public Procurement Toolbox, "Checklist for protecting competition when splitting contracts into lots", www.oecd.org/governance/procurement/toolbox/search/checklist-protecting-competition-splitting-contracts-lots.pdf.

6.8. Recommendations for action

1) The OECD recommends that a **reform of the National Registry of Constructors** is undertaken. The ONC is currently working on the adoption of new rules on the Registry. The OECD recommends that the following proposals are considered:

- The Registry should be electronic and interoperable with contrat.ar.
- Data contained in the Registry should be easily accessed and imported by entities procuring public works.
- The decision-making process on companies' registration and certification should be transparent.
- The Registry should justify the decisions denying registration and allow companies to provide a solution if possible.
- Registered contractors should be allowed to update information without filing a new registration application every year.
- The Registry's decision-making body should not include members from the private sector or members with a possible conflict of interest.
- The Registry should be integrated in contrat.ar so as to avoid duplication of registrations.

2) **Procurement procedures for public works should be standardised**. The ONC should consider adopting general tender terms, a manual of proceedings, and the minimum content of the terms containing the technical requirements as it has done for the procurement of goods and services.

3) Argentina should consider options to **relax the rules on tendering by international companies**, possibly after conducting an evaluation of the impact that opening up tenders to foreign participants will have on the national economy.

4) Argentina should regulate **joint bidding**, and allow public procuring entities to require information from bidders in order to assess a joint bid's pro- or anti-competitive effects. Argentina (through the competition authority) should set clear and specific criteria to assist procurement officials determine the pro-competitive nature of joint bids.
5) **Subcontracting should be further regulated** by allowing entities procuring public works to require bidders to disclose:
   - their intention to use subcontractors
   - the identity of any subcontractors
   - the reasons why subcontracting is necessary for the correct performance of the contract.
6) Argentina should develop and make public a **strategic annual or a multi-year plan** indicating the public works that the country is planning to undertake. Care should be taken not to disclose detailed information that can help collusive schemes.
7) Argentina should allow a **contract to be split into lots if it encourages more bids** in general and not only bids from national companies. Market research should be used to decide whether dividing a contract into lots is the correct strategic option.

7. Improving tender terms and contract award criteria

7.1. Unclear or incomplete tender terms

Tender terms should be designed to maximise the number and type of bidders. The clearer the tender terms, the easier it is for potential suppliers to make an informed decision whether to bid for the tender.

The publication of draft technical specifications inviting comments before the publication of the call for tenders, as provided for in the Contracting Regime Decree, is a useful initiative. It helps both the public administration and private contractors to understand and clarify grey areas in draft technical specifications, adds certainty, and maximises bidders' chances of winning by allowing bids to be really tailored to requirements. Argentina could consider requiring all entities in the public administration to conduct this type of consultation procedure. However, public entities should pay special attention not to disclose sensitive information that could increase the risks of collusion (see Section 8).

The Public Works Law in Argentina allows the award of a contract on the basis of provisional technical specifications and budget under exceptional circumstances. Opening a tender while a contract is still in the early stages of specification is detrimental to competition, since serious bidders may be unwilling to take the risk and be discouraged from bidding, and the public administration may not get what it needs. Argentina should limit as much as possible tendering of contracts that are not fully defined.

7.2. Prioritising functional requirements

The OECD Guidelines recommend that, in general, public bodies define tender specifications in terms of functional (performance-based) requirements, so that they focus

on the objective rather than the method of its implementation. This can encourage alternative or innovative solutions and so make collusive practices less likely.

The Argentinian legal framework for public works makes no mention of public-works procurement on the basis on functional specifications. DNV has reported occasionally allowing bidders to present alternative offers. Besides ad hoc efforts from public entities to support innovative solutions, it seems that the only national public-works contracts using functional requirements in Argentina are the performance-based road rehabilitation and maintenance contracts (CREMA) managed by DNV and financed by national funds, the World Bank or the Inter-American Development Bank.

CREMA is a combined rehabilitation and maintenance contract that requires the contractor to rehabilitate and subsequently maintain roads under a lump-sum contract for a total period of five years. Rehabilitation works are carried out during the first 12 to 18 months of the contract, while maintenance activities are undertaken throughout the 5-year contract period.

The DNV designed technical requirements for this project based on results, which are measured on the basis of road-surface history, current surface condition (such as cracks, pothole areas, rut depths), roughness and deflection profiles, as well as traffic volumes and composition. The contract is awarded to the lowest-priced bid. The winning contractor is required to carry out a detailed engineering study based on the technical specifications defined by the DNV. Payments are made when a specified level of service is achieved rather than on the basis of a pre-determined bill of quantities and unit rates as used in admeasurement-type of contracts.

According to stakeholders interviewed during the fact-finding mission, CREMA contracts have delivered positive results. In view of the advantages of this initiative, Argentina could consider adapting it to other types of contracts if the market research identifies it as a suitable solution.

7.3. Contract award criteria

Article 18 of the Public Works Law and Article 15 of the Decree of the Contracting Regime states that procurement entities in Argentina must award contracts to the *most convenient offer* in terms of price, quality, suitability of the bidder and other conditions of the offer.

Most contracting entities consider that these criteria are vague, and allow much discretion to public sector officials, which may leave room for irregular (through error or intent) contracting decisions. According to stakeholders interviewed during the fact-finding mission, most public-works contracts are awarded to the lowest priced bid. While some tender terms foresee a value for money (weighted points) award system, the OECD understands that this is not the general rule in public works.

As price is an objective and clear criterion, it limits the risk of a contracting authority's impartiality being questioned and the award decision being successfully challenged in court. For highly technical, complex and innovative sectors, such as public works, however, award criteria based on quality rather than on price can yield better procurement outcomes and also reduce the risk of collusion as quality is more difficult to rig than prices.

Price-only criteria are suitable for more standardised works or services where price is the main dimension which matters for the contracting authority. Non-price criteria are a better fit where price only is insufficient to provide a good response to the contracting authorities' requirements. In Mexico, for instance, non-price criteria are mandatory for infrastructure work and preferred for public works. In Brazil, where the preferred criteria for awarding

contracts is price, non-price factors may be used in the procurement of large-scale works or services largely dependent on sophisticated or restricted technology (OECD, 2015[23]).

Quality criteria may relate to technical performance, aesthetic and functional characteristics, maintenance service, technical assistance and quality of the staff employed. Other criteria may include past performance. For example, Canada refers to "competences" related to, for example, managerial structure, key personnel, prior industrial experience, facilities, and financial strength (OECD, 2015[23]).

Time for completion is one of the quality dimensions that may be relevant for public-works contracts. For example, delays in delivery of highway repair entail substantial welfare losses for highway users. In the United States, state highway departments have designed mechanisms to award highway work contracts that internalise the cost imposed by delays, the so-called "A+B scoring auctions". The design of these scoring auctions provides incentives to the contractors to shorten the delivery time by weighting both costs and the time for completion. When tested against empirical data, these auction designs have been shown to deliver better outcomes compared to standard price-only tenders or other commonly used contracting instruments (OECD, 2014[24]).

Box 7.1. A case study of scoring auctions: A+B bidding for highway-repair projects

A+B bidding is an auction design where participants are invited to submit their bids on: (A) labour and materials costs, and (B) number of days to completion. The scoring rule is calculated as follows:

Total score=A+B*Specified Road User Cost per day

The contract is awarded to the lowest total score. This type of auction has been used by some departments of transportation in the United States since 1990. As stated in the Californian Department of Transportation directive (2013) encouraging the use of A+B bidding, this mechanism allows each contractor to optimally choose its bid, given the trade-off between time and costs. Additionally, contracts have sometimes been accompanied by incentive-disincentive provisions by means of payments-penalties to accelerate delivery.

(Lewis and Bajari, 2011[25]) show that the "B" portion of the scoring rule results in the internalisation of the costs associated with delay. They find that this contract design can achieve efficient outcomes, in contrast to standard "A"-only contracts, which generally entail slower completion times. Using a data set of highway-repair works awarded by the California Department of Transport between 2003 and 2008, they conclude that A+B contracts are welfare enhancing, as works were completed 30 to 40% faster and road-user gains superseded the rise in procurement costs. They estimate welfare gains of up to 22% of total contracted value from changing all contracts to A+B bidding.

Source: (OECD, 2014[24]).

Scoring rules (using, for example, weights or metrics) that measure the relative importance of each criterion should be clearly stated in the call for tender. In Spain, the law stipulates that criteria should be translatable into figures or percentages, obtained through the application of formulas included in the tender specifications. Some procurement systems allow for a descent ranking of the criteria whenever it is not possible to specify weights (for example, in the EU, Sweden, Spain, Bulgaria and Czech Republic). In Switzerland, case law has stipulated that price should be given a weight of at least 20% in the scoring

rule; in Ukraine, the relative weight of the price in the scoring rule cannot be lower than 50%; and in Brazil and Cost Rica, price should be given a greater weight than non-price criteria (OECD, 2015[23]).

The OECD recommends Argentina encourage the use of qualitative contract award criteria for public works, unless the call for tenders specifies precise technical standards, leaving little margin for variation in quality criteria and so making price an appropriate award criterion. Such criteria can be specifically related to the performance, durability or other attributes of the works so as to improve their value and reward innovation and cost-cutting measures, and promote competitive bidding. When adopting value for money criteria, Argentina should describe and provide relative weights to such criteria in a manner that is clear, objective and understandable for procurers and bidders.

7.4. Limiting modifications of contracts after award

Private-sector stakeholders interviewed by the OECD reported that deficiently designed technical specifications result in frequently modified contracts both before and during the execution of the works. Contract modifications distort the competitive process of public tenders, particularly when changes relate to substantial issues that would have led to different offers and bidders if they had been present in the initial tender terms.

Articles 30, 37, 38 and 53 of the Public Works Law regulate when and how a public-works contract can be modified in Argentina. The technical specifications can be modified by the public administration even if the contract has been awarded and the works are underway, provided that the object of the contract remains unchanged. Contractors are obliged to follow these modifications. If they result in an increase or decrease of overall costs, the contractor will be paid for the increase, but will not be compensated for any lost profit caused by the reduction, modification or removal of part of the works.

If modifications to a contract's technical specifications result in total value of the works increasing or decreasing by 20%, the contractor does have the right to terminate the contract. However, if the contract is based upon unit prices and the modifications to the technical specifications or contract result in a decrease or increase of higher than 20%, the public administration and the contractor may renegotiate the unit price. Contracts may also be modified to rectify a budgetary mistake.

Complex projects like public works are often prone to renegotiation due to the higher technical uncertainty commonly associated with infrastructure work and the longer time horizons involved. Inadequate design and contractual incompleteness result in higher rates of renegotiation. During 1990 and 2000, in the concessions sector in Latin America, and excluding telecommunications, as much as 41% of infrastructure concessions have been renegotiated. The incidence rises to 55% and 75%, if covering only transportation, and water and sanitation concessions, respectively. It has been estimated that renegotiations were on average undertaken 3.1 and 1.6 years after the initial concession award on the infrastructure (OECD, 2014[24])

In most jurisdictions, when a public contract needs to be modified substantially, the starting assumption is that the modification will trigger a new competitive public tender process in order to give all potential bidders the chance to submit offers that meet the altered circumstances (SIGMA, 2016[26]).

Limited modifications to an existing public contract are often allowed when they are necessary and justified, such as in situations where genuine unforeseeable circumstances occur. Box 7.2 shows how the European Union Public Procurement Directive has regulated this.

Box 7.2. Modification of contracts under the EU directive on public procurement

The EU Public Procurement Directive[14] permits the modification of a contract without the need to conduct a new procurement procedure only within strict boundaries and in specified situations. In general, contracts may be modified when the modifications are not substantial.

The directive sets out six non-substantial modifications permitted during the term of a contract.

1) **Modifications expressly provided for in the initial procurement documents**. Review clauses in procurement documents must be clear, precise and unequivocal. Review clauses must specify the scope and nature of possible modifications or options as well as the conditions under which they may be used. Review clauses must not alter the overall nature of the contract.

2) **Additional works, services or supplies** that have become necessary, but were not included in the initial procurement. These are only possible where a contractor cannot be changed for economic or technical reasons such as interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, and changes would cause significant inconvenience or substantial duplication of costs for the contracting authority. Any increase in costs from modifications should not exceed 50% of the original contract's value. Contracting authorities that use this provision to modify a contract must publish a modification notice in the Official Journal of the European Union (OJEU).

3) **Modifications due to unforeseen circumstances** that a diligent contracting authority could not have foreseen, and which do not alter the contract's overall nature. Any increase in costs from modifications should not exceed 50% of the original contract's value. Contracting authorities that use this provision to modify a contract must publish a modification notice in the OJEU.

   Replacement of a contractual partner is allowed in three situations. i) When it is the consequence of a clear, precise and unequivocal review clause that sets out the scope and nature of the replacement, as well as the conditions under which it may be used. ii) When a contractor faces structural changes during a contract, such as an internal reorganisation, takeover, merger, acquisition, or even insolvency. iii) When the contracting authority itself assumes the main contractor's obligations towards its subcontractors.

4) **Low-value (non-substantial) modifications.** These modifications must be: i) below the relevant EU financial threshold for the contract; and ii) less than 10% of the initial contract value for a services-supplies contract or less than 15% for a works contract.

5) **Other non-substantial modifications.** Modifications are considered to be substantial and to require a new procurement procedure when they render the contract "materially different in character from the one initially concluded". According to the Directive, this is the case when the modification: i) has an impact on the initial procurement procedure; ii) changes the economic balance in favour of the contractor; iii) extends the scope of the contract considerably; iv) sees the contractor replaced in other situations than those mentioned above as non-substantial changes to the contract.

Source: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN; (SIGMA, 2016[26]).

Argentinian law does not take into account the negative impact on competition that modifications to budgets or technical specifications can have, and does not impose a new procurement process when the modifications are so substantial that they change the initial competitive realm. Argentina should put in place clear regulations to allow contract changes only if they are non-substantial or are expressly provided for in a contract's review clauses.

7.5. Implementing an effective administrative appeals system

Responses collected by the OECD during the fact-finding mission indicated that administrative non-trial complaints (*recurso de reconsideración*, *recurso jerárquico* and *recurso de alzada*) are burdensome and often unsuccessful, as authorities can be reluctant to change their own decisions.

Some general-tender terms ask for the submission of a guarantee in order to lodge a complaint against a tender decision adopted (for example, the pre-award decision). The amount of the guarantee is established in the tender terms and may amount to up to 4% of the official budget of the works.[15] The guarantee can be forfeited if the complaint is rejected. The requirement for a guarantee was reported to be a disincentive for bringing administrative complaints, since authorities often reject complaints and, as a result, the guarantee may be lost.

According to Article 12 of LPA, administrative complaints against administrative acts do not have suspensive effects. The administration may, however, decide to suspend the implementation of its decision for public-interest reasons or to avoid causing prejudice to the interested party. Interim measures requesting the standstill of an administrative act may be requested before a judge under the terms of the Law 26.854 on Interim Measures.

Following the exhaustion of administrative non-trial complaints, aggrieved bidders can challenge award decisions before the competent administrative courts. It was reported to the OECD that the administration rarely suspends the implementation of its own decisions notwithstanding the fact that a court appeal is pending. Therefore, the tender process can go forward and the contract can be signed and executed. This discourages the filing of an appeal, even if there is a legitimate ground, as the complainant will be incurring legal costs without the reasonable expectation of being awarded the project in good time. Also, firms are required to submit a declaration of all their pending litigation with the state to participate in tenders, which may affect their evaluation and so discourage the lodging of complaints.

Responses given during the OECD fact-finding mission indicated that court proceedings were lengthy, costly and ineffective. In a 2016 review of Colombia's public procurement system the OECD found that, in a national context of lengthy court proceedings, interim (temporary) protection of the bidders' rights is vital, since, otherwise, by the time a final court decision is reached, the performance of the contract will have progressed or have been completed, thus making it impossible to reverse the decision (OECD, 2016[27]).

The OECD Recommendation on Public Procurement provides that countries should handle bidder complaints in "*a fair, timely and transparent way through the establishment of effective courses of action for challenging procurement decisions to correct defects, prevent wrong-doing and build confidence of bidders, including foreign competitors, in the integrity and fairness of the public procurement system. Additional key aspects of an effective complaints system are dedicated and independent review and adequate redress*" (OECD, 2015[28]). A sound and reliable appeals system increases the confidence and

participation of firms in tenders, and helps to clarify tender issues for future procurement processes.

This report has not looked at Argentina's court system. Regarding administrative-level complaints against tender decisions, Argentina should consider making them free (apart from legal costs) and ensure that they are effectively dealt with, so that they do not hold up tenders for a long time. Guidelines regarding the handling of complaints would be useful.[16]

7.6. Recommendations for action

- Argentina should **limit as much as possible the awarding of contracts while their terms are still not fully defined**.
- Argentina should consider defining **tender specifications in terms of functional requirements** (as it has done for the CREMA contracts), if the market analysis identifies it as a suitable solution.
- Argentina should consider **encouraging the use of qualitative contract-award criteria for public works**. When adopting value for money criteria, Argentina should describe and provide relative weights to such criteria in a manner that is clear, transparent and understandable for procurers and bidders.
- Argentina should adopt **clear regulations limiting the ex post modification of public works contracts** and only allow them if they are non-substantial or are expressly provided for in a contract's review clauses.
- Regarding **administrative-level complaints against tender decisions**, Argentina should consider making them **free** (apart from legal costs) and ensure that they are **effectively dealt with.**

8. Transparency, disclosure and integrity in submitting bids

The Contracting Regime Decree states that the contracting procedures in Argentina must adhere to the general principle of transparency.[17] This means that all stages of public procurement must be public, in particular the opening of bids.[18]

Transparency is essential to tackling corruption in public procurement. Requiring too much transparency, however, can have negative effects on competition in tenders, given that market transparency is a facilitating factor for collusion. During its fact-finding mission, the OECD observed that contracting authorities consider transparency extremely important, but that competition concerns resulting from transparency are rarely considered by procurement officials.

8.1. Limiting disclosure of information regarding bidders and bids

In Argentina, the **opening of bids** is public via contrat.ar, which makes details regarding the identity of bidders, the total price of offers and prices for each item publicly available. The decision about the contract award is also uploaded onto contrat.ar.

Detailed information on bidders and bids may facilitate collusive agreements by providing cartel members with the information necessary to monitor collusive schemes and perhaps punish bidders that deviate from the agreed terms. Punishment may consist of, for example, exclusionary conduct or price wars to discipline the cheating company, as well as schemes to compensate "losing" cartel members for the deviation.

The OECD recognises that there are public-policy considerations in deciding whether bid-level information is disclosed, including accountability of public officials, transparency regarding allocation of public bodies' budgets, fighting corruption, as well as participants' rights to appeal decisions by contracting authorities. These other objectives may be still achieved, however, if the public release of information about bids and bidders is delayed until a certain time after the conclusion of the tender (say, six to eight months after the award of the contract) or bidders' information is anonymised, for example, by identifying them on the portal using a code known only by the contracting entity. This would make it more difficult for members of a collusive scheme to monitor bidding behaviour in real time. The winning bidder would still be announced.

As illustrated in Box 8.1, some OECD countries have adopted disclosure rules that take into account not only transparency requirements, but also competition considerations.

Box 8.1. Disclosure rules of public procurement information in France and Germany

In **France** contracting authorities are required to ensure the confidentiality of industrial or commercial secrets, as well as the non-disclosure of information that could distort competition, such as information on general or detailed prices of the tenders during the procurement procedure.

The practice has been to protect all bids from access by competing tenderers. Information about the winning tender such as overall pricing must, however, be disclosed to competitors post-award. The technical and financial details of the winning tender (such as unit prices) may be redacted to preserve confidentiality.

The goal is to avoid facilitating collusive practices against the public economic interest.

In **Germany**, business secrets are understood broadly as "*all facts, circumstances and processes referring to a company, which are not obvious, but accessible to a limited number of persons only and in which the legal entity has a justified interest of non-disclosure*". Business secrets cover the entirety of the bids submitted in procurement procedure and the contracting authority is required to protect them during the tender process.

Source: (Sanchez-Graells, 2018[29]).

Contrat.ar also contains information about the questions that potential bidders have submitted about tender terms. While making public the questions and answers is valuable to all companies considering submitting a bid, the publication of the identity of companies that have asked questions is more sensitive. It could facilitate collusion at an early stage of the tender procedure by enabling potential bidders to identify competitors and providing an opportunity for collusion before bid submission.

The OECD recommends that public authorities anonymise companies submitting questions, at least until the contract has been awarded.

8.2. Site visits

Argentinian law does not set forth requirements and procedures for **site visits** to the locations of the tendered works, which are commonly organised by contracting authorities to help potential bidders in their bid preparation. The tender terms of the Ministry of Interior require bidders to submit a certificate indicating that they have participated in a site visit,

as proof that they are aware of the works' technical characteristics and assume the performance risks.

Depending on the contracting authority, site visits are carried out individually with each potential bidder or collectively gathering all bidders on site together. The latter may facilitate bid rigging by bringing all potential bidders together at the same place and providing an opportunity for collusion before bid submission.

The OECD recommends that site visits are organised individually and attended by two procurement officials to assuage concerns of corruption. The contracting authority could also improve efficiency and avoid bringing together potential bidders by using technology such as drones for site inspections.

8.3. Maximum reserve prices

In Argentina, tender terms include the official budget for the works being tendered.

The OECD Guidelines (OECD, 2009[2]) recommend using **maximum reserve prices** only if they are the result of thorough market analysis and contracting officials are convinced of their competitive nature. Any reference prices should always remain confidential. Publishing them informs bidders how much the contracting authority is willing to pay, making price-fixing easier. It also creates a focal point around which bidders will likely focus their bids, regardless of whether they explicitly agree to fix prices.

The OECD recommends that Argentina does not publish this type of information (OECD, 2009[2]). Some contracting entities in Argentina such as ADIFSE, a state-owned company in charge of building rail infrastructure and whose procurement procedures are not governed by the Public Works Law, does not make public its official works budget. ADIFSE claims that this measure and others, such as keeping consultations anonymous, have resulted in contractors offering more aggressive prices. ADIFSE reported that, according to their internal estimates, the average price per kilometre of rail construction has decreased by 30% since the implementation of these measures.

8.4. Abnormally low prices

Some public entities in Argentina do not award contracts below a certain price. For instance, the Ministry of Interior excludes offers that are below 15% of the official budget, if analysis of a bidder's technical report shows that it will not be able to honour the contract at the proposed price. DNV reviews bids proposing a price lower than 80% of the official budget for the works, and requests an additional bank guarantee three times the amount of the contract-performance bond.

Contracting authorities in many OECD countries consider that **abnormally low prices** are risky because it is not uncommon for a winning bidder to request a higher-priced contract after the award. Another risk of **abnormally low tenders** (**ALT**) is that the winning bidder simply stops work as the price being paid does not cover its costs, leading to budget overruns and long delays in completing a project (OECD, 2015[23]).

An ALT price may be genuine, however, and can result from a new entrant having a more advantageous cost structure than its rivals, be the consequence of efficiencies, such as the use of new technologies, or economies of scale or scope. The restoration of competitive conditions in a market (for example, the termination of a cartel agreement following the initiation of a cartel infringement investigation by a competition authority) could also

explain significantly lower tender prices compared to previously offered ones. Procurers should therefore consider the tender terms and the market reality when deciding whether a price offered is too low.

The OECD recommends that Argentina considers adopting regulation in this area. The OECD checklist on how to reduce the risks of ALT while protecting competition described in Box 8.2 could be used as a basis for this regulation.

Box 8.2. OECD checklist on ways to reduce the risks of abnormally low tenders (ALT), while protecting competition

1) To address the risks of abnormally low tenders without acting in a way that may reduce competition, at the **pre-tendering stage**, the procurer should:

- Provide all potential bidders with **clear tender documentation**, including all the relevant information available on the product or service being procured, in order to help bidders make the most realistic cost estimates possible.
- Ensure that the **time allotted for suppliers to respond** is proportionate to the size and complexity of the procurement. This is particularly important in technically complex projects for which it may take time to develop more accurate cost estimates.
- Use **assessment criteria that focus not only on price**, but also factors such as quality, deliverability, value or others important to the procurer that bidders might reduce in order to offer a very low price.
- Require the **winning bidder** to take pre-emptive steps to **internalise the risk** if its costs are higher than expected. For example, by taking out professional liability or project insurance, or providing a performance bond that pays out to the procurer in the event that the contractor cannot deliver the project on the originally agreed terms.
- Set out in detail in the tender documentation that **renegotiation** will only be considered when the information originally provided by the procurer proves to be inaccurate (incorrect or incomplete), or when clearly specified conditions are satisfied (for example, an increase in the price of specific inputs that could not have been predicted by the bidder). Furthermore, applicable procurement law may set out conditions that must be fulfilled for renegotiation to be permitted.
- Include **sanctions** in the contract for any bidder that pulls out or fails to deliver the terms of its contract, unless the information originally provided by the procurer proves to be inaccurate (incorrect or incomplete). These sanctions could include financial penalties, temporary debarment of firms or individuals, or legal claims for damages by the contracting authority against the contractor. In the large majority of cases, sanctions are a sufficient deterrent, suppliers deliver at the conditions at which the tender was decided, and no extra action is necessary. Any sanctions would need to be consistent with applicable procurement law.
- Set out in the tender documentation that if a procurer suspects a firm has strategically bid below its average variable cost, it will **refer the case to the competition authority**, which may decide to assess whether the action is problematic under the relevant standards.
- Consider, in high-value projects, creating **whistle-blower rewards** for reporting evidence that a firm has bid at a price it intends to renegotiate at a later date, especially if accompanied by evidence of corrupt agreements with procurement officials.

2) To address the risks of abnormally low tenders while not reducing the value that the procurement might achieve, at the **tendering stage**, the procurer should:

- Assess all bids against its evaluation criteria, which might include the quality or deliverability of the bid, and **not automatically exclude a bid on the basis of its low price**. Doing so would, for example, risk excluding new entrants making loss-leading bids to obtain a foothold in a market.
- Check the **cost assumptions of the winning bid** to make sure it is deliverable, whether it is an abnormally low bid or not. Any checks carried out need to be proportionate to the procurement in question to avoid creating unnecessary costs and delays in the bidding process.

Source: OECD Public Procurement Toolbox, *Checklist for protecting competition when managing the risks of very low tenders*, www.oecd.org/governance/procurement/toolbox/search/checklist-protecting-competition-managing-risks-very-low-tenders.pdf.

8.5. Certificate of independent bid determination (CIBD)

A certificate of independent bid determination (CIBD) is recommended by the OECD Guidelines (OECD, 2009[2])to promote competition in public procurement. A CIBD is a statement by the bidder that their submitted bid is genuine, non-collusive and made with the intention of accepting the contract, if awarded.[19] It makes firms aware of the unlawful nature of collusive agreements; demonstrates that the contracting authority is aware of, and alert to, bid rigging; and shows the contracting authority's zero tolerance for bid-rigging practices. Moreover, it makes the legal representatives of firms more directly accountable for any unlawful behaviour. As such, it can be an important deterrent to bid rigging.

The Argentinian regulatory framework does not require bidders to submit a CIBD if they wish to participate in a tender. Nevertheless, CNDC has suggested the inclusion of a CIBD in tender documents on the occasions it was consulted on the design of procurement processes (see Section 4.2).

In January 2019, the DNV took the initiative, after participating in the workshops organised by the OECD and discussions with CNDC, to require the signature of a CIBD in all its procurement processes. CNDC has been supporting DNV in this effort and helped with the design of the CIBD (see Annex 8A The DNV's CIBD).

Argentina should promote the submission of a CIBD for all public tenders.

8.6. Recommendations for action

- Argentina should **avoid publishing information about the identity of bidders, the total price of offers and prices** for each item during the tender process and a period after the contract has been awarded. The public release of this information should be delayed until a certain time after the conclusion of the tender (say, six to eight months after the award of the contract) or bidders' information should be anonymised. The winning bidder would still be announced.
- **Contracting authorities should avoid bringing together potential bidders for site visits,** either by organising visits individually or by using technology, such as drones for site inspections.

- Argentina should not publish the official budget of works.
- Argentinian procurement entities **should assess abnormally low tenders** to ensure that they are genuinely competitive.
- Argentina should promote the requirement for a certificate of independent bid determination for all public tenders.

Annex 8A The DNV's CIBD

CERTIFICATE OF INDEPENDENT BID DETERMINATION
Certificate of independent price determination

1. The bidder as an affidavit certifies that:
    a. The prices in this offer have been determined independently, without consultation, communication or agreement with any other bidder or competitor, with the aim of restricting competition with respect to:
        i. The prices;
        ii. The intention to submit an offer; or
        iii. The methods or factors used to calculate the prices offered.
    b. The prices in this offer have not been and will not be disclosed by the bidder, either directly or indirectly, to any other bidder or competitor before the opening of bids, unless required otherwise by law. The prices in this offer were not manifested, expressed or discussed in any chamber, federation or business confederation or similar body.
    c. The bidder has not made or will not make any attempt to induce the interest to present or not an offer for the purpose of restricting competition.
    d. The bidder has not agreed or entered into contact with its competitors for the purpose of allocating geographic areas or markets.
2. Each signature in the economic offer is considered as a certification by the signatory that he/she is:
    a. A person within the organization of the bidder responsible for determining the prices that are being presented in this offer or proposal, and has not participated or will participate in any action contrary to paragraphs (1) (a) to (1) (c) of this certificate; or
    b. The signatory:
        i. on the date of the present certificate has powers to represent the bidder and to state that it has not participated nor will participate in any action contrary to paragraphs (1) (a) to (1) (c) of this certificate.
        ii. As an authorized agent, certifies that the persons indicated in paragraph (2) (b) (i) of this certificate have not participated, nor will participate, in any action contrary to paragraphs (1) (a) to (1) (c) of this certificate;
        iii. As a representative, he/she has not personally participated, and will not participate, in any action contrary to paragraphs (1) (a) to (1) (c) of this certificate;
        iv. is not aware that any of the conducts provided for in article 2 of Law No. 27 442 have been carried out.

First name
Surname
Position
ID
The present certificate must be signed and presented in original.

9. Raising awareness of the risks of bid rigging

Procurement that is designed to capture the benefits of the competitive process among firms will result in efficiency gains (OECD, 2015[23]). Using data covering more than 200 auctions conducted in developing countries for infrastructure development, one economic study has estimated cost savings from promoting competition in tendering to amount to 8.2% of total infrastructure development costs (Estache and Iimi, 2008[30]).

Competition policy in Argentina has not been a priority until 2015 (see Section 4). During its fact-finding mission, the OECD observed that competition policy and, in particular, the need to prevent and detect bid rigging, has not been taken into consideration in public procurement policy. It has been based on public-law principles, and focused on integrity, transparency and probity of the process, but not on competition.

Public procurement officials' knowledge about the negative impact of bid rigging in procurement and about CNDC's role in enforcing and advocating for competition policy is limited. Awareness of competition policy in the private sector, apart from specialists, has also been low.

Stakeholders interviewed by the OECD during the fact-finding mission have indicated that there are many reasons for this lack of competition awareness. Public procurement officials are generally lawyers with experience and expertise in administrative law. Competition law has only recently begun to be taught in universities. Anti-cartel enforcement by CNDC is not considered as a real threat by companies, partly because of how few number of cases on bid rigging have been brought in the past 15 years. The CNDCs advocacy initiatives are recent (see Section 4). The OA and the INAP do not organise competition training for public procurement officials (see Section 9.2); neither does CAMARCO for its members (see Section 9.3). This environment leaves public procurers unfamiliar with the support they can request from the CNDC in terms of capacity building and reporting bid-rigging suspicions.

Stakeholders have mentioned that inter-institutional co-operation is not common practice in Argentina. This is reflected in the limited and informal interactions between the CNDC and other public-administration bodies involved in public procurement (see Section 9.1)

9.1. The role of the competition authority in enforcement and awareness-raising

As discussed in Section 4, the 2018 Competition Law reinforced the competition agency's enforcement powers with the creation of a leniency programme (leading to the adoption of a temporary procedure for leniency application) and an increase in the level of fines that may be imposed.

Strong and regular competition enforcement is important for preventing and deterring bid rigging, as is raising awareness in the private sector.

This project started before the *cuadernos* corruption investigation, which is on-going at time of writing. The case involves alleged bribes and bid-rigging agreements among constructors. The public debate since the *cuadernos* case came to light has focused on fighting corruption (Den Toom, 2018[31]).

Collusion and corruption are two distinct issues involving different behaviours and having different effects. Nonetheless, and as illustrated in Box 9.1, collusion and corruption in public procurement can often occur at the same time. For example, a bid-rigging scheme may be facilitated by having an "insider" in a public agency that provides the bidders (in

exchange of a bribe for example) with information necessary to rig bids in a plausible manner and may even operate as a cartel enforcement mechanism. Both illegal conducts have a serious negative impact on the integrity of and public confidence in public-procurement processes (OECD, 2010[32]). The OECD Integrity Review of Argentina has recommended strengthening public integrity to prevent corruption throughout the whole cycle of public procurement processes (OECD, 2019[33]).

Box 9.1. Collusion and corruption: the "Lava Jato" case

In Brazil, the "Lava Jato" (car wash) case, which began in 2013, involves a number of investigations that helped uncover one of the most widespread corruption, collusion and money-laundering cases in Latin American history. The corruption and collusion scheme involved politicians appointing high-level directors at state-controlled oil company Petrobras, who would, in turn, accept bribes in exchange for government contracts, with corrupt money then used to finance political campaigns. In addition, the construction companies involved in the corruption scheme divided the markets among themselves and fixed prices, all affecting government procurement.

Following an initial investigation of a possible corruption scheme involving a senior director of Petrobras, the Brazilian competition authority (CADE) opened around 20 bid-rigging investigations targeting construction companies involved in different projects such as the construction of power plants, the construction of stadiums (for the 2014 FIFA World Cup in Brazil and the 2016 Olympic Games in Rio de Janeiro) and railroads. In the period 2015-2017, CADE signed a number of leniency agreements related to the "Lava Jato" case.

As the investigation involved both collusion and corruption, the leniency agreements have been jointly signed by CADE and the prosecutor's office or the state prosecutor. This case highlights the importance of having in place self-reporting programmes both for corruption and competition law infringements and effective co-operation between public institutions.

Source: (OECD, 2019[34]).

The adoption of the 2018 Competition Law is a positive step towards building a culture of genuine competition in public works and public procurement in Argentina. The success of the new legislation will depend on whether sufficiently high fines will be imposed in appropriate cases (Whish, 2018[12]). High detection and severe sanctions on bid-rigging participants are important in raising awareness and deterring companies from violating competition law in the future. As shown in Box 9.2, focus on increasing sanctions and prosecuting bid-rigging cases is an international trend.

Box 9.2. Competition enforcement trends at international level

Ireland

A 2012 amendment to the Irish Competition Act increased the maximum prison sentence that can be imposed on an individual for hardcore cartel offences, including bid rigging, from 5 to 10 years. The 2012 amendment also provides that a convicted party must to reimburse the competition authority for the costs of the investigation and prosecution.

Korea

The Korean Fair Trade Commission (KFTC) fined a dozen companies, including some of the country's largest construction groups, KOR 26 billion for rigging bids on projects related to the Saemangeum Seawall, the world's longest man-made dyke in 2015.

Colombia

The Colombian Competition Authority (Superintendencia de Industria y Comercio, SIC) has increased enforcement actions since 2010 and is now handling approximately 15 cases a year, up from 3 in the years previous to the new drive.

Australia

An OECD report on maximum and average pecuniary penalties for competition-law infringements in Australia found those imposed were significantly lower than the pecuniary penalties imposed in other OECD jurisdictions considered in the report. This was particularly true for large companies or conduct that lasted for a long period. Among its findings, the report highlighted that the Australian Competition Authority (ACCC) does not start its penalty assessment by reference to the company's turnover or value of commerce affected.

Penalties in Australia are not set by the competition agency, but by courts, even if the competition authority can suggest an appropriate penalty. Following this report, the ACCC indicated that "*we do not want breaches of our competition law to be seen as an acceptable cost of doing business. We need penalties that will be large enough to be noticed by senior management and company boards, and also shareholders* […] *The ACCC sees merit in considering the relevance of this baseline approach*" – penalties applied on the basis of the company's turnover or value of commerce affected – "*noting that if it was applied in Australia, it would appear likely that firms with larger turnover would generally end up with much higher penalties.*" The ACCC also considered the OECD's suggestion to consider developing penalty guidelines, similar to the approach taken by the other OECD jurisdictions.

Canada

The Canadian Competition Act was amended in March 2009 to increase the liability associated with cartel offences. The maximum penalty for price fixing increased from a term of imprisonment not exceeding 5 years to a term not exceeding 14 years, and from fines not exceeding CAN 10 million to fines not exceeding CAN 25 million. The maximum penalty for bid rigging also increased, from a term of imprisonment not exceeding 5 years to a term not exceeding 14 years.

Spain

In 2016, the Spanish Competition Authority CNMC took the strategic decision to boost its fight against bid rigging. To this end, a specialised enforcement unit was created to develop screening techniques, data analysis and statistics to detect collusion.

In 2018, CNMC created also an economic intelligence unit, attached to the Competition Directorate, with its own personnel and technical resources. The unit is specialised in whistle-blowing, bid rigging, ex officio detection, and developing knowledge on algorithms and artificial intelligence.

As a result of these efforts, in the period 2016-2018, CNMC sanctioned nine bid rigging cases, with six cases still under investigation.

Source: (OECD, 2018[35]). (OECD, 2016[4]). ACCC press release (26 March 2018), "OECD finds Australian competition law penalties are significantly lower", www.accc.gov.au/media-release/oecd-finds-australian-competition-law-penalties-are-significantly-lower.

Sanctions also have an impact upon the willingness to apply for leniency programmes. Leniency is attractive only if a competition authority has built up a sufficient level of credibility about its capacity to detect and punish cartel infringements (OECD, 2018[36]).

The CNDC and the planned ANC should make sure that competition law is effectively enforced by investigating bid-rigging practices. Until now, CNDC's weak enforcement powers, the difficulties in conducting dawn raids, and a lack of resources, such as

equipment for IT forensics, have slowed down competition enforcement in Argentina. Since its creation in 1980, the CNDC has prosecuted only two bid rigging cases.

The CNDC Advocacy Unit, set up in 2016 (see Section 4) now promotes competition policy with the government and the private sector. The CNDC provides, upon request, advice on the design of tender terms for certain procurement entities. For instance, the CNDC has been consulted about the purchase of haemophilia drugs, land-transport services between Bolivia and Argentina, and dredging works in the port of Río de la Plata. Box 9.3 provides examples.

Box 9.3. CNDC's advice on purchase of medicines

Joint procurement of haemophilia drugs

In 2018, for the first time in Argentina, a large number of public organisations co-operated in the design of a public tender to procure factor VIII, a treatment for haemophilia A. The CNDC participated in the development of the bidding process, giving advice on the bid specifications so that opportunities for collusion were minimised. The experiment was a success and received bids substantially lowered the cost of the treatment for 2018 compared to previous years. The government is planning to extend this process to other medical treatments.

New procurement for pharmaceuticals for the elderly

In April 2018, PAMI, the health insurer for the elderly population, a public entity and the largest single buyer of medicines in Argentina, accounting for between 35% and 40% of the total market for pharmaceutical products, changed the way it would contract with the pharmaceutical industry. Up to that date, PAMI purchased medicines through an agreement with three trade associations representing the majority of the industry. The CNDC held informal meetings with PAMI and chief of staff officials to discuss how it would contract, which resulted in PAMI issuing tenders to contract with individual laboratories, rather than trade associations.

Source: (OECD, 2018[37])

Procurement officials are often in the best position to detect signs of collusion in public tenders, as they have access to tender data and documents, opportunities to observe patterns of behaviour in the bidding process, and comprehensive knowledge of the relevant market. This makes it fundamental that competition agencies and public procurement authorities co-operate to tackle bid rigging effectively.

CNDC could consider building a more stable and formal relationship with procurement entities through, for example, the Federal Network of Government Procurement (Red Federal de Contrataciones Gubernamentales; see Box 9.5). The CNDC should also establish a more structured and stronger link with the ONC and be given the resources to do so. As shown in Box 9.4, co-operation agreements between contracting authorities and competition agencies are considered good practice in many OECD countries.

Such an agreement in Argentina could include:

1) assistance in preparing training materials for procurement officials
2) participation in training activities
3) joint initiatives to set up a website or hotline to allow interested parties to report fraud, corruption and bid rigging anonymously

4) advice on strategy, design, development and implementation of contracting procedures related to large or strategic purchases
5) the elaboration of guidelines on fighting bid rigging
6) direct access to public procurement databases.

Box 9.4. Co-operation agreements between competition, procurement and anti-corruption authorities in OECD countries

Italy

The **Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato, AGCM)** has provided advice to public procurement agency Consip on a number of tenders.

In 2014, AGCM signed a memorandum of understanding (MoU) with the Anti-Corruption Authority (in charge of managing the National Database on Public Contracts) to foster co-operation and exchange of procurement information. Exchanged procurement data allowed the AGCM to identify suspicious patterns in a tender on school-cleaning services and launch a formal investigation. Evidence gathered showed bidders had co-ordinated their bids by distributing available lots between themselves and using subcontracts to compensate companies that sat out the procurement process. In December 2015, the competition authority fined the companies in this bid-rigging scheme up to EUR 110 million.

Bid rigging is both a criminal and an administrative competition law offence in Italy. In January 2018, the AGCM signed a MoU with the Public Prosecutor's Offices of Rome and Milan to increase the effectiveness of prevention and fight against bid rigging. The MoU sets up an operational framework for the exchange of information on criminal and administrative proceedings within the respective areas of responsibility.

Canada

Competition Bureau Canada provides training sessions on fighting bid rigging to employees of Public Services and Procurement Canada (PSPC), the Canadian federal government's principal procurement agency. The relationship between the two authorities has been formalised by an MoU, aimed at enhancing co-operation and intensifying prevention, detection and reporting of collusive behaviour. The Competition Bureau and PSPC have agreed to share information and co-operate for advocacy and enforcement, and now PSPC refers bid-rigging complaints and cases to the Bureau for investigation. Their collaboration now includes joint training sessions for relevant stakeholders on how to prevent and detect cartels.

Source: (OECD, 2016[4]); (Depau, 2016[38]); (OECD, 2018[39]).

Box 9.5. Federal Network of Government Procurement

In Argentina, each government level (national, provincial and municipal) may adopt its own contracting regime.

This resulted in inefficiencies for suppliers, contracting authorities, and citizens. Suppliers were faced with different contracting rules and e-procurement systems, and if providing goods, services and works in different provinces they were required to submit the same document each time they wanted to participate in a procurement procedure. This increased the costs of submitting bids and had a negative impact on competition.

Against this background, in 2009, contracting authorities from 17 levels of government decided to create the Federal Network of Government Procurement (Red Federal de Contrataciones Gubernamentales). The main objectives of the network are to: 1) strengthen its members' contracting regimes; 2) share good practices; 3) promote capacity building; 4) establish co-operation and exchange of information mechanisms; and 5) promote law harmonisation.

Source: (Montes and Fretes, 2013[40]).

The CNDC should also consider building an inter-institutional relationship, which may require the signing of a formal co-operation agreement, with the Public Prosecutor's Office (Ministerio Público Fiscal) to exchange information and documents and discuss assistance in investigations.

9.2. Capacity building of staff involved in public works

In Argentina, public procurement officials are not systematically trained in the prevention and detection of bid rigging.

Raising awareness among procurement officials about the costs and risks of collusion is important in the fight against bid rigging. The Guidelines recommend procurement agencies regularly train their staff in bid-rigging prevention and detection.

INAP, which provides training to public officials when they join the public administration and throughout their careers, offers a dedicated training module on public procurement in association with ONC. While focusing more on purchases of goods and services than on public works, it does include courses on how to use compra.ar; criteria for evaluating offers; possible sanctions to suppliers; guarantees; different phases of contracts; and ethics and transparency in public procurement. Other stand-alone courses on using contrat.ar or introductions to public procurement are available for public officials on INAP's website. None of these modules or courses include any training on bid rigging: what it is, when it occurs, how to prevent and detect it.

The OA, conducts training on transparency in contracting procedures and on the recently adopted Decree on Public Ethics,[20] which regulates public officials' behaviour when faced with conflicts of interest. Between 2017 and 2018, 350 public officials attended these OA workshops. Although competition in public purchasing is indirectly addressed in some of the OA's capacity-building events, the fight against bid rigging is not specifically or thoroughly addressed.

Since the creation of its Advocacy Unit in 2016, the CNDC has organised a series of capacity-building events on bid rigging.

- On 8 November 2016, the CNDC and the OECD organised an event about Competition and Public Procurement at which the OA and other public entities participated. Experts from Brazil, Chile and Colombia were invited to share their experiences.
- In August 2017, the CNDC participated in the XXII Meeting of the Federal Network of Government Procurement. Staff from the CNDC discussed the new competition law (which had not yet come into force), bid-rigging risks and definition, reporting mechanisms, how to detect bid-rigging practices, and how to design procurement procedures to reduce the risks of bid rigging.

- In October 2017, the CNDC, the OA and the British Embassy organised an International conference on "Fighting Bid Rigging and Promoting Competition on Public Procurement". Experts from the Paris School of Economics, the Italian Agency of Centralised Procurement, and the General Court of the European Union participated in this conference.
- In November 2017, the CNDC trained procurement officials from the Ministry of Finance of the Province of La Rioja.
- In December 2018 and March 2019, the CNDC and the OECD co-organised four workshops on fighting bid rigging for procurement officials, mostly dealing with public works, as part of this project. International experts from Brazil, Spain, Italy and Mexico gave presentations about bid-rigging cases and the design of competitive procurement procedures.

On the basis of these initiatives, Argentina should begin developing and implementing a comprehensive, long-term programme of capacity building in public procurement and fighting bid rigging, rather than relying on isolated initiatives. The modules proposed by INAP provide a good basis to develop such a training programme, with the support of CNDC, assuming it has sufficient resources. The OECD produced a training manual on bid rigging designed for use by the public administration in the context of this project, to help set up regular training about collusion for procurement officials.

9.3. Raising awareness in the private sector about the risks of bid rigging

Capacity building in the private sector, including with SMEs, on competition risks in public procurement was identified as a subject for future work in the 2016 report on the implementation of the OECD recommendation on fighting bid rigging (OECD, 2016[4]).

It is crucial to inform the private sector about the illegal nature of bid rigging, its legal and financial consequences, and its negative impact upon business reputation and future opportunities.

Argentina has recently adopted a new regime on the criminal responsibility of private legal entities. It states that companies wishing to bid in public-works procurement processes must have a compliance programme in place. This obligation only applies to tackling integrity breaches, however, not infringements of competition law, such as bid rigging.

Compliance programmes are a useful tool to increase awareness on what actions may be illegal in a bidding process. The OECD's review has revealed that both the private and the public sector are not, in most cases, familiar with competition law and the difference between corruption and collusion. Adding competition good practices in compliance programmes would be a good measure.

Until recently, bid rigging and the role of trade associations could play in collusion schemes has not been explored. The CNDC published guidelines on competition law for trade chambers and professional associations in December 2018.[21] CAMARCO is now developing a compliance programme that should also cover this, with which CNDC could consider guiding CAMARCO. Rail infrastructure entity ADIFSE, in collaboration with German organisation Alliance for Integrity,[22] has organised capacity building to improve awareness within CAMARCO of corruption and collusion.

The ONC, with the support of the OA and the CNDC, could also consider taking initiatives to build the capacity of companies in these sectors.

9.4. Recommendations for action

- **Fighting bid rigging should be part of the country's public procurement policy**.
- The **competition authority should build a stable and formal relationship with procurement entities** to boost its advocacy role in public procurement.
- The **Competition Authority should build an inter-institutional relationship with the Public Prosecutor's Office (Ministerio Público Fiscal)** to create formal channels of communication between the institutions.
- Argentina should **develop and implement a comprehensive, long-term programme of capacity building in public procurement and fighting bid rigging for procurement officials**. The training manual on bid rigging developed by the OECD could be used for this purpose.
- Argentina should **raise awareness in the private sector of the risks of bid rigging** by, for example, requiring the inclusion of competition good practices in compliance programmes or developing initiatives to build the capacity of companies in sectors that are strategic for public works. This could be done with the support and guidance of the ONC, the OA, and the competition authority.

10. Detecting and punishing collusive agreements

10.1. Efficient internal reporting mechanisms

Many bid-rigging investigations are initiated as a result of information received from procurement officials who have spotted suspicious behaviour. To ensure that suspicions are reported, clear lines of reporting must be established.

In Argentina, competition has not been perceived as being relevant in public procurement (see Section 9). More weight has been given to corruption. Inside Argentinian public entities in charge of procuring public works, there exist no internal clear channels to report suspicions of bid rigging.

The OA has mechanisms in place to report suspicions anonymously of corruption and has set up ethics and integrity units inside public entities (Unidad de Ética y Transparencia, UET). The UET at DNV, mentioned in Section 2.3, has established a procedure for anonymous complaints about corruption in DNV. All UETs relay complaints that fall outside the OA's competence to the relevant competent public authority. Complaints regarding bid rigging could therefore be routed to the CNDC.

Complaints submitted to CNDC cannot be anonymised as the Competition Law requires that the identity of the complainant be revealed.[23] As public awareness about the role of the CNDC has been limited (see Section 9), it may be unlikely that public officials or companies would use this channel to report bid rigging. The OECD recommends adding a link to the CNDC website that indicates the details for lodging a complaint in calls for tenders.

The OECD recommends that Argentina establishes specific reporting units and procedures to report bid rigging suspicions. The unit receiving complaints could be the legal department inside the contracting entity, which may be able to analyse the seriousness of the suspicions and take the relevant action. Reporting procedures inside contracting entities (and therefore the legal department, if this is the chosen venue) should be anonymised and

confidential; whistle-blowers should be protected from retaliation. Box 10.1 illustrates anonymous reporting mechanisms set up by various competition authorities.

Box 10.1. Confidential and anonymous reporting of anti-competitive practices

Competition authorities around the world rely on information from whistle-blowers in order to investigate anti-competitive practices and agreements. Whistle-blowers can be cartel members as well as third-party informants.

Mexican competition authority COFECE has a standardised form on its website that allows any person to report information about possible anti-competitive practices; the procedure is confidential, and the sender can provide information anonymously, if he or she wishes.

The **European Commission** recently introduced a new whistle-blowing tool that allows the exchange of information and protects an informant's anonymity "*through a specifically designed encrypted messaging system that allows two-way communications [...] run by a specialised external-service provider that acts as an intermediary, and which relays only the content of received messages without forwarding any metadata that could be used to identify the individual providing the information*".

Sources: COFECE, "Reporta prácticas anticompetitivas", www.cofece.mx/autoridad-investigadora/reporta-practicas-anticompetitivas; European Commission, Anonymous Whistleblower Tool, http://ec.europa.eu/competition/cartels/whistleblower/index.html; European Commission press release, "Antitrust: Commission introduces new anonymous whistleblower tool", 16 March 2017, http://europa.eu/rapid/press-release_IP-17-591_en.htm.

10.2. Other detection tools

On top of evidence reported by whistle-blowers, competition authorities rely on other detection tools, such as market studies or cartel screens to launch their own investigations.

Cartel screens are "economic tools designed to analyse observable economic data and information"[24] and can help identify markets where cartel-like behaviour (or bid rigging) is more likely to occur, or those already affected by collusive behaviour.

The screens can be structural or behavioural. Structural screens focus on industry and market characteristics, such as number of firms, barriers to entry, innovation and market transparency, in order to assess the risk of collusion. Behavioural screens analyse market participants' behaviour and assess if it is more consistent with collusion or competition (the pattern of several market variables can be affected by collusion). The two approaches are complementary (OECD, 2013[41]).

Screens are especially useful to detect bid rigging in public tenders, when bidding data are reliable and accessible to competition agencies. International experience with screens for bid rigging is already broad, and is now rapidly evolving thanks to digitalisation.

Box 10.2. Cartel screening tools

In 2017, the United Kingdom's **Competition and Markets Authority (CMA)** developed a **digital screening tool for procurement officials.** Using tender data and documents, such as calls for tenders, bid submissions and respective prices, and the identity of the winning bidder, the tool can test for suspicious signs of collusion in the number and pattern of bidders, pricing patterns, document origin and low-endeavour submissions. The results of the test, based upon adjustable thresholds and weightings, flag possible instances of bid rigging in a tender.

In Brazil, the Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica, CADE) has developed a tool called **Cérebro** to enhance the authority's detection capabilities. With a large dataset composed of multiple databases, the tool employs data mining and statistical tests to identify suspicious patterns such as bid suppression, cover bidding, bid rotation, superfluous losing bidders, stable market shares, pricing patterns, textual similarities in bids and submitted files' metadata. The tool helps the authority to detect bid rigging, open investigations, and collect evidence.

In 2018, CADE conducted its first investigation based on the information obtained from Cérebro: a check of tenders run by an authority to employ firefighters for its premises. Cérebro identified suspicious behaviour by 14 companies in more than 500 public tenders, and obtained evidence that allowed CADE to obtain judicial authorization to search 13 of the companies.

Sources: Competition and Markets Authority (2017), "Screening for cartels: tool for procurers", www.gov.uk/government/publications/screening-for-cartels-tool-for-procurers; CADE's presentation to the OECD (2018) workshop on cartel screening in the digital era, www.slideshare.net/OECD-DAF/cartel-screening-in-the-digital-era-cade-brazil-january-2018-oecd-workshop; and the contribution from Brazil to the OECD Latin American and Caribbean Competition Forum session on "Promoting Effective Competition in Public Procurement", DAF/COMP/LACF(2016)19, https://one.oecd.org/document/DAF/COMP/LACF(2016)19/en/pdf.

The OECD's review has revealed that the CNDC does not have direct access to procurement data, and has to request them from contracting authorities on a case-by-case basis. As contracting authorities are unfamiliar with competition investigations, the submitted data are sometimes incomplete, badly organised or not in a user-friendly format. Publicly available data (such as those published on contrat.ar) are not designed to assist with the detection of bid-rigging schemes. Data should be collected and stored in a database (or interoperable databases) that enable conducting statistical or econometric analyses of bidding patterns (see Box 10.3).

The OECD recommends that Argentina considers granting CNDC access to procurement data held by ONC. This may require a formal agreement between ONC and CNDC that should deal both with data access and how data could be registered and stored to facilitate their extraction and treatment (see Box 10.3). In view of the novelty of the leniency programme and Argentina's low bid-rigging enforcement record, screening procurement data to identify collusive patterns may prove extremely useful. Nevertheless, developing and implementing a screening tool will depend on whether the CNDC and its successor entity, the ANC, are granted sufficient human and IT resources.

Box 10.3. Principles of the design and content of tender databases to assist with detecting bid-rigging patterns

Data targeting. The data should fit the scope of any proposed analysis. Identifying the purpose of each analysis will serve to inform the type and format of the data collected. For example, information on contracts does not allow for the analysis of bidding patterns, the detection of instances of potential bid rigging, or the design of appropriate tenders.

Data quality. Good-quality data are paramount to producing useful results that can be correctly interpreted. The data input and validation methods should be designed so that data are recorded in a standard, consistent and error-free manner. For example, how pricing and units are used should be uniform; text fields and naming conventions should be set; and checks for discrepancies in coding should – to the greatest possible extent – be built into the data-input stage.

Data usability. Tender data should be as flexible as possible, so that the necessary filters and analytical techniques can be easily applied. As much information as possible should be stored in a searchable format that allows easy handling and use; for example, detailed records in spreadsheets or databases rather than scanned images of contracts.

Any databases should be interoperable, both in terms of formatting and cross referencing. For example, if data at the tender, contract-award and contract-performance stages are held separately, it should be possible to join these records if necessary.

Data access. Database design should establish who holds and maintains the base, as well as who has access to it, both for inputs and outputs. Granting selective access to external stakeholders, such as the procurement governing body or the competition authority (for which an agreement may be required), should be considered. Given the nature and content of the information to be held in this database, it should not be made publicly available.

Source: (OECD, 2018[15]).

10.3. Debarment

Debarment consists of excluding bidders who have engaged in collusive behaviour from future tenders for a certain period of time. As shown in Box 10.4, debarment is used to sanction bid-rigging infringements in several jurisdictions and has a deterrent effect, especially when exclusions from procurement are lengthy (Cerrone, Hermstrüwer and Robalo, 2018[42]).

In concentrated markets with high barriers to entry, bidder exclusion may result in a lack of supply or considerably reduce participants in future contracting procedures, which could increase the risk of collusion. In such markets, the debarment of suppliers should be used with caution.

Box 10.4. Debarment of companies for involvement in bid-rigging activities

European Union

Article 57(4)(d) of EU Public Procurement Directive 2014/24/EU provides that contracting authorities may exclude or may be required by European Union member states to exclude from participation in a procurement procedure any economic operator for whom the contracting authority has sufficiently plausible indications to conclude that it has entered into agreements with other economic operators aimed at distorting competition.

Spain

According to the Spanish Law on Public Contracting, contracting authorities may exclude from tenders companies that have been found guilty by the Competition Authority or a judge of serious competition infringements. This exclusion is for a period up to three years and does not apply to leniency applicants. Likewise, the law provides for a list of self-clearing measures that excluded companies may implement to regain access to tendering procedures.

United States

According to US Federal Acquisition Regulation § 406-2 Causes for Debarment, officials may debar a contractor for a conviction of, or civil judgment for, a violation of federal or state antitrust statutes relating to the submission of offers.

Cross-debarment for multilateral banks

The African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, and the World Bank Group agreed in 2010 to mutually enforce each other's debarment actions, with respect to the four harmonized practices: corruption, fraud, coercion, and collusion.

Sources: European Union (2014), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Official Journal of the European Union, L 94/65, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN; US Federal Acquisition Regulation, www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf; http://lnadbg4.adb.org/oai001p.nsf/.

According to the new Decree on the Governance of Public Works, contracting entities may exclude bidders when:

1) There are precise and clear indications that bidders have agreed and co-ordinated their bids.
2) Bidders have received a judicial or administrative sanction for abuse of dominant position, dumping, collusion or any other form of unfair competition in the three years previous to submitting the bid.

When a contracting authority debars a company for suspicions of bid rigging, it should inform the CNDC before notifying the bidder in question. If the CNDC is not informed beforehand, there is a high risk that the bidder will destroy evidence before the CNDC has the opportunity to decide whether to open a case for bid rigging. Close co-operation between the contracting and the competition authorities is highly recommended.

Also, the new competition law provides for a sanction with a potentially strong dissuasive power upon companies: the suspension from the Registry of Providers for a maximum of five years for anti-competitive conducts, and eight years for bid rigging. The law is silent, however, about whether this suspension is also valid for the National Registry of Constructors. The OECD recommends that Argentina clarifies whether this sanction is applicable to bid-rigging practices in the procurement of public works, and if not, extend it to cover public works.

CNDC's decisions are made public on its website. The OECD recommends that Argentina consider creating a register or blacklist of companies convicted of having infringed competition law, which would be designed, developed and maintained by the CNDC. Germany has recently passed a bill for the creation of a competition register that lists

companies condemned for criminal offences (such as bribery, money laundering and tax evasion), violations of competition law, and certain labour law provisions (see Box 10.5).

Box 10.5. Competition Register in Germany

The law that created the German Competition Register (Wettbewerbsregistergesetz) entered into force on 29 July 2017. The German competition authority, the Bundeskartellamt, is in charge of running the Register. The law requires contracting authorities to retrieve information on bidders from the Competition Register before awarding contracts of more than EUR 30 000.

The Competition Register lists companies that have been convicted of the establishment of criminal associations, money laundering, public-sector fraud, bribery and corruption in business transactions, the granting of advantages, human trafficking, and tax evasion. Companies that have violated environmental, social, employment obligations and competition law (and whose offences resulted in fines above EUR 50 000) are also listed in the Register. Registrations relate to final judgements or rulings on fines, except for non-final decisions on breaches of competition law.

The Register enables contracting authorities to check in a single nationwide electronic search whether a company has committed relevant violations of law. Data recorded in the Competition Register are not available to the general public; they can only be accessed by contracting authorities for the purpose of awarding contracts. Registrations are deleted after a certain period (three or five years) and companies that have taken self-cleaning measures may also request early deletion.

Sources: "New competition register at Bundeskartellamt – Launch of establishment team", www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/23_10_2017_Wettbewerbsregister.html; Oppenhoff & Partner, "The new Competition Register – what enterprises need to know", www.oppenhoff.eu/en/added-value/articles/the-new-competition-register-what-enterprises-need-to-know.html.

10.4. Recommendations for action

- Argentina should establish specific **reporting units and anonymous and confidential procedures to report bid-rigging suspicions**.
- Argentina should consider **developing and implementing a screening tool**.
- **Procurement data should be accessible and kept in a user-friendly format**, facilitating their extraction and treatment (for example, for conducting statistical or econometric analyses of bidding patterns).
- The OECD recommends **close co-operation between contracting authorities and the competition authority in debarring companies** for rigging bids. Contracting authorities should inform the competition authority before notifying bidders of debarment.
- Argentina should clarify if the **suspension from the Registry of Providers** applicable to companies for anti-competitive conducts or bid rigging is **also valid for the National Registry of Constructors** and if not, include it.
- Argentina should create a **register or blacklist of companies convicted for having infringed competition law**, designed, developed and maintained by the competition authority.

Endnotes

[1] See https://cofece.mx/wp-content/uploads/2017/11/HISTORIA_IMSS_080415.pdf.

[2] See www.oecd.org/competition/cartels/fightingbidrigginginpublicprocurement.htm (accessed 19 February 2019).

[3] See www.minhacienda.gob.ar/onp/documentos/comunicados/proy_presupuesto2019.pdf.

[4] Ley 13.064 de Obras Públicas. See http://servicios.infoleg.gob.ar/infolegInternet/anexos/35000-39999/38542/norma.htm (accessed 19 February 2019)

[5] Decreto 1023/2001 del Régimen de Contrataciones de la Administración Pública. See http://servicios.infoleg.gob.ar/infolegInternet/anexos/65000-69999/68396/texact.htm (accessed 2 April 2019)

[6] Decreto 1169/2018 de sistema de gobernanza de las contrataciones de obra pública. See http://servicios.infoleg.gob.ar/infolegInternet/anexos/315000-319999/318039/norma.htm (accessed 2 April 2019).

[7] Ley 18.875 Compre Nacional, http://servicios.infoleg.gob.ar/infolegInternet/anexos/60000-64999/64610/norma.htm (accessed 3 April 2019). Ley 27.437 Compre Argentino y Desarrollo de Proveedores, http://servicios.infoleg.gob.ar/infolegInternet/anexos/310000-314999/310020/norma.htm (accessed 3 April 2019)

[8] Including all its agencies, departments, independent or decentralised entities, state-owned enterprises and companies with a public concession.

[9] See https://comprar.gob.ar.

[10] See https://contrat.ar.

[11] See Decreto 1169/2018 de Sistema de Gobernanza de las Contrataciones de Obra Pública, www.boletinoficial.gob.ar/detalleAviso/primera/198769/20181226, and Decreto 1117/2018, www.senado.gov.ar/upload/29133.pdf.

[12] See www.argentina.gob.ar/anticorrupcion.

[13] Ley 25.188 de Ética en el ejercicio de la Función Pública, http://servicios.infoleg.gob.ar/infolegInternet/anexos/60000-64999/60847/norma.htm (accessed 3 April 2019).

[14] Ley 24.156 de la Administración Financiera y de los Sistemas de Control del Sector Público Nacional, http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/554/texact.htm (accessed on 16 April 2019).

[15] La Comisión de Control y Seguimiento del Régimen de Redeterminación de Precios de Contratos de Obra Pública y de Consultoría de Obra Pública de la Administración Pública Nacional (Decreto 691/2016, http://servicios.infoleg.gob.ar/infolegInternet/anexos/260000-264999/261512/norma.htm); la Comisión de Concertación y Coordinación Operativa de la Obra Pública y Vivienda Federal (Resolución 102/2016 del Ministerio de Interior, Obras Públicas y Vivienda, http://servicios.infoleg.gob.ar/infolegInternet/anexos/255000-259999/259985/norma.htm); and Comisión de Seguimiento Operativo de la Obra Pública de Transporte (Resolución E 486/2016 del

Ministerio de Transporte, www.argentina.gob.ar/normativa/nacional/resolución-486-2016-268448/texto). All accessed on 3 April 2019.

[16] The National Registry of Constructors was mainly regulated by Decreto 1724/93 (www.argentina.gob.ar/subsecretaria-de-coordinacion-de-obra-publica-federal/decreto-reglamentario-1724/93), which was partially modified by Decreto 1621/99 (www.argentina.gob.ar/subsecretaria-de-coordinacion-de-obra-publica-federal/decreto-1621/99). The new Decreto 1169/2018 on the Governance of Public Works establishes that Decreto 1724/93 (and its modifications) will continue to apply until a new regulation for the National Registry of Constructors is adopted.

[17] Article 21, Ley 22.520, Ley de Ministerios.

[18] Article 17, Ley 22.520, Ley de Ministerios.

[19] Decreto1336/2016.

[20] At this security level, tax identification will be granted in the physical presence of the applicant in a bureau (agency, district, customs or service centre) of the Federal Administration of Public Incomes (Administración Federal de Ingresos Públicos, AFIP). An authorised staff member will verify the applicant's documentation to prove his or her identity.

[21] Article 9 of the Public Works Laws. Exceptions to public tenders may apply under these conditions: 1) when the cost of the work does not exceed the amount established by the executive; 2) when extra, previously unseen works are indispensable for a contract under execution; 3) when, due to an emergency, it is not possible to follow the normal public tender process; 4) when national security is at stake; 5) when a contractor's specific skills are key to the success of a contract award; 6) when a public tender has been declared void due to a lack of bids or lack of reasonable bids; 7) other cases provided for in Chapter I of Title II of the contracting regime of the National Administration.

[22] According to Resolution 814/1996, this limit is ARS 69,000, an amount not updated since 1996.

[23] Article 26 of the Contracting Regime Decree.

[24] Article 26 of the Contracting Regime Decree.

[25] In 2007, Argentina signed a protocol on public procurement within the framework of MERCOSUR, not yet in force, and a free-trade agreement with Chile containing a chapter on public procurement, which entered into force on 1 May 2019.

[26] Article 15 of the Public Works Law.

[27] Article 16 of the Public Works Law.

[28] The OECD does not have data for 2018 and 2019. CNDC claims that the budget went down during that period.

[29] Praxair Argentina, Air Liquide Argentina, Messer Argentina y AGA, and Indura Argentina, CNDC ruling, 15/07/2005, Cond 697 064-011323/2001, Resolution 119; cndc.produccion.gob.ar/node/447. The CNDC found that the parties had co-ordinated their bid prices in the public tenders for liquid oxygen, leading to hospitals and clinics being charged artificially high prices and undergoing significant financial losses. The fact that the product affected by the cartel could not be substituted and was an essential good for hospitals and their patients was considered as an aggravating factor and led to a substantial increase in the fines levied.

[30] Judgment of 16 April 2019 of the Federal Court of Appeals in Civil and Commercial Matters in the case No. 244/2016.

[31] Ley 27442 de Defensa de la Competencia and Decreto 480/2018.

[32] Ley 25.156/1999, modified by Ley 26.993/2014, introduced a system for ex post merger control and eliminated criminal sanctions for antitrust violations. It also provided for the creation of the

National Court for the Defence of Competition (Tribunal Nacional de Defensa de la Competencia, TNDC), a new antitrust enforcement body, under the aegis of the Ministry of Economy, designed to replace the CNDC. The TNDC was never created, however, and the CNDC kept its functions as an antitrust authority.

[33] The maximum amount that can be imposed upon a party cannot in any case exceed 200 million adjustable units (approximately USD 150 million).

[1] See, www.oecd.org/governance/procurement/toolbox/.

[2] Categories include: CATEGORY "A": Local construction company, with a background in public, private or subcontracted works and constituted under the corporate form contemplated in the Commercial Code, Law 19.550. CATEGORY "B": Sole proprietorship, with a background in public, private or subcontracted works. CATEGORY "C": Local company, incorporated under some corporate form, with no work history. CATEGORY "D": Sole proprietorship, with no work history. CATEGORY "E": Foreign company recognised as a construction company according to the current legislation of the country of origin, with a background in public, private or subcontracted works. All documentation provided by foreign companies must be presented in Spanish.

[3] Decreto 1169/2018.

[4] Disposición 62 – E/2016, Manual de Procedimiento del Régimen de Contrataciones de la Administración Nacional, http://servicios.infoleg.gob.ar/infolegInternet/anexos/265000-269999/265967/norma.htm

[5] Disposición 63 E/2016.

[6] The value of one module is ARS 1,600 according to Article 28 of Decree 1030/2016, http://servicios.infoleg.gob.ar/infolegInternet/anexos/265000-269999/265506/texact.htm.

[7] Article 19 of the Public Works Law.

[8] The 10 northern provinces are: La Rioja, Catamarca, Salta, Jujuy, Tucuman, Santiago del Estero, Chaco, Corrientes, Formosa, and Misiones.

[9] These six provinces are: Río Negro, Neuquén, Santa Cruz, La Pampa, Chubut, and Tierra del Fuego.

[10] The Ministry has three national plans: the National Water Plan, National Housing Plan, and National Habitat Plan. The National Water Plan aims for 100% coverage of clean water, 75% coverage for sewage systems, and the implementation of climate-change adaptation projects, irrigation works and projects to improve the integral water-resource management. The National Housing Plan calls for 120 000 new houses and 175 000 subsidised mortgages, among other goals. The National Habitat Plan involves the country's 100 most neglected and underdeveloped localities with the goal of providing them with clean water and sewage systems, upgraded public spaces, and improved housing.

[11] For example, the National Transportation and Infrastructure Plan provided for public and private investments for more than USD 30 000 million for the period 2016-2019. See www.argentina.gob.ar/noticias/dietrich-presento-en-rosario-los-avances-del-plan-de-transporte. The envisaged investments, however, have been reduced due to the current economic crisis.

[12] Article 8 of Decree 1030/2016.

[13] Article 2 of Compre Nacional Law.

[14] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0024.

[15] Article 34 of General Tender Terms of the Ministry of Transport. In the case of DNV, this guarantee represents 0.2% of the official budget of the works and the Ministry of Interior requires a

guarantee of 0.005% of the official budget, www.transporte.gob.ar/UserFiles/boletin/ANEXOS-RESOLUCION-RS-1139-2018-MTR/IF-1139-2018-MTR-II.pdf.

[16] Examples of good practices can be found here: www.sigmaweb.org/publications/46179348.pdf.

[17] Article 3c of the Contracting Regime Decree.

[18] Article 9 of the Public Works Law.

[19] The certificate is signed by an individual with the power to bind the firm.

[20] Decree 202/2017.

[21] See www.argentina.gob.ar/sites/default/files/guia_camaras_y_asociaciones_empresariales_10-12-2018.pdf.

[22] Alliance for Integrity is an initiative of the Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung (BMZ), implemented by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ).

[23] Article 37 of the 2018 Competition Law.

[24] OECD (2013), "Ex officio cartel investigations and the use of screens to detect cartels", www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2013)27&docLanguage=En.

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