

International Anti-Corruption Conference 2018 in Copenhagen
National anti-corruption statement (Argentina)

ENVISIONING THE FUTURE OF INTEGRITY IN INFRASTRUCTURE: HOLISTIC APPROACHES FOR MANAGING CORRUPTION RISKS ACROSS THE PUBLIC INVESTMENT CYCLE

This document will explore strategies and mechanisms used by the Argentine Government and other key actors that participate in the designing and execution process of infrastructure in the public sector. Such strategies and mechanisms are based upon procedures that include integrity and transparency tools.

The Argentine Republic has taken on the challenge of finding approaches to properly manage risks across the execution cycle of infrastructure projects.

Thus, tools such as High Level Reporting Mechanisms, integrity clauses added to contracts for public works, enactment of the Law on Criminal Liability of Legal Persons, developing guidelines for its application to companies; as well as a proper management of apparent conflicts of interest in public procurement, gradually show the remarkable achievements attained with respect to economic and time savings that are evidenced in this sector.

Some of the actions promoted by the Anti-corruption Office for the purpose of achieving these goals are detailed below:

A. High Level Reporting Mechanism in the bidding process of the Safe Highway and Roads Network Project

The National Highway Department and the Anti-corruption Office —whose main mission is adopting integrity policies and combating corruption— have agreed upon implementing a mechanism and a specific protocol to file reports and/or alerts on ethical irregularities or requests for bribery during the first bidding process that the National Highway Department is executing pursuant to the recently enacted Law 27 328 that regulates Public-Private Participation contracts.

The name of the procedure is **High Level Reporting Mechanism** (MRAN, for its acronym in Spanish) and it is based upon a corruption prevention tool promoted by the Organization for Economic Cooperation and Development (OECD) and the Basel Institute on Governance. Its main goal is to provide companies from the private sector —and other interested parties— participating in a bidding process, with a reliable, specific mechanism, known by everyone, to report risk situations. Other feature of the MRAN protocol includes the participation of a group of experts, external to the process for the analysis and handling of reports received.

By implementing this tool, the purpose is to obtain an efficient response at an early stage of the process. Therefore:

- I. It is established a specific reporting channel, known by every actor of the process;
- II. Reports are received directly by a high-ranking official;
- III. Short terms are set to deal with reports;
- IV. A group of experts external to the process is informed.

The Anti-corruption Office used MRAN for the bidding process conducted by the National Highway Department within the framework of the Safe Highway and Roads Network Project, implemented using Public-Private Participation contracts (https://www.minfinanzas.gob.ar/uppp/transp_com_tec.php).

Public-Private Participation contracts (Law 27 328) are those entered into by agencies and entities that are part of the National Public Sector and private or public parties for the purposes of developing one or more activities of designing, constructing, extending, improving, maintaining, supplying equipment and goods, running or operating and financing.

Executive Order 118/2017 regulates the Law on Public-Private Participation (PPP) and entrusts the Anti-Corruption Office with the function of identifying currently international best practices on transparency and ethics with respect to Public-Private Participation projects.

Under that framework, the National Highway Department sent copies of three documents prepared by the Ethics and Transparency Unit:

1. An integrity clause to be added in the bidding documents of the public-private participation contracts, in which it is included a high-level reporting mechanism for filing reports.
2. Integrity provisions to be included in contracts.
3. Message to post on official websites to disseminate the mechanism.

This office has been requested to prepare internal rules for handling reports that may be received when such mechanism is used. Therefore, internal rules for handling reports received using the MRAN have been set out, detailing agencies involved and regulating its procedure.

The High-Level Reporting Mechanism is responsible for:

- Receiving, managing and directing inquiries and high-level reports, related to PPP projects conducted in the Ministry of Energy of the Nation;
- Requesting information, clarifications, documents, or whatever is deemed necessary by the contracting agency, in this case the Ministry of Energy of the Nation, or from any other governmental agency, individuals or any other person;
- Evaluating whether the high-level reports received comply with the MRAN investigative criteria;
- Forwarding the reports that comply with the investigative criteria to the Group of Experts for its participation; such a Group will assess the reports and will give recommendations for solving the issues reported.
- Gathering and publishing information on the high-level reports handled.
- Giving recommendations to the requesting agency, in this case the Ministry of Energy of the Nation on how to manage corruption risks or any other ethical irregularities that may have been identified;
- Monitoring whether the contracting agency has implemented the recommendations, in this case the Ministry of Energy of the Nation, and interacting with high-ranking officials from such Ministry, in case of failure to comply with the solution proposed by the Anti-corruption Office.

In case there are elements indicating the possible commission of a crime, it brings a court case to the relevant judicial authority.

In the case of the National Highway Department, the Anti-corruption Office would act as the agency responsible for the Mechanism, in accord with the functions legally assigned. Within the sphere of the Anti-Corruption Office, a High-Level Agency will be created for making decisions about the High-Level Report (RAN, for its acronym in Spanish), that would be made up by: the Department of Public Ethic, Transparency and Fight against Corruption, the Deputy Secretary of Integrity and Transparency and the Deputy Secretary of Anti-corruption Investigations.

The other participating agency would be a Group of Experts made up by:

- Two technical representatives proposed by the Association of Engineers;
- A technical representative proposed by the Anti-corruption Office;
- A representative from the Center for Anticorruption Studies of the University of San Andrés.

In addition, the MRAN will be activated when alerts or reports on following issues are received:

- a. Bid rigging;
- B. Bribery or attempted bribery;

- C. conflicts of interest;
- D. Influence Peddling.

Within 48 hours after it has been received, the High Level Report will be preliminary analyzed and registered, and shall be forwarded to the High-Level Agency in order to:

- Dismiss the report; or
- Start the MRAN procedure aiming at solving the issues reported.

Lastly, the High-Level Agency may provide recommendations to the competent authorities on legislative and regulatory issues for the purposes of addressing the systemic problems identified when conducting their activities.

Even though none of the reports received to date fall within the MRAN protocol, the channel was used by actors from the public and private sector.

Inclusion of MRAN to the bidding terms and conditions has been well received by actors participating in the process and this tool is intended to be included in other Public-Private Participation projects. Implementing this tool provides greater transparency and security to contracting parties in those large-scale projects that have impact on the community as a whole and promotes the culture of reporting in Argentina.

For further information, please visit: <http://www.oecd.org/corruption/hlrn.htm>;

<https://www.collectiveaction.com/initiatives/hlrn>

B- MINISTRY OF TRANSPORTATION: TRANSPARENCY AND COMPLIANCE IN PUBLIC WORKS

SAVING ACHIEVED WAS USED TO CARRY OUT MORE PUBLIC WORKS

- Efficiency and savings amounting to ARS 104 015 million [*Argentine pesos one hundred and four thousand and fifteen million*]
- Public works are 30% cheaper.
- Biddings have 10 or 20 bidders

Time reduction in bidding processes:

- National Highway Department: -54% from 2015 to 2016 and -21% from 2016 to 2017
- Airports: -38% from 2015 to 2016 and -22% from 2016 to 2017
- Railway -30% from 2015 to 2016 and -46% from 2016 to 2017
- Public transportation: -13 % from 2015 to 2016 and -39% from 2016 to 2017

Success cases:

Unloading transaction:

Locomotives: Decrease by 92% in USD. It cost USD 3850 per unit in 2015 and USD 310 per unit in 2018.

Rail cars: Decrease by 78% in USD. It cost USD 1960 per unit in 2015 and USD 423 per unit in 2018.

Decrease in logistical costs in Buenos Aires Port

- Reduction in sweeping and cleaning (-66%)
- Reduction in towing fees (-27%)

- TAP (Protected Argentine Transport) Certificate is no longer mandatory (up to -25%)
- Port Support Area (-40% and +25% flow of trucks)
- Green Award Certification (up to -10%)
- Incorporation of decrease in cabotage traffic
- -54% in USD per container
- (534 USD 2015 vs. 247 USD 2018)

C- Integrity guidelines for better compliance with sections 22 and 23 of Law 27 401 on Criminal liability of Legal Persons:

Recently, on 1 October 2018, through Resolution 27/2018, the Integrity Guidelines for better compliance with sections 22 and 23 of Law 27 401 have been adopted.

The Law on Criminal Liability of Legal Persons that became in force in March 2018 sets forth the criminal liability of legal persons for corruption crimes: transnational and domestic bribery, influence peddling, negotiations incompatible with the fulfillment of public functions, exaction, embezzlement and false, aggravated balance sheets and reports.

By enacting this law, Argentina concludes with a non-compliance of more than fifteen years with the OECD Convention against Transnational Bribery.

Two are the **main goals** of this law. First: to provide more efficiency to the prevention and fight against corruption policies and create incentives for legal persons to prevent the commission of crimes against the public administration. Second: Companies and other legal persons cooperate with authorities in criminalizing corruption by indicating the persons from the public and private sector participating in the crimes. These reasons explain the importance of this law as a tool for fighting against corruption.

Even though the adoption of an Integrity Program is not mandatory (as it is not in any country in the world), it brings about following benefits:

- Exemption from liability for legal persons in whose name, in their interest or benefit any of the mentioned crimes are committed (if it is combined with an spontaneous voluntary disclosure and the return of the wrongful benefit);
- Mitigation of a potential criminal sanction;
- A condition to be admitted to an effective collaboration agreement with the prosecuting authorities.
- In addition, a proper program is fundamental to participate in certain National State contracts.

Through **Executive Order 277/2018**, the Anti-corruption Office was requested to establish guidelines for better compliance with the implementation of the Integrity Programs.

In Argentina, the agency responsible for issuing the Guidelines (the Anti-Corruption Office) is not the agency in charge of enforcing the regulation (as it is a criminal rule). Our model is similar to the one in Colombia and the United Kingdom.

The process for their drafting was open and participative. Inputs were received from a public consultation that lasted over a month, and finally a working group discussed the content of the document, in which associations, non-governmental organizations, experts, officials and other actors from the private sector and civil society participated.

The guidelines do not replace the assessments that are carried out by each organization. They are not imperative instruments either; therefore, every legal person may adopt or not the procedures and mechanisms therein mentioned or give the elements one form or another.

D- MANAGEMENT OF APPARENT CONFLICTS OF INTEREST IN STATE CONTRACTS (EXECUTIVE ORDER 202/2017)

Integrity Executive Order:

The Anti-Corruption Office participated in drafting two Integrity Executive Orders that were signed by the President of the Argentine Republic (Executive Orders 201/17 and 202/17). These are additional tools of transparency and control regarding legal cases against the State and seven public contracts in cases in which there may be a link with the top authorities of the National Public Administration.

Executive Order 202/17 stipulates that the Anti-corruption Office is the enforcement authority; anyone who wants to contract with the State must submit a sworn affidavit of interests to inform any link with the highest authorities from the government. If the person fails to do so, severe punishments are set forth, among others the impossibility to contract with the State.

By the end of 2017, 7751 sworn affidavits of interest from individuals and 11260 from legal persons have been submitted to the National Office of Procurements.

Executive Order 202 signed in March 2017 —which approved a special procedure for public contracts or for granting licenses, permits, authorizations, or a legal interest in property of public and private domain of the State from the Public National Sector, in which there might exist a potential or apparent conflict of interest as a result of a link between one of the parties and the maximum authorities of the Executive Power— is another example of the transparency tools applicable, among others, to the infrastructure development sector; such tools try to remove possible incorrect situations or doubts from citizens regarding the proper management of the interests of the State.

Executive Order 202/2017 stipulates that a “**Sworn Affidavit of Interest**” must be submitted by any person who participates in a public procurement procedure or a procedure for granting a license, permit, authorization or a legal interest in a property of public and private domain of the State, within the sphere of the National Public Sector. In this affidavit the bidder or requester must indicate if he -or in the case of legal persons, specific members- have certain links with the **maximum authorities of the Nation** or with officers with lower ranking that have jurisdiction or power to decide in respect on a contract or act in which the affiant is interested.

For the purposes of applying the rule, it makes no difference the modality of contract.

Links between the affiant and an official, which the executive order considers of interest and therefore must be declared, are:

- A) Blood relationship within the fourth degree and in-law-relationship within the second degree;
- B) Company or association;
- C) Pending legal action;
- D) To be debtor or creditor;
- E) To have received significant benefits;
- F) Public friendship that is evidenced in greater familiarity or frequent interaction.

Tools of Transparency and citizen participation under Executive Order 202/2017

In case any of such links are reported, a procedure with greater measures of publicity and control is opened and such a circumstance must be informed to the General Auditing of the Nation and the Anti-corruption Office. The latter will examine possible violations to Law 25 188 (section 5).

Notification must be sent within three (3) working days as from the Affidavit is received. The purpose is to inform control agencies immediately about the existence of possible, potential and apparent conflicts of interest so as to conduct a timely and effective control.

The contracting/participating authority shall provide the necessary means for fully publishing the proceedings on its website and that of the Anti-corruption Office. Considering that such publishing is a "...preventive measure for deterring the venality of the public function", the transparency standard under Executive Orders 1023/01 and 1030/16 is raised, enabling citizens a centralized and quick access to procurement files without the need of invoking any interest for their consultation.

The integrality criteria in the publishing of proceedings imply that -where possible- such proceedings are summarized in a single document and same format.

Executive Order 202/2017 sets forth a minimum integrity standard that must be maintained. Therefore, if the responsible agency or entity wants to adopt more than one of the proposed mechanisms, it can do it in a justified manner.

Failure to submit the Sworn Affidavit of Interest may be considered sufficient grounds for being excluded from the procedure. If false information is provided, such a circumstance shall constitute a serious offense pursuant to applicable penalty system.