



Fighting Bid Rigging in Public Procurement in Mexico

**A Secretariat Analytical Report on Compliance with
OECD Standards of Procurement Legislation,
Regulations and Practices in CFE**

Fighting Bid Rigging in Public Procurement in Mexico

A Secretariat Analytical Report on Compliance
with OECD Standards of Procurement
Legislation, Regulations and Practices in CFE

2015



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The OECD is a unique forum where the governments of 34 democracies work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practices and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD.

OECD Publishing disseminates widely the results of the Organisation's statistics gathering and research on economics, social and environmental issues, as well as the conventions, guidelines and standards agreed by its members.

This work is issued under the responsibility of the Secretary General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the OECD member countries.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

The OECD has two official languages: English and French. The English version of this report is the only official one.

© OCDE 2015

You can copy, download or print OECD content for your own use, and you can include excerpts from OECD publications databases and multimedia products in your own documents, presentations, blogs, websites and teaching materials, provided that suitable acknowledgment of OECD as source and copyright owner is given. All requests for public or commercial use and translations rights should be submitted to rights@oecd.org. Requests for permission to photocopy portions of this material for public or commercial use shall be addressed directly to Copyright Clearance Center (CCC) at info@copyright.com or the Centre français d'exploitation du droit de copie (CFC) contact@cfcopies.com

FOREWORD

The Organisation for Economic Co-operation and Development (OECD) promotes policies that aim to achieve good governance practices. Ensuring that public procurement is carried out competitively constitutes an important part of this mission. In order to assist countries with improving their public procurement processes, the OECD Council has adopted a Recommendation on Fighting Bid Rigging in Public Procurement¹ (included in Annex 1 to this report) that calls for governments to assess their public procurement laws and practices at all levels of government in order to promote more effective procurement and to reduce the risk of bid rigging in public tenders. The Recommendation includes the OECD's Competition Committee Guidelines for Fighting Bid Rigging in Public Procurement,² elicited from international best practices on how to fight bid rigging in public procurement³

The OECD works closely with national and local governments to facilitate the implementation of its Recommendation and Guidelines. As part of the collaboration of OECD with Mexico, in December 2012 the OECD signed an Inter Institutional Agreement with the Federal Electricity Commission (*Comisión Federal de Electricidad*, CFE) and the Mexican competition authority (formerly *Comisión Federal de Competencia*, CFC, now *Comisión Federal de Competencia Económica*, COFECE).⁴ The purpose of the Agreement was to assist CFE in implementing the OECD Competition Committee's Guidelines for Fighting Bid Rigging in Public Procurement and its applicable checklists for designing effective public procurement procedures and for detecting collusive practices during the course of tender processes, both with the aim of reducing the risk of bid rigging in public procurement.

¹ Recommendation adopted in July, 2012.

² First adopted in 2009, included in Annex 1 to this report.

³ Available at:
<http://www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm>

⁴ Since September 2013.

This Analytical Report contains recommendations to CFE on how to enhance its procurement procedures to avoid collusion among suppliers and to promote competition. The Analytical Report also reiterates a number of recommendations that the OECD has put forward in earlier reports to address limitations and undesirable features in Mexico's current legal framework.

The implementation of the OECD recommendations together with an increased awareness among CFE procurement officials of the existence, risks and costs of collusion will enable CFE to increase the effectiveness of its procurement strategy to the benefit of its many clients and ultimately to the taxpayers of Mexico. The savings generated can then be used by CFE to provide better services to its customers.

This Report was prepared by Emiliano Shea and María José Montiel of the Mexican Institute for Competitiveness (IMCO) and Leonardo Noyola Vogel, competition expert at the OECD Mexico Centre for Latin America. They would like to thank the following for their input and cooperation: Antonio Capobianco of the OECD Secretariat, Benjamín Contreras, Carlos Mena, Raymundo León, Andrea Marván, Heidi Sada, Mónica Zegarra, Elías Mizrahi, Julio García Pérez, José Eduardo Mendoza y Roberto Uribe at the COFECE; Swen Martin Manuel Liby Alonso of IMCO and Javier Dávila and Alejandro Bonilla at the Federal SFP (*Secretaría de la Función Pública*). Invaluable assistance and useful information was provided by many CFE officials, especially by Humberto Quezada and Christian Portes.

TABLE OF CONTENTS

LIST OF ACRONYMS	9
EXECUTIVE SUMMARY	11
CHAPTER 1: INTRODUCTION	13
1.1 Project background.....	13
1.2 Outline of the report	14
1.3 Public procurement and bid rigging	15
1.4 Bid rigging or collusive tendering	17
1.5 The OECD Recommendation for Fighting Bid Rigging in Public Procurement and the Related Guidelines	20
CHAPTER 2: PUBLIC PROCUREMENT IN MEXICO.....	27
2.1 Procurement Laws in Mexico	27
2.2 The pre-tender phase	29
2.3 The tender phase.....	57
2.4 The post-award phase	61
2.5 OECD recommendations on the Mexican legal framework	62
CHAPTER 3: PROCUREMENT AT CFE	69
3.1 Electricity as a public service and CFE	69
3.2 Procurement structure at CFE.....	75
CHAPTER 4: PROCUREMENT PROCESS AT CFE.....	87
4.1 Authorised amounts for direct awards and restricted invitations.....	87
4.2 Number and value of contracts	88
4.3 Central and regional procurement	89
4.4 Contract distribution based on office functions.....	90
4.5 Goods, services and leasing arrangements at CFE	92
4.6 The pre-tender phase at CFE	97
4.7 The tender phase at CFE.....	123
4.8 The post-award phase at CFE	125
CHAPTER 5: RECOMMENDATIONS TO CFE ON HOWTO FIGHT BID RIGGING IN PROCUREMENT PROCEDURES	129
5.1 Strategic planning aimed at fighting bid rigging	131
5.2 Gathering and organising procurement information.....	132
5.3 Create a specific administrative unit for Market Studies.....	136
ANNEXES.....	157

Tables

Table 1. Authorised thresholds during the second semester of 2013	39
Table 2. Relevant reverse auctions in Federal agencies (2009-2011).....	53
Table 3. Authorised thresholds for direct awards and restricted invitations in 2013 (Thousand Mexican pesos, value added tax not included)	88
Table 4. Contracts and value of contracts (2008-2012)	88
Table 5. Yearly distribution of procurement by office function—without coal (2008-2012)	91
Table 6. Budget for energy fuels in 2013 by CFE	93
Table 7. Contracts and accumulated nominal value for goods, services and leasing arrangements (2008-2012).....	95
Table 8. Distribution and value of contracts by procurement method (2008-2012) ..	101
Table 9. Distribution of contracts that were exempted using a section of Article 41 of the PPA and their value (2008-2012)	103
Table 10. Distribution of procurement exemptions in sections I; II, III, VIII, XIX of Article 41 of the PPA over time (2008-2012)	106
Table 11. Distribution of procurement exempted using sections I; II; III; VIII and XIX of Article 41 of the PPA by office function (2008-2012)	107
Table 12. Average overcharge by number of cartels in different economic surveys	114
Table 13. Reduction on amount of guarantees.....	121
Table 14. Number of contractual terminations 2008-2013	126

Figures

Figure 1. Common bid rigging practices	18
Figure 2. Market conditions that facilitate collusion	20
Figure 3. Relevant procurement legislation in Mexico (*)	28
Figure 4. Stages of the pre-tender procurement phase.....	30
Figure 5. Decision chart for evaluation criteria	42
Figure 6. Hierarchy of technical norms	42
Figure 7. Timeframe for tenders	57
Figure 8. CFE General structure and central procurement offices (*)	76
Figure 9. Distribution of central and regional procurement areas	77
Figure 10. Departments of the Office of Supply Management.....	79
Figure 11. Minimum conditions for a strategy against bid rigging.....	132

Boxes

Box 1. Consolidated purchases in Mexico and their financial benefits	46
Box 2. The CCNPMIS experience.....	49
Box 3. Reverse auctions in Mexico and their financial benefits.....	52
Box 4. The CompraNet system.....	60
Box 5. The main activities of the electricity sector	69
Box 6. Energy Reform of 2013	71
Box 7. Annual Training Programme 2013.....	84

Charts

Chart 1. Winning Bids (most purchased product at IMSS).....	48
Chart 2. The production capacity of CFE and independent producers in Mega Watts (MW), 2004-2012	70
Chart 3. Number of employees and budget in 2012 (millions of pesos 2012)	74
Chart 4. Percentage spent by Federal entities registered on CompraNet in 2012.....	75
Chart 5. Average nominal value of centralised –without coal- and decentralised purchases (2008-2012) in thousands of pesos	89
Chart 6. Yearly procurement by centralised and decentralised offices	90
Chart 7. Procurement for Generation, Transmission and Distribution	92
Chart 8. Distribution of procurement categories	96
Chart 9. Average procurement distribution by office function and procurement procedure.....	102
Chart 10. Distribution of low monetary transactions by direct awards and restricted invitations.....	107
Chart 11. Yearly distribution of value of contracts assigned to international suppliers	109
Chart 12. Percentage of public tenders according to the evaluation criteria, 2012 ..	112

LIST OF ACRONYMS

CAAS	<i>Comité de Adquisiciones Arrendamientos y Servicios</i> (Acquisitions, Services and Leases Committee)
CCMASE	<i>Comisión Consultiva Mixta de Abastecimientos del Sector Eléctrico</i> (Joint Advisory Committee)
CENAC	<i>Centros Nacionales de Capacitación</i> (National Training Centres)
CENACE	<i>Centro Nacional de Control de Energía</i> (National Energy Control Center)
COFECE	<i>Comisión Federal de Competencia Económica</i> (Federal Economic Competition Commission)
CFE	<i>Comisión Federal de Electricidad</i> (Federal Electricity Commission)
CIBD	Certificate of Independent Bid Determination
CompraNet	<i>Sistema Electrónico de Información Pública Gubernamental</i> (Federal Electronic Database for Tenders)
FLECA	<i>Ley Federal de Competencia Económica</i> (Federal Law of Economic Competition)
FSA	<i>Ley Federal sobre Metrología y Normalización</i> (Federal Standards Act)
FBA	<i>Ley Federal de Presupuesto y Responsabilidad Hacendaria</i> (Federal Responsibility Budgetary Act)
IFT	<i>Instituto Federal de Telecomunicaciones</i> (Federal Telecommunications Institute)
IMCO	<i>Instituto Mexicano para la Competitividad A.C.</i> (Mexican Institute for Competitiveness)

IMSS	<i>Instituto Mexicano del Seguro Social</i> (Mexican Institute for Social Security)
ISSSTE	<i>Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado</i> (The State's Employees Social Security and Social Services Institute)
LAPEM	<i>Laboratorio de pruebas de equipos y materiales</i> (The Laboratories of the CFE for testing equipment and materials)
OECD	Organisation for Economic Co-operation and Development
OIC	<i>Órgano Interno de Control</i> (The Internal Control Unit of the CFE)
PAAAS	<i>Programa Annual de Adquisiciones Arrendamientos y Servicios</i> (Annual Procurement Programme)
PEF	<i>Presupuesto de Egresos de la Federación</i> (Federal Budget)
PEMEX	<i>Petróleos Mexicanos</i> (Mexican Oil State Company)
PND	<i>Plan Nacional de Desarrollo</i> (National Development Plan)
PPA	<i>Ley de Adquisiciones, Arrendamientos y Servicios Del Sector Público, LAASSP</i> (Public Procurement Act)
PPAA	<i>Ley de Asociaciones Público Privadas</i> (Public-Private Association Act)
PPR	<i>Reglamento de la Ley de Adquisiciones, Arrendamientos y Servicios Del Sector Público, RLAASSP</i> (Public Procurement Regulation- PPR)
PWA	<i>Ley de Obras Públicas y Servicios Relacionados con las Mismas</i> (Public Works Act)
SAI	<i>Sistema de Adquisiciones por Internet</i> (Online Procurement System)
SFP	<i>Secretaría de la Función Pública</i> (Ministry of Public Administration)
SURECON	<i>Subcomités de Revisión de Convocatorias</i> (Subcommittee for reviewing calls for tenders)

EXECUTIVE SUMMARY

CFE is the second largest public entity in terms of procurement budget in Mexico, with over 300 purchasing units throughout the country. CFE represents almost 20% of all Federal procurement.⁵

CFE is considered an innovator in the area of procurement, as it has always been striving to improve its purchasing methods. In December 2012, CFE entered into an agreement with the OECD to work with the OECD Secretariat and the Mexican competition authority, the *Comisión Federal de Competencia Económica* to identify areas for further improvement in its procurement practices with a view to reduce the risk of collusion in its public tenders.

This report assesses whether the procurement practices of CFE are in line with OECD best practices on how to fight collusion in public tenders. The recommendations in this report are designed to enhance procurement procedures at CFE, to foster competition in its procurement processes, and to create a better informed organisation so that its procurement officials find themselves in a better position to prevent and detect bid rigging conspiracies.

The report is divided into five chapters.

- **Chapter 1** introduces the concept of bid rigging and discusses its consequences. It also presents an overview of the OECD Recommendation for Fighting Bid Rigging in Public Procurement and its related Guidelines.
- **Chapter 2** includes a general overview of public procurement in Mexico and a summary of the legal framework that applies to public procurement in the country.
- **Chapter 3** briefly reviews the history, mission, importance and organisational structure and relevant requiring areas of CFE.
- **Chapter 4** provides an overview of the procurement process at CFE and a general overview of its purchases from 2008 to 2012.
- **Chapter 5** provides specific recommendations on how CFE can increase competition in its procurement activities, fight bid rigging and comply with international best practices.

⁵ This figure excludes purchases made from PEMEX.

This report finds that the most important areas for improvement relate to how CFE procurement officials can design better purchasing strategies, collect and gather more and better information, and acquire an understanding of how collusion can be detected by identifying warning signs during the tender process. A well planned strategy and an independent and dedicated team is necessary if CFE is committed to reduce the risk of bid rigging. The first measure recommended in this report is to prioritise the efforts to improve market studies and to make this information more accessible to procurement officials. The report recommends that CFE creates a robust database on past procurement and sets up a dedicated market study unit to supervise and co-ordinate this important phase of the procurement process.

The report also suggests that CFE should carry out cost-benefit analyses of its past procurement to determine the best purchasing strategies for different goods and services. CFE is also encouraged to increase dialogue with providers, without however sharing sensitive and strategic information, as this information could be used by bidders to co-ordinate their bidding behaviour and facilitate collusive agreements.

Other important recommendations include: a better management of the information flow towards third parties to avoid sensitive information being disclosed unnecessarily; expanding the efforts of CFE to consolidate purchases and take better advantage of framework agreements; adopting practices to increase the number of bidders; implementing a strict unconditional approach to deal with joint bids; limiting the use of split awards; and deterring the use of sub-contracting.

As a consequence of the recent reforms in the energy sector in Mexico, CFE is called to reform its legal framework for procurement. This process will offer an opportunity for CFE to consider the risks identified in this report and to implement its recommendations that will help achieve efficiencies and generate savings in its procurement activities.

CHAPTER 1: INTRODUCTION

1.1 Project background

Since 2011, Mexico has sought to improve its procurement practices and step up its fight against bid rigging in partnership with the OECD. When Mexico's Social Security Institute (IMSS) signed a Memorandum of Understanding with the OECD and Mexico's Competition Commission in January 2011, it became the first public agency in Mexico (and in the world) to formally commit itself to adopting and implementing the OECD Competition Committee's Guidelines for Fighting Bid Rigging in Public Procurement.⁶ The OECD report on IMSS's procurement practices was launched on January 11th, 2012. The IMSS project was followed by two similar reports: one with the Government of the State of Mexico (*Gobierno del Estado de México*, GEM),⁷ and another with the State's Employees' Social Security and Social Services Institute (*Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado*, ISSSTE)⁸ The findings from these reports are constantly referred to throughout the present report.

⁶ See Fighting Bid Rigging in Public Procurement in Mexico. A Secretariat report on IMSS' procurement regulations and practices, 2011 (hereinafter the IMSS Report), available at: <http://www.oecd.org/daf/competition/fightingbidrigginginpublicprocurementinmexico2011.htm>

⁷ The OECD's report to GEM was submitted in May 2012. See "Fighting Bid Rigging in Public Procurement in Mexico. A Secretariat Analytical Report of Procurement Legislation, Regulations, and Practices in the State of Mexico, 2012" (hereinafter the GEM Report), available at: <http://www.oecd.org/daf/competition/fightingbidrigginginpublicprocurementinmexicogemreport--2012.htm>

⁸ The ISSSTE report was released on 14 November 2013. See "Fighting Bid Rigging in Public Procurement in Mexico. A Secretariat Analytical Report on Legislation, Regulations and Practices to Procurement Undertaken by

The project with the Comisión Federal de Electricidad⁹ is therefore the fourth project in recent times in which the OECD collaborates with a significant Mexican public institution. The present report reviews the procurement practices of the second largest procurement entity in the country. For a state company such as CFE, it is critical that procurement is cost-effective and that it meets the highest ethical standards. The specific objective of the OECD/CFE Agreement was to implementing the Guidelines for Fighting Bid Rigging in Public Procurement in the public procurement processes of goods, leases and services carried out by the “CFE” (Inter-Institutional Agreement). The procurement of public works and infrastructure was not part of the OECD project.

The CFE project is divided into two parts. First, the OECD agreed to prepare an Analytical Report to assess the extent to which the current procurement practices and regulations of CFE comply with the OECD Guidelines. Second, the OECD agreed to train CFE procurement officials on (i) how to assess the dangers of bid rigging, design tender processes to reduce the risk of collusion, and (ii) how to detect bid rigging practices during the tender process. In November 2012 and in April and November 2013, the OECD Secretariat—together with staff from the COFECE and international experts—organised 5 training courses for approximately 200 CFE employees.

In order to prepare this report, the OECD interviewed 38 CFE officials from different departments directly or indirectly involved in procurement. The report is also based on the information that CFE provided to the OECD over the course of the entire project.

1.2 Outline of the report

The objective of this report is to assess whether the Mexican procurement legislation¹⁰ applicable to CFE and the internal procurement practices of CFE

ISSSTE”, 2013 (hereinafter the ISSSTE Report), available at: <http://www.oecd.org/daf/competition/mexicoissste2013.htm>

⁹ This report will refer to the Federal Electricity Commission as either ‘CFE’ or ‘the Commission’.

¹⁰ Upon completion of this report, the special procurement regime derived from the Constitutional reform of 2013 and the Federal Electricity Commission Law (LCFE) has not entered into force. In this regard, the recommendations made in this report with reference to existing laws should be considered by the

are in line with the OECD Guidelines for Fighting Bid Rigging. This Analytical Report is divided into five chapters.

- **Chapter 1** introduces the concept of bid rigging and discusses its detrimental consequences. It also presents an overview of the OECD Recommendation for Fighting Bid Rigging in Public Procurement and its related Guidelines.
- **Chapter 2** includes a general overview of public procurement in Mexico and a summary of the legal framework that applies to public procurement in the country. This chapter summarises the conclusions and recommendations in previous analytical reports on the Mexican procurement legislation made by the OECD.
- **Chapter 3** briefly reviews the history, mission, importance and organisational structure of CFE and relevant procuring areas.
- **Chapter 4** provides an overview of the procurement process of CFE and a general overview of its purchases from 2008 to 2012. It also includes observations from interviews of CFE staff made by the OECD on procurement practices. This chapter points out CFE areas of potential risk of bid rigging for CFE.¹¹
- **Chapter 5** provides specific recommendations on how CFE can increase competition in its procurement activities, fight bid rigging and comply with international best practices.

1.3 Public procurement and bid rigging

Both public and private organisations use competitive tenders to make purchases. For any organisation procurement is a strategic function that shapes the overall performance of the company. The main purpose of competitive tenders is to lower prices and drive costs down. Fair and open competition among prospective suppliers encourages innovation, which can result in lower prices or better quality in supplies and services. The OECD recommends that central and local government institutions should seek to use competitive tenders when they purchase goods and services.

Board of Directors of the CFE when issuing the provisions referred in Article 78 the aforementioned Law.

¹¹ If the reader is already acquainted with the CFE, with the notion of bid rigging and with the OECD Guidelines, they are advised to start with this chapter.

In most cases and especially with very large contracts, competitive tenders are the most efficient form of public procurement. However, there might be instances when this is not the case. For example, when there is only one supplier of a specific good or a service, or when a procurement is dictated by an urgent requirement which cannot be postponed. In these cases, Mexican law allows for the use of exceptions in the form of either direct contracting (direct award) or tenders to which only a small number of bidders are invited (restricted invitation).¹² Through appropriate planning and organisation, the number of exceptions can be reduced significantly and the overall efficiency of public procurement maximised.

Public procurement—in all countries—is notoriously vulnerable to corruption and fraud. Its complexity and the fact that it involves very large financial resources create both opportunities and incentives for dishonest behaviour on the part of public officials as well as private suppliers. To guarantee market efficiency and competitive tendering, in Mexico and elsewhere, governments have established institutions and rules to ensure the integrity of the procurement process. Competition authorities, for example, have powers to investigate and prosecute collusion (or bid rigging) in public tender processes.

Governments have also taken important steps to increase the transparency of procurement processes to ensure accountability of the public administration. For example, in Mexico transparency includes making the results of procurement opportunities publicly available on the Internet (on CompraNet) and allowing social witnesses¹³ to monitor the process. However, transparency in public procurement procedures must be dealt with carefully. Excessive and unnecessary transparency may facilitate anticompetitive agreements. For instance, a cartel that is constantly informed of procurement strategies and prices can easily monitor and punish firms that deviate from the collusive arrangement.

¹² Specified in Article 41 of the Public Procurement Act or in Spanish, *Ley de Adquisiciones y Arrendamientos y Servicios Del Sector Público* (LAASSP). As a minimum, three invitations must be sent out to potential bidders, however there is no upper limit.

¹³ Social witnesses are usually members of a non-governmental organisation (NGO) who are invited to observe one or several parts of the procurement process. They have the opportunity to raise concerns about corrupt behaviour and to provide recommendations for increasing the integrity of the process. CFE was an early adopter of social witnesses in Mexico.

The OECD Competition Committee has warned governments that transparency before, during and after the procurement process must be handled in such a way that it does not facilitate bid rigging.

1.4 Bid rigging or collusive tendering

Public and private organisations often rely on competitive bidding processes to achieve value for money. Bid rigging in public procurement is a very specific type of collusion that occurs when businesses that are expected to compete against each other agree tacitly or overtly to raise the price of goods or services that are being purchased by governments through public tenders. Although it is also found in the private sector, bid rigging is a very harmful practice for governments and ultimately for taxpayers.

Bid rigging is illegal in all OECD countries, and in many countries (including Mexico) it is also a criminal offence. In Mexico the Federal Law of Economic Competition (*Ley Federal de Competencia Económica*) prohibits and sanctions bid rigging and collusion. Criminal sanctions are governed by the Federal Criminal Code¹⁴ under Article 254 bis and are proposed by the Attorney General following a complaint of the competition authorities and are decided by the Judiciary. The Comisión Federal de Competencia (COFECE) is responsible for the investigation and prosecution of businesses and individuals which engage in collusive practices at the administrative level.¹⁵ The Federal Economic Competition Act qualifies as *Absolute Monopolistic Practices* the contracts, agreements, arrangements, or combinations among economic agents, whose aims or effects are any of the following:

- I. To fix, raise, agree upon or manipulate the purchase or sale price of the goods or services supplied or demanded in the markets;
- II. To establish the obligation to produce, process, distribute or market only a restricted or limited amount of goods, or to render a specific volume, number, or frequency of restricted or limited services;

¹⁴ In Spanish: *Código Penal Federal*, CPF. Sanctions range from five to ten years in prison and from 1.000 to 10 000 days of a fine.

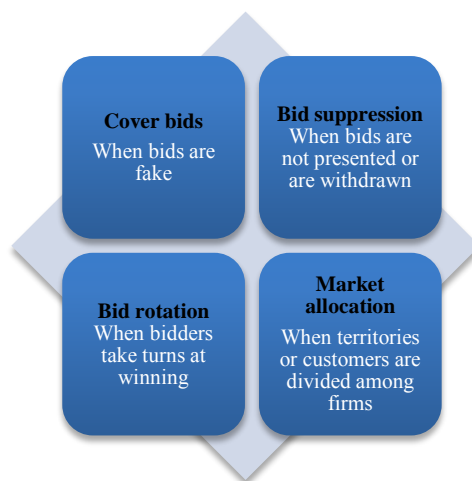
¹⁵ Since September 2013 the Federal Telecom Regulator (in Spanish *Instituto Federal de Telecomunicaciones* or IFT) is also responsible for enforcing competition rules in the telecom and broadcasting sectors.

- III. To divide, distribute, assign or impose portions or segments of the current or potential market of goods and services, through customers, suppliers, time or spaces;
- IV. To establish, agree upon or co-ordinate bids or to abstain from tenders or auctions;
- V. The exchange of information with some of the objects or purposes from the above.

Competition in procurement can achieve lower prices, better quality and innovation. In contrast, in a bid rigging scheme, bidders agree to eliminate competition so that prices are higher and quality is lower. As a consequence, governments pay more for goods and services and this result in waste of public money and resources to the direct detriment of taxpayers. Collusion in procurement also undermines the confidence of society in public organisations and institutions.

As stated in the OECD Guidelines, bid rigging can take many forms which are illustrated in the following diagram (Fig. 1). These practices are by no means mutually exclusive, and would in fact be expected to be observed simultaneously.

Figure 1. Common bid rigging practices



Source: OECD, 2009, Guidelines for fighting bid rigging in public procurement.

Schemes frequently include components that provide an appearance of competition. They may, for instance, include *cover bids* where dishonest bidders submit an offer that they know cannot win because it includes unacceptable terms or because the price is known to be too high. Schemes may also include *bid-suppression*, where a supplier that participates in the early stages of the tender process agrees with its competitors not to submit a final bid. When cartel members are involved in *cover bids* or *bid suppression*, the losing bidders can be rewarded in different ways, including direct payments for compensation of lucrative sub-contracts from the winning bidder.

In a *market allocation* scenario, the cartel members may divide the market into geographic areas, and decide in advance which firms should be allowed to submit the winning bid in each area.¹⁶ In such cases, they could submit a cover bid, which would help create an appearance of competition where none exists. Cartel members could also divide the market by customers. In this case, each firm would sell only to its clients. The other cartel members would decline to participate in the bidding process, or submit complementary bids. Finally, in *bid rotation* cartel members continue to bid for different contract opportunities although they take turns in winning the tenders.

In addition to these different bid-rigging schemes, firms engaged in collusive tendering use different mechanisms for the apportionment and distribution of the (illegal) monopoly profit among the participants. These mechanisms depend on the particular bid rigging scheme. For instance, sometimes the redistribution of the illegal gains is ensured through market allocation, i.e., the market is divided and each member reaps his profit from its appointed clients without competition. Another form of distribution could mean there are compensatory payments for firms participating in *cover-bids*.

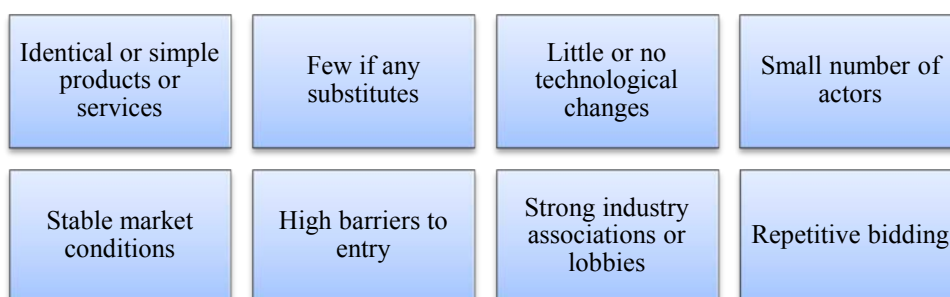
Finally, cartels include supervising—or monitoring mechanisms—to ensure that the cartel members respect collusive arrangements. Without supervision and retaliation mechanisms, a cartel cannot operate. When firms in a cartel are found to deviate from a collusive arrangement, retaliation or punishment is usually expected from other members of a cartel. For this reason, when tenders are organised randomly instead of repetitively, it becomes troublesome for colluding firms to enforce their retaliation mechanisms. For instance, as stated in the

¹⁶ So that one would be allowed to win in, for example, Baja California, another in Yucatán, and so on. Firms organised in bid rigging schemes would know when it was their turn to lose.

OECD Guidelines, the members of the cartel can punish a company which seeks to evade the cartel agreement by targeting the bids originally allocated to it. Thus, contracts for goods or services that are regular and recurring may require special tools and vigilance to discourage collusive tendering.

The OECD Guidelines identify several market characteristics that can facilitate bid rigging schemes (see Figure 2). These characteristics include markets with a small number of competitors, high barriers to entry, or where the chamber of industry is tightly organised. Other market conditions that favour bid rigging include stable market conditions, little or no technological changes, few if any substitutes and repetitive bidding. Finally, identical or simple products or services facilitate collusion because it makes easier the arrangements, given a similar pricing structure.

Figure 2. Market conditions that facilitate collusion



Source: OECD, 2019, *Guidelines for fighting bid rigging in public procurement*

1.5 The OECD Recommendation for Fighting Bid Rigging in Public Procurement and the Related Guidelines

On July 17th 2012, the OECD Council adopted a Recommendation on Fighting Bid Rigging in Public Procurement that 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. The Recommendation represents a step forward in the fight against collusion in public procurement that the OECD has been encouraging.

The 2009 Guidelines for Fighting Bid Rigging in Public Procurement¹⁷ (the “Guidelines”) and their worldwide dissemination are particularly important in this endeavour.

The Guidelines are based on the international best practices and offer non-binding advice to public institutions on how to reduce the risk of bid rigging through effective tender design and how to detect collusive practices during the tender process. Besides describing the market structures relevant for bid rigging and collusive schemes, the OECD Guidelines also include two checklists. The first checklist deals with the optimal design of tender processes to reduce the risk of bid rigging. The main objective of this first checklist is prevention. The second checklist includes advice on how to detect bid rigging during the tender process by identifying suspicious bidders’ behaviour, suspicious statements or pricing patterns that should alert procurement officials to the fact that the procurement process has been manipulated. The 2012 Recommendation and the Guidelines are essential instruments to facilitate the work of OECD and non-OECD governments in detecting and reducing anti-competitive practices in public procurement.

1.5.1 Checklist for designing the procurement process

The design checklist includes six broad sections that are summarised below:

Know your markets

Officials in charge of procurement should be well-informed about the market (or markets) for the product or service that they are about to purchase before they design the tender process. They need to be reasonably knowledgeable about price levels and quality standards, as well as about potential substitutes for the product or service they want to purchase. They should also know whether the relevant industry exhibits some of the characteristics that make collusion more likely.¹⁸

¹⁷ Available at:
<http://www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm>

¹⁸ See section 1.4 and Figure 2.

Maximise the number of genuine competing bidders

Procurement officials should design the tender process to maximise participation of genuinely competitive bidders. They should, for example, avoid introducing unnecessary restrictions on the importance or nationality of firms that may submit bids. Similarly, they should seek to reduce the costs pertaining to bidding. This can be done in a number of ways. For instance, procurers can streamline tender procedures across time and products by using the same application forms or contract models. Electronic bidding systems and timely announcements of tenders can also reduce participation costs.

Use clear requirements and avoid predictability

Officials should define product and service requirements clearly, and avoid predictability. Drafting specifications and the formulation of terms of reference (TOR) is a stage of the public procurement process that could present risks of bias, fraud, and corruption. Specifications should be clear-cut and not leave undue room for interpretation by suppliers. Emphasis should be on what needs to be done or delivered rather than on how it is executed, since excessive and unnecessarily specific requirements will discourage innovative solutions and reduce the number of potential bidders. Clarity should not be confused with predictability.

Reduce communication among bidders

The tender process should be designed to reduce communication among bidders. While interested suppliers may be invited to discuss the technical and administrative specifications of the tender with the procurement staff, regularly scheduled meetings that bring together potential suppliers should be avoided. For this reason, electronic bidding is preferable to bid-submission in person as the latter may provide firms with a last-minute opportunity for communication and deal-making. If possible, bids should be submitted in such a way that bidders cannot see their competitors and their bids. Bidders should be required to disclose all communication with competitors and preferably sign a Certificate of Independent Bid Determination (CIBD).¹⁹ Although transparency is important,

¹⁹

A Certificate of Independent Bid Determination (CIBD) is used by tendering authorities to deter collusion. It requires bidders to disclose to the tendering authority all communications and arrangements that the bidder has entered into with competitors relating to the tender. It must be signed by the legal representative of the company and is used to declare that there is not an illegal

procurement officials must be careful about precisely which information is made public during the tender process so that it does not facilitate a cartel agreement.

Define clear criteria for awarding contracts

The criteria for choosing the winning bid must be defined carefully and reviewed thoroughly. If criteria other than price are used – such as quality or post-sale services – it must be described in full and weighted adequately in advance to avoid post-award challenges. The extent to which the weighting criteria are disclosed in advance can affect the ability of the bidders to co-ordinate their bid. Preferential treatment for any class, size, or type of suppliers should be avoided, and performance records – or other indicators that unduly favour incumbents – should not be overemphasised. Officials should also consider how the choice of award criteria affects future competition, and they should reserve the right not to award the contract if there is reason to think the bidding process was not competitive.

Train staff on the risks of bid rigging

The awareness of procurement officials about the costs and risks of collusion is critical for tackling bid rigging. Agencies that conduct public procurement should regularly train their staff in cartel and bid-rigging detection, with the assistance of competition authorities or external legal consultants. Agencies should store and periodically review information on past tenders. They should establish adequate mechanisms for bidders to convey competition concerns and suspicions about collusive practices they are aware of, as well as training employees at the procuring agency about these mechanisms.

1.5.2 Checklist for detecting bid rigging

The second checklist focuses on how to detect bid rigging during the tender process and it includes five general recommendations:

agreement between competitors. It both deters bid rigging and strengthens the legal position – and the ability to prosecute – of the tendering and competition authorities in the case of bid rigging. It is also a psychological deterrent for individuals involved in collusive practices because it implies a direct responsibility for them. These certificates are required by law in a number of OECD countries (such as Canada and the US) although not yet in Mexico. However, there is a version of this document for Mexico which is published by COFECE. See Annex 2.

Look for warning signs and patterns when businesses are submitting bids

Procurement officials should be aware of warning signs and patterns detectable when firms submit bids. If the same firm always wins, or if some firms are repeatedly bidding but never winning, this behaviour could be justified by possible collusion. Bid rigging could also manifest itself when the winning bidder repeatedly sub-contracts to losing bidders, or if firms seem to take turns at winning tenders.

Look for warning signs in all documents submitted

Procurement officials should look for warning signs in submitted documents. Identical mistakes, spelling errors, or identical handwriting in the documents of different bidders may suggest that bidding material was written by the same individuals. Identical bids, or bids including identical calculations and estimates are a clear indication that bidders may have colluded.

Look for warning signs and patterns in pricing

Officials should look for warning signs in pricing and bidding strategies. Unexplainable large differences in the price offered by the winning and the losing bidders may indicate collusion. Identical prices in several competitive bids or sudden inexplicable changes in prices may also indicate bid rigging. Discrepancies in one supplier's pricing in bids for similar tenders (over time and across regions) should also raise concern.

Look for suspicious statements at all times

Procurement officials should be on the lookout for suspicious statements from bidders. These could include references to market or industry "standard prices" as well as statements indicating that a supplier only operates in certain areas or with certain customers. Other serious causes for concern are statements referring to previous agreements among bidders or questions expressed about CIBDs, or indications that, although signed, these will not be taken seriously.

Look for suspicious behaviour at all times

Officials should be sensitive to suspicious bidders' behaviour. Such behaviour could include private meetings – or frequent socialising – among suppliers prior to a bidding opportunity. If a firm submits bids on behalf of a competitor it should also be considered a warning sign.

A note of caution about indicators of bid rigging

It is important that procurement officials be aware that this checklist reflects only potential signs of collusion and, as such, they do not in themselves constitute proof of collusion among bidders. If one, or several, of these signs are observed, procurement officials should be especially vigilant. It is important that officials be well aware of the steps they should take if they suspect that bidders are colluding and carefully record all information so that a pattern of behaviour can be established over time.

Steps procurement official should take if bid rigging is suspected

In addition to a working understanding of the relevant laws applicable to bid rigging in their jurisdiction, officials should discuss their suspicions with their own legal staff and with the competition authority, and together decide the best measures and steps to be taken. Certainly, they should not discuss their concerns with bidders. It is very important that all documentation be retained and all signs of collusion recorded. This is especially important since collusion often only becomes clear as specific patterns are established over time.

CHAPTER 2: PUBLIC PROCUREMENT IN MEXICO

2.1 Procurement Laws in Mexico

The legal basis for public procurement in Mexico is **Article 134** of the Constitution.²⁰ Public tenders are mandatory in order to achieve efficient public spending. The **Public Procurement Act**²¹ (or **PPA**), regulates the process that enables public institutions to acquire *goods, services and leasing arrangements* with private businesses either through *public tenders* or through other procurement methods with limited competition, such as *direct awards* and *restricted invitations* (to at least three different suppliers).²²

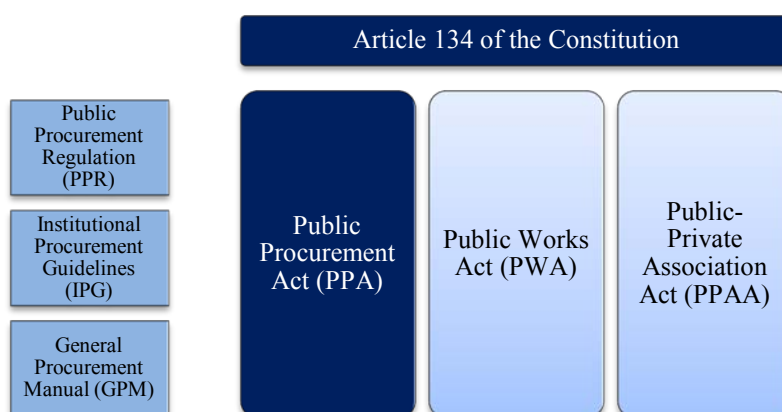
²⁰ Article 134 states that “The economic resources available to the Federal Government, the States, the Municipalities, the Government of the Federal District and the political-administrative organs thereof, and to the respective decentralised agencies or government controlled companies, shall be managed with efficiency, effectiveness, economy, openness and honesty in order to comply with the purposes for which they are intended. (...) Any acquisitions, leases and transfers of any kind of goods, the rendering of services (...) shall be awarded or carried out through public biddings, through the issuance of public summons so that solvent propositions may be submitted in a closed envelope, which shall be opened in public with the aim of assuring the best conditions available in benefit of the State in regards to price, quality, financing, opportunity and all other pertinent circumstances (,,)”.

²¹ In Spanish: *Ley de Adquisiciones, Arrendamientos y Servicios Del Sector Público*, LAASSP.

²² Public works are regulated by another set of laws- Public Works Act (*Ley de Obras Públicas y Servicios Relacionados con las mismas*, LOPSRM) and Public Private Association Act PPAA (*Ley de Asociaciones Público Privadas*, LAPP). Public works are not covered by this report.

There are also *regulations* established by the Head of the Executive²³ which implement the PPA; this is the **Public Procurement Regulation**²⁴ or **PPR**. In addition, every public sector institution is required to issue its own **Institutional Procurement Guidelines**²⁵ to ensure that procurement processes are aligned to the PPA and other applicable laws. To assist officials and describe the different procurement processes the Government has adopted a **General Procurement Manual**²⁶ (see Figure 3).

Figure 3. Relevant procurement legislation in Mexico (*)



(*) In this report we only focus on the Public Procurement Act. The Public Works Act and the Public-Private Association Act are not considered in this analysis; both have their own implementing regulations.

²³ The Head of the Executive is the President of Mexico (Article 89 section 1 of the Constitution).

²⁴ In Spanish: *Reglamento de la Ley de Adquisiciones, Arrendamientos y Servicios Del Sector Público*, RLAASSP.

²⁵ In Spanish: *Políticas, Bases y Lineamientos en Materia de Adquisiciones, Arrendamientos y Servicios*, POBALINES.

²⁶ In Spanish: *Manual Administrativo de Aplicación General en Materia de Adquisiciones, Arrendamientos y Servicios del Sector Público*, MAAGMAASSP.

Before assessing the procurement rules and practices of CFE in light of the OECD Guidelines, this chapter will summarise the general procurement process—and the potential risks of bid rigging—by breaking down the relevant legal procurement framework in Mexico into three distinct phases: pre-tender, tender and post-award.

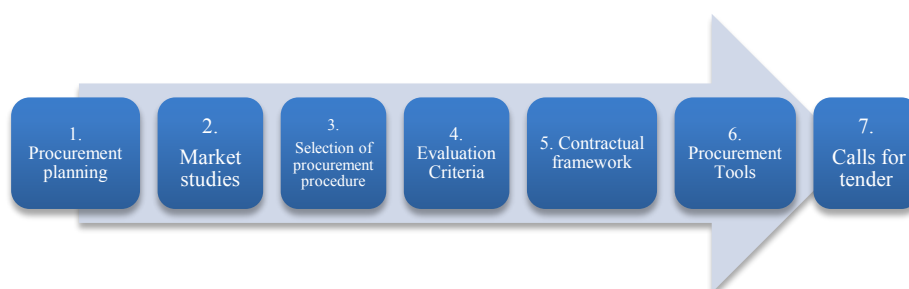
2.2 The pre-tender phase

2.2.1 *Seven stages for procurement in Mexico*

The pre-tender phase in Mexico can be divided into **seven consecutive stages**.²⁷ First, officials must determine the procurement objectives and requirements for the relevant time period based on their budget (1). Second, they must look at their purchasing and bargaining positions in the market (2). This will enable their institution to choose the most advantageous form of procurement and the best contracting method (3). Once they have chosen a procurement and contracting method, procurement officials must determine the evaluation criteria for awarding the contract (4). They are then in a position to design a tailor-made contract for the goods or services they wish to procure (5). Officials must next decide how they will use different procurement tools in order to make the procurement process most competitive (6). Subsequently, a public tender can be announced (7). These seven steps (see Figure 4) constitute the pre-tender phase in this report.

²⁷ While there are many secondary processes that are relevant, this form of describing the procurement process focuses on the aspects of the legal framework that are most relevant to preventing and detecting bid rigging.

Figure 4. Stages of the pre-tender procurement phase



Stage 1: Procurement planning

Planning is the first step of the pre-tender phase and sets a procurement budget. Planning is crucial for any strategy against bid rigging, because it determines the degree of predictability and expected competition in the market. Planning is also mandated by the PPA,²⁸ which requires that every area with purchasing powers must determine its annual requirements and integrate the information into an **Annual Procurement Programme (AAP)** that is eventually incorporated into the institution's **annual budget**. The Annual Procurement Programme must take into account the objectives and priorities set out in other institutional programmes, as well as the objectives and priorities determined in the **National Development Plan**²⁹ and/or other sectorial programmes. That is to say, procurement is secondary to other institutional objectives. In this way, public officials must always favour the provision of a public service over procurement objectives. For example, if a hospital runs out of medicines in an emergency, then paying a higher price is justified.

The AAP must also take into account the guidelines set out in the **Federal Standards Act**.³⁰ This is a law that governs standards for the products that will be purchased by public institutions. Finally, the APP must also consider the institution's objectives in the short, medium and long terms in order to design an

²⁸ The Procurement act has 8 articles that regulate planning, programming and appropriation of the Annual Procurement Programme, PAAAS (18, 20, 21, 22, 24, 25, and 56). Any modification of the annual plan should be referred to the Ministry of Public Administration (*Secretaría de la Función Pública*, SFP) and updated monthly on the CompraNet electronic system (Article 21).

²⁹ In Spanish: *Plan Nacional de Desarrollo*, PND.

³⁰ In Spanish: *Ley Federal sobre Metrología y Normalización*, LFMN.

efficient procurement plan for the same time periods (Article 20 of the PPA). The AAP is first revised by an internal **Procurement Committee**,³¹ and then approved by the head of the institution (Article 16 of PPR). The Programme must be evaluated and, ideally, the results incorporated into the following year's procurement Programming. Finally, Article 21 of the PPA requires that this Programme be available by January the 31st of each year on the CompraNet electronic system. However, the AAP is modified and updated throughout the year in order to better assign the available resources.³²

Stage 2: Market studies

Any public institution that is considering purchasing goods or services is required by law to carry out a market study. The law defines a market study as a piece of research on the availability of goods and services, as well as on their estimated price (Article 2 of the PPA).

Standardised products usually require less sophisticated market studies because information is accessible and readily available.³³ Market studies also help public officials carry out very specific tasks (PPR, Article 29):

1. Determine non-acceptable and convenient prices;³⁴
2. Provide evidence to select the procurement procedure a public tender or an exception (restricted invitation or direct award);
3. Provide insight for choosing the best contractual frameworks and pricing schemes.

The Public Procurement Regulation (Article 28) considers that a market study must contemplate at least information from the following sources:

³¹ In Spanish: *Comité de Adquisiciones Arrendamientos y Servicios*, CAAS.

³² In CFE this task is carried out by the Systems Department. See Chapter 3.

³³ This means that procurement officials should be able to distinguish between standardised and specialised products in order to prioritise the most important market studies and have them ready on time.

³⁴ Non-acceptable prices are estimated prices over which no proposals are accepted; convenient prices are the lower threshold under which proposals are not accepted. See Stage 5: Contract Framework, 4.6.5 *Pricing schemes for goods and services* in this chapter.

- The CompraNet electronic procurement system;
- Industrial or commercial lobbies or associations, as well as individual producers, providers, distributors and retailers; and
- Internet or telephone calls with a legitimate and reliable source.³⁵

Of the several pre-tender stages, market studies are the most important. This is because they allow officials to identify the correct evaluation criteria, define the best contractual framework and make the best use of the procurement tools. For this reason, the information necessary for market studies should be collected carefully analysed rigorously and the results kept confidential from potential providers, since the information could be used to rig bids.

Stage 3: Selection of procurement procedure

The PPA (Article 26) takes into account three different contracting processes: (1) public tender, (2) restricted invitations (to at least three suppliers) and (3) direct award. The general rule is that public tender should be the preferred procurement model because it promotes competition between bidders and allows the government to maximise value for money. In this procedure different bidders present their offers, which are reviewed by the procurement entity. The contract is assigned to the bidder which has the best offer compatible with the call for public tender. However, public tenders are not always the most effective way of procuring goods and services. There are situations where the other procurement methods (direct award³⁶ or restricted invitation³⁷) are more efficient.³⁸ This is especially the case when (i) the opportunity cost of organising a public tender is higher than the opportunity cost of using an exception to

³⁵ They need to provide evidence of all sources used during the research.

³⁶ Direct award is the procedure whereby the public procurement officers select and assign a contract to a specific supplier without the obligation to advertise the procurement opportunity publicly.

³⁷ The procurement method based on restricted invitation is similar to public tender except that the requirements are not initially published, and only available to a pre-selected number of bidders.

³⁸ See next subsections 2.2.2 *High value exceptions* and 2.2.3 *Low value exceptions*.

public tendering,³⁹ (ii) when secrecy is required because the publicity given to a public tender could represent a threat to national security or (iii) in cases of emergency which do not allow the organisation of a public tender (See Articles 41 and 42 of the PPA).

Deciding when something will *not* be procured through a public tender requires procurement officials to justify why they have decided to use one of the exceptions set out in Articles 41 and 42 of the PPA. In many ways this can be considered to be the greatest risk to the procurement process because it allows for some discretion in deciding if the institution should use a less competitive procedure.

The arguments for allowing an exception to public tendering can be divided into two groups: *low value and high value exceptions*. The high value exceptions are regulated by Article 41, which includes a set of twenty exceptions that allow for high monetary transactions.⁴⁰ The low value exceptions are regulated under Article 42 of the PPA.

2.2.2 *High value exceptions (Article 41)*

The arguments that are usually associated with the use of an exception under Article 41 are summarised as follows:

- **TECHNICAL REQUIREMENTS:** The technical or specific nature of certain goods or services makes contracting with a particular provider necessary. For example, this is the case if there are no substitutes in the market, if the good is covered by an intellectual property right, if there are arguments to justify buying from a particular company, if the procurement consists of a prototype that tests the functionality of the object, or if the procurement concerns specialised equipment.⁴¹

³⁹ For examples see Chapter 2, section 2.2, stage 3 and Chapter 4, section 4.6 The pre tender phase at CFE, *Stage 3 Selection of procurement procedures at CFE*.

⁴⁰ However, it should be noted that the Act for the Development of the Competitiveness of the Micro, Small and Medium Enterprise mandates that 35% of all procurement must be sourced to Micro, Small and Medium Enterprises.

⁴¹ See sections I, VIII, XV, XVI, XVII, XIX, Article 41 of PPA.

- **SPECIAL RESEARCH:** When a very specific study or research is required from a particular supplier, competitive tendering is not mandatory. For example, for consultancy services, studies or research in a given area, procurement officials are allowed to use restricted invitations,⁴² which could be extended to public and private higher education institutions and public research centres among others.⁴³ Similarly, if a service is to be provided by a contractor with the help of one technical assistant no public tendering is required. Similarly if the services are provided by one individual,⁴⁴ public tenders are not mandatory if these do not hire more than one specialist.⁴⁵
- **LACK OF PROVIDERS:** If a public tender was declared void, procurement officials can proceed with a restricted invitation or direct award. The requirements in the new call for tender, however, must remain the same.⁴⁶
- **NATIONAL SECURITY:** Public tendering may be exempted when performed exclusively for military purposes or for the navy, or when it could jeopardise national security or public safety.⁴⁷
- **RANDOM AND UNPREDICTABLE SITUATIONS:** Another situation where procurement officials can decide to procure without a public tender is when an unexpected and urgent situation requires the institution to act promptly to ensure a public service. For example, social or economic instability or if there is an act of God that makes it

⁴² See section X, Article 41 of PPA.

⁴³ It should be noted that a direct award shall be authorised only when the information provided to the bidders, in order to prepare their proposal, is reserved in the terms established in the Transparency and Access to Federal Public Information Act.

⁴⁴ See section VIII, Article 41 of PPA.

⁴⁵ See sections X and XIV, Article 41 of PPA.

⁴⁶ See section VII, Article 41 of PPA.

⁴⁷ See section IV, Article 41 of PPA.

necessary to hasten procurement. These conditions are considered sufficient to trigger this exception.⁴⁸

- **OTHER FAVOURABLE PURCHASING CONDITIONS:** When the opportunity cost of a public tender is higher than the opportunity cost of an exception, then competitive tendering can be suspended. Additionally, it is possible to authorise an exception if a supplier is selling at low prices because of a bankruptcy, or if there is a constraining framework agreement for a specific good or service.⁴⁹ Another favourable purchasing condition relates to the low value exceptions discussed in the next subsection.
- **RESCINDED CONTRACTS ALLOW THE SECOND BEST OFFER TO BE CONTRACTED WITHOUT A TENDER:** If a contract derived from a public tender is rescinded, under section VI of Article 41, officials are allowed to assign the contract directly to the second best offer as long as its price is not 10% more expensive than the original contract.
- **PERISHABLE GOODS, GRAINS, OR REPAIRED AND SECOND-HAND GOODS CAN BE EXEMPTED FROM TENDERS.** Under section IX of Article 41, the law allows for these goods to be acquired without tenders.
- **GOODS AND SERVICES ACQUIRED FROM IMPOVERISHED POPULATIONS CAN BE EXEMPTED FROM TENDERS.** Under section XI of Article 41, the PPA allows public institutions to buy from impoverished or marginal populations.
- Goods and services that will be sold for profit or are part of a “productive function” and can be exempted from tenders. This is allowed under section XII of Article 41 of the PPA.

⁴⁸ See sections II and V, Article 41 of PPA.

⁴⁹ See sections III, XIII, XVIII, and XX, Article 41 of PPA.

2.2.3 *Low value exceptions (Article 42)*

Article 42 of the PPA allows public officials to spend **up to 30%** of their approved procurement budget through direct contracting and restricted invitations, if these are low value transactions. The specific amount for each low value exception depends on the authorised price ranges decided by Congress.⁵⁰ Because the efficiency of a large institution would be greatly impaired if every purchase was subject to the time frames and regulatory requirements of public tenders, these low value exceptions are sometimes necessary. This does not imply that the use of these exceptions could not be abused, hence favouring bid rigging, if there is not an adequate oversight.

2.2.4 *Authorising exceptions to public tenders*

In all Federal public institutions the use of exceptions to public tenders is decided by at least one internal procurement committee. These committees must verify that the contracting area duly justifies the use of one of the exceptions. According to Article 22 of the PPA, every Federal public institution must have at least one **Procurement Committee**.⁵¹ However, if an institution is organised on a decentralised basis, it is authorised to establish as many regional procurement committees as required to streamline the process. In this case, a Central Committee must be put in place and, while it does not have overruling authority over the regional committees, it is authorised to set the rules for their operations.

Exceptions to competitive public tendering are *not always* authorised by Procurement Committees. The PPA clearly specifies that Committees will only authorise cases relating to **12 out of 20** sections in Article 41.⁵² This generally leaves the competitive nature of emergency purchases, low monetary transactions and international public tenders to the discretion of the **heads of the**

⁵⁰ The lower chamber of Congress resets the threshold for low monetary procurement exceptions every year with the approval of the Federal Budget (*Presupuesto de Egresos de la Federación*, PEF). This information can be found in the Annexes of the decree. In 2013, any entity or agency authorised to spend over a million pesos in procurement –such as the CFE- was limited to **\$389 thousand pesos** for **direct awards** and a total of **\$2.678 million pesos** for **restricted invitations**. See annex 8 in the 2013 National Budget Decree.

⁵¹ In Spanish: *Comité de Adquisiciones, Arrendamientos y Servicios*, CAAS.

⁵² See above.

contracting areas. According to the **General Procurement Manual**,⁵³ the contracting areas must always specify the procurement officials authorised to approve the use of exceptions as determined in the **Internal Procurement Guidelines (POBALINES)**.

2.2.5 *Joint bids*

Joint bids refer to the situation where two or more independent bidders submit a single bid for a tender without formalising their relation into a long-lasting partnership. The pro-competitive purpose of a joint bid is to allow new or small suppliers into a tender that would usually require a complex combination of skills or large volumes of goods and services, and who would otherwise be unable to participate on their own. In these circumstances allowing suppliers to participate jointly attract more bidders and expands competition in the tender. In other circumstances, however, joint bids eliminate a potential bidder and therefore restraint competition. In Mexico joint bids are always allowed unless the procuring institution decides otherwise. Article 34 of the PPA only requires that 1) people legally responsible for each party be clearly identified and; 2) that these bids take into account the legal framework set out in the Federal Economic Competition Act.

2.2.6 *Split awards*

Article 39 of the PPA foresees the possibility of awarding the contract to several bidders as long as this does not interfere with free competition. The law also mandates all Federal institutions to take into account any observations made by the COFECE and IFT. These procurement instruments are very important for maintaining the adequate provision of public services because they allow institutions to disperse the risk of a lack of supply. Notwithstanding this, split onwards increase the risk that the government pays higher prices: if the main provider fails to deliver it may accept the second best proposition with a higher price (up to a ten per cent limit). This condition could facilitate a collusive

⁵³ This document is a Guideline issued by the SFP to assist officials in streamlining the procurement process within the Federal Government. It includes a description of the different processes and steps required to lawfully purchase goods and services. In Spanish: *Manual Administrativo de Aplicación General en Materia de Adquisiciones Arrendamientos y Servicios*, MAAGAASSP. See: MAAGAASSP 4.2.3.1.1 and MAAGAASSP 4.2.3.1.4. See *Figure 3 Relevant procurement legislation in Mexico*.

agreement if the penalties for failing to deliver are lower than the expected payoff from the shared profits obtained with the second price.

2.2.7 International Tenders

All public entities are bound by Article 134 of the Constitution and the relevant Procurement Chapters contained in international trade agreements. Procurement is open to international suppliers when expenditure accounts for an amount higher than a pre-determined threshold specified in the relevant international treaties. This means, that for large purchases, public institutions usually use international tenders. According to the Article 28 of the PPA, there are two types of international tenders specified in the law:

- **International tenders subject to trade agreements:** National and international bidders from countries with a trade agreement with Mexico are allowed to participate. This type of tender is mandatory when it is specified in the agreement.
- **Open international tenders:** National and International bidders are allowed to participate. This option is available when a national tender has been declared void or when it is a specified condition in a procurement that is being financed with external credit granted to Mexico. In cases where a national tender has been declared void, and if the contract is not subject to a trade agreement, the entities may choose indistinctly to issue an international tender subject to trade agreements or an open international tender.

The PPA explicitly states that public institutions and state entities should favour procurement in which national labour and resources are employed, as well as favouring national suppliers during the evaluation stage with a price-margin preference of up to 15% over the prices offered by foreign suppliers (Article 14 of the PPA).⁵⁴

⁵⁴ “Article 14. In open international procurement procedures, dependencies and entities will choose, under equal circumstances and considering (...) the percentage of local content indicated in Article 28, section I, of this Act, procedures that shall have, in the economic comparison of proposals, a preference price margin of up to fifteen per cent with respect to imported goods, according to the rules established by the Ministry of the Economy, upon review of the Ministry of Public Administration.”

For international tenders, procurement officials must first check that their agency or entity –such as the CFE- is listed in the procurement chapters of the treaties, and then check the monetary thresholds that apply to the different goods and services in each treaty. Every six months the SFP updates and publishes the current value of these thresholds in Mexican pesos.⁵⁵ This information is divided into two categories: (i) procurement subject to the PPA and (ii) procurement subject to the Public Works Act (PWA). If the purchase required by an institution is worth more than the threshold indicated, then an international tender with the signatory countries becomes mandatory. The following table shows this difference for public institutions and decentralised public agencies (such as CFE). The amounts are significantly higher for the latter.

Table 1. Authorised thresholds during the second semester of 2013

Public Entity	PPA Threshold (pesos)	PPA Threshold (dollars)	PWA Threshold (pesos)	PWA Threshold (dollars)
Public Institutions	\$ 991,009	\$ 77,494	\$ 128,831,677	\$ 10,074,262
Decentralised public agencies	\$ 4,955,057	\$ 387,471	\$ 158,569,473	\$ 12,399,671

Source: SFP

However, even when an expected purchase exceeds these thresholds, a national tender can still be possible if there are exceptions explicitly foreseen in the international treaty. These are called economic reservations⁵⁶ and are used by governments to promote and protect local and/or strategic industries for a limited period of time. These reservations are generally governed by the principle of reciprocity between countries. The objective of these reservations is to allow for local industries to become more competitive internationally before exposing them to foreign competition. That is to say, public institutions can use these reservations explicitly stated in the treaties to transform international tenders

⁵⁵ This information was obtained during an interview with experts on international tenders and international treaties from the Ministry of Public Administration, October 18, 2013.

⁵⁶ A reservation is defined by the 1969 Vienna Convention on the Law of Treaties (VCLT) as: a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. (Article 2 (1) (d)).

into national tenders and limit foreign competition in the procurement of certain goods and services.

In the international treaties signed by Mexico, these reservations can be transitional or permanent. Generally, both types of reservations are expressed as pre-determined budgets that are assigned to different institutions. Public institutions have discretionary powers when to use these reservations.⁵⁷ This mechanism leaves public institutions (such as CFE) with a significant discretion that can be used to favour local companies and exclude international competition. The main difference between permanent and transitional reservations is that while transitional reservations decrease over time, permanent reservations do not. For this reason, transitional reservations are always much wider at the beginning of a treaty life although they gradually disappear (usually within 10 years). It should be noted that permanent reservations are always much lower than the transitional reservations.

Each international trade agreement establishes a list of goods and services that fall within a permanent or a transitional reservation. For example, the North American Free Trade Agreement (NAFTA) has adopted an approach based on a so-called “negative list”. This means that all goods and services are subject to the procurement provision in the NAFTA treaty with the *exception* of those expressly listed. The trade agreement with the European Union, adopts a different approach based on a so-called “positive list”. In this case, *only* the products that appear on the list are subject to international public tenders.⁵⁸ Today, the only transitional reservations that are still in use are those provided for in the Mexico-Chile Free Trade Agreement.⁵⁹

⁵⁷ For example, if CFE was planning a tender worth 5 million pesos that would require an international tender, it could apply one hundred thousand pesos of its assigned transitional reserve in order to decrease the value of the contract to 4.9 million pesos, which would then allow the institution to make a call for a national tender instead.

⁵⁸ As for products and services of interest to the business activities of CFE, the last treaty to include electrical manufacturing as products subject to mandatory temporary reservations was the trade agreement with Israel. This reservation has now disappeared because of the passage of time.

⁵⁹ However, Mexico is negotiating the Trans-Pacific Partnership Agreement (TPPA) which might introduce a new series of temporary and permanent reservations. The TPPA will include the United States, Mexico, Peru, Chile, Vietnam, Malaysia, Brunei, Australia, New Zealand and Japan.

Stage 4: Evaluation criteria

Designing a tender that maximises competitive bidding involves well-defined requirements and clear awarding criteria. Failing to consider clear-cut requirements and objectives can jeopardise the tender before it is made public, limiting entry of potential bidders. Awarding contracts without respecting the criteria chosen beforehand can signal to *genuine bidders* that the procurement process is not fair, and thus discourage them from participating in future tenders.

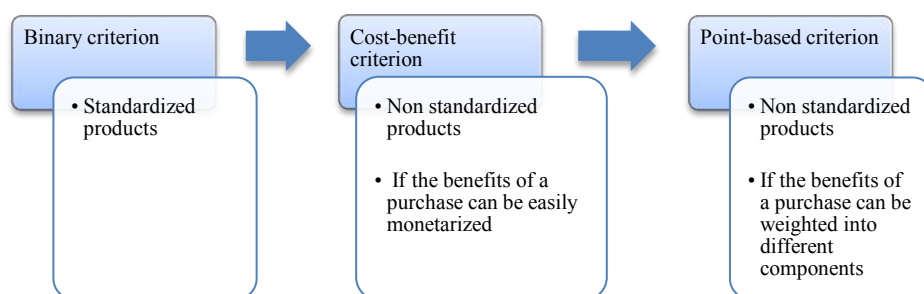
The law specifies that public tenders (as well as restricted invitations) must be evaluated using either point-based or cost-benefit criteria. The only legal exception is the use of the binary criterion, which requires contracting areas to justify why one of the other two evaluation methods was not chosen (see Fig. 5).

1. Under the point-based evaluation criterion different components of the bids are subject to different weighting parameters. These parameters must be carefully specified in the terms of reference of the tender. The official guidelines⁶⁰ limit the point base line to 50 points. The experience of the supplier can account for 5 to 7.5 of the total points. That is to say, the experience of a supplier yields from 10% to 15% of the final score.
2. The cost-benefit evaluation criterion is very similar to the point-based criterion with the difference that the benefits of the different bid components must be monetised to allow for a cost/benefit analysis of the bids.
3. Under the binary evaluation criterion the winning bid is the bid that satisfies the technical requirements in the tender and has the lowest price.⁶¹ This lowest price must also fall within the accepted range determined by both the **convenient** and **maximum reference** prices.⁶²

⁶⁰ In Spanish: *Lineamientos para la aplicación del criterio de evaluación de proposiciones a través del mecanismo de puntos o porcentajes en los procedimientos de contratación.* Available at: http://www.funcionpublica.gob.mx/unaopsp/doctor/comunes/dof09-09-2010_C2.pdf

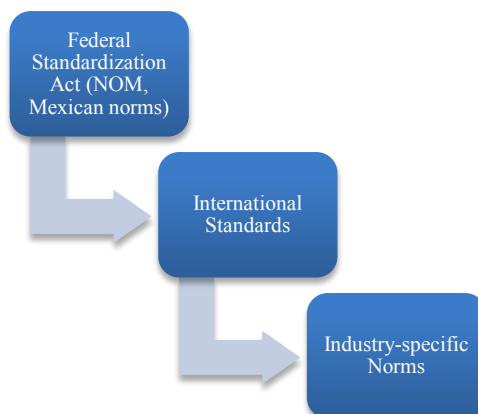
⁶¹ In general, the binary criterion is more suited for standardised products because a cost-benefit or point-based analysis would add little to the end result.

⁶² See discussion further below in section 2.2.9 *Pricing schemes for goods and services*.

Figure 5. Decision chart for evaluation criteria

2.2.8 Technical standards

Article 31 of the PPR specifies that procurement should first meet the requirements established in the Federal Standardisation Act (*Ley Federal sobre Metrología y Normalización, LFMN*). When a particular product standard is missing, then international standards can be used. However, if the international standard is considered inadequate or outdated, it is possible to use a technical industry standard. Technical industry standards should not limit, however, the free participation of bidders.

Figure 6. Hierarchy of technical norms

Determining which standards will be used is a very technical task. For this reason, the use of a specific standard within a public institution must be clearly justified to avoid tender specifications and evaluation criteria which favour one supplier or a group of suppliers to the detriment of competition.⁶³

2.2.9 Pricing schemes and types of contracts for goods and services

The law considers different prices that should be calculated during the procurement process when the binary evaluation criterion applies:

1. **Non-acceptable price:** This is the limit above which the procuring institution will not accept any bids. This price is calculated as a 10% margin above the **median** of all the prices collected during the market study. If it is impossible to calculate a median, the non-acceptable price is calculated based on the bids submitted and approved, and it amounts to a 10% above the **average** bid price.
2. **Convenient price:** This is the lowest price that can be accepted by the procuring institution. This price is derived from the average price of the bids that have been considered technically acceptable less a certain percentage. This margin is specified in the Internal Procurement Guidelines (POBALINES).
3. Article 39 PPR also refers to an additional price: the **maximum reference price**.⁶⁴ It states that, ‘given the case,’ one of the requirements that the call for tender must contain is a price that bidders can use as a baseline to offer discounts as part of their proposal. This is the maximum reference price.⁶⁵

Article 44 of the PPA requires the use of *fixed-price contracts*. However, when there are economic changes for which the signing parties (providers or suppliers) are not responsible –such as changes in the prices of supplies or new

⁶³ As the OECD Design Checklist 1, point 3 (Use clear requirements and avoid predictability) states, it is generally advisable to use performance specifications rather than providing a product description.

⁶⁴ However the PPR does not establish any methodology for calculating this price.

⁶⁵ This procurement method is different from the electronic reverse auctions (OSD) because, as the same PPR also explains, the maximum reference price is not used in reverse auctions (Article 38, section VI, PPR).

tariffs- the contracting authority may accept a *variable-price contract*. In these circumstances, the highest price should not exceed 20% of the contract's estimated price (i.e. that for a fixed-price counterfactual) and the price variation formula should be clearly specified in the contract. For example, prices of minerals may vary considerably because of exogenous factors, so procuring minerals with a price-variation scheme could actually make the tender more attractive for genuine bidders because there is a relative amount of shared risk.

The law also allows for *open-ended contracts*. The difference between an open-ended contract and a standard contract is that it does not specify a finite number of products or services and it allows for an interval or range (minimum and maximum) of quantities to be bought under the contract. Open-ended contracts are allowed under Article 47 of the PPA and Article 85 of the PPR. These types of contracts never commit the buyer to purchasing a particular amount because the demand for products or services is variable.

Stage 5: Contract Framework

During this stage of the pre-tender phase, procurement officials are required to assess carefully whether aggregated/consolidated contracting can be a more efficient form of procurement than carrying out several individual tenders for the same goods or services. If aggregated/consolidated contracting results the more efficient option, procurement officials should also decide the number of batches that will be included in each tender.

Different economic studies reveal that the immediate benefits in price reductions in consolidated purchases and framework agreements are generally greater than the costs expected from diminishing competition when purchases are too large to allow for smaller companies to participate.⁶⁶

⁶⁶ See the following texts for more information: Albano, G, Sparro, M, 2010, "Flexible Strategies for Centralised Public Procurement" *Review of Economics and Institutions*, Vol. 1, No 2. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887791; Commonwealth Procurement Guidelines, 2008, *Financial management guidance* no. 1 December, 2008. Available at: <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/CPG/index.html>; Communities and Local Government, 2008, *The National Procurement Strategy for Local Government Final Report: Towards public service transformation*. Available at: <http://www.communities.gov.uk/publications/localgovernment/procurementstrategy>

2.2.10 Consolidated purchases

A consolidated purchase occurs when an institution decides to buy larger volumes of the same product(s) to meet the demand from different parts of its organisation through one procurement procedure instead of organising many tenders. The purpose of consolidation is to increase administrative efficiency and obtain better prices because of the larger volumes purchased. The main idea behind these contracts is that the size of the contracts endows the procurer with enough bargaining power to extract better prices and/or quality standards and allows suppliers access to economies of scale. Public institutions usually make use of consolidated purchases when procuring goods and services that are widely used in their organisation. This allows them to ensure better prices and quality of the products they buy in abundance.⁶⁷ These consolidated purchases distinguish themselves from other contracts because they are usually very large and are intended for different areas of an institution or even for several public institutions that require the same goods or services. There are two ways of consolidating purchases: within an institution –i.e. different areas or regional offices- and between different public institutions. It should be noted that, if they wish to, regional offices (or areas) may organise consolidated purchases. However in some cases –such as the CFE-, regional offices require the authorisation of central offices to continue with a consolidation procedure.

These contracts are regulated under Article 17 of the PPA and articles 13 and 14 of the PPR. Specifically, Article 17 of PPA permits public agencies to purchase goods jointly and grants additional authority to the SFP and the Ministry of the Economy to establish which goods and services can be the subject of consolidated purchases. However, this does not mean that public agencies cannot carry out consolidated purchases by themselves.

⁶⁷ This is the case usually for standardised products such as office supplies, packaging services, and communication devices to name a few.

Box 1. Consolidated purchases in Mexico and their financial benefits

Efforts to consolidate have been made in several public institutions. For example, since 2006 the Mexican Social Security Institute (IMSS) committed itself to making the best use of its significant purchasing power through consolidation of purchases and multi-year contracts. One example of these actions has been a model for regional consolidation that is intended for purchases that are not feasible at the central level. In this way, the IMSS claims to have increased the procurement expertise among its officials and strengthened regional suppliers. For other purchases IMSS has increased central level consolidations.⁶⁸

Similarly, ISSSTE has been consolidating purchases across its many purchasing offices throughout the country and has increased the number of joint purchases with IMSS and other agencies and entities. In particular, in September 2012, ISSSTE joined with IMSS and two other Federal health institutions, those of the Ministry of National Defence (*Secretaría de la Defensa Nacional*, SEDENA in Spanish) and those of the State of Baja California. These institutions carried out a consolidated purchase for nine medicines. The official figures estimate potential savings of up to 1.7 billion pesos. In particular, ISSSTE's savings amounted to over 420 million pesos.⁶⁹

On 14 January 2014, IMSS released the results of the consolidated purchasing of medicines,⁷⁰ which represented an investment of over 40 billion pesos. This purchase procured medications for all prescriptions handed out to over 80 million Mexicans. The figures claim to represent savings of up to 3.7 billion pesos (9 percent of the scheduled investment), which will be used to improve hospital infrastructure and equipment purchases. This consolidated purchase included the requirements of ISSSTE, PEMEX, the Ministry of National Defence (SEDENA), the Naval Ministry (SEMAR) the Women's Hospital, the Psychiatric Hospital, the National Homeopathic Hospital and the Juárez Centre. These medicines also furnish hospitals in different states: Baja California, Campeche, Colima, Tlaxcala and Veracruz. According to the IMSS's Director General, this is the largest consolidated purchase ever carried out in the country.

⁶⁸ OECD 2011, *Fighting bid rigging in public procurement in Mexico. A Secretariat analytical report on IMSS procurement regulations and practices*.

⁶⁹ Information provided by IMSS to the former CFC and OECD in November 2012.

⁷⁰ See: <http://www.imss.gob.mx/prensa/archivo/201401/003>

Finally, between December 2012 and August 2013 the Federal Government reported estimated savings from consolidated purchases in the order of 22 million pesos and estimated savings of up to 81 million pesos in framework agreements.⁷¹

Consolidated purchases and their potential effect on collusive arrangements

A good example of the benefits of consolidated purchases and their effect on collusive agreements is the experience at IMSS. Between 2006 and 2008, procurement officials at IMSS adjusted their procurement policies to reduce the viability of collusion. They found, for the most purchased product, evidence of collusive behaviour after switching to consolidated purchases.

Previous procurement policy:

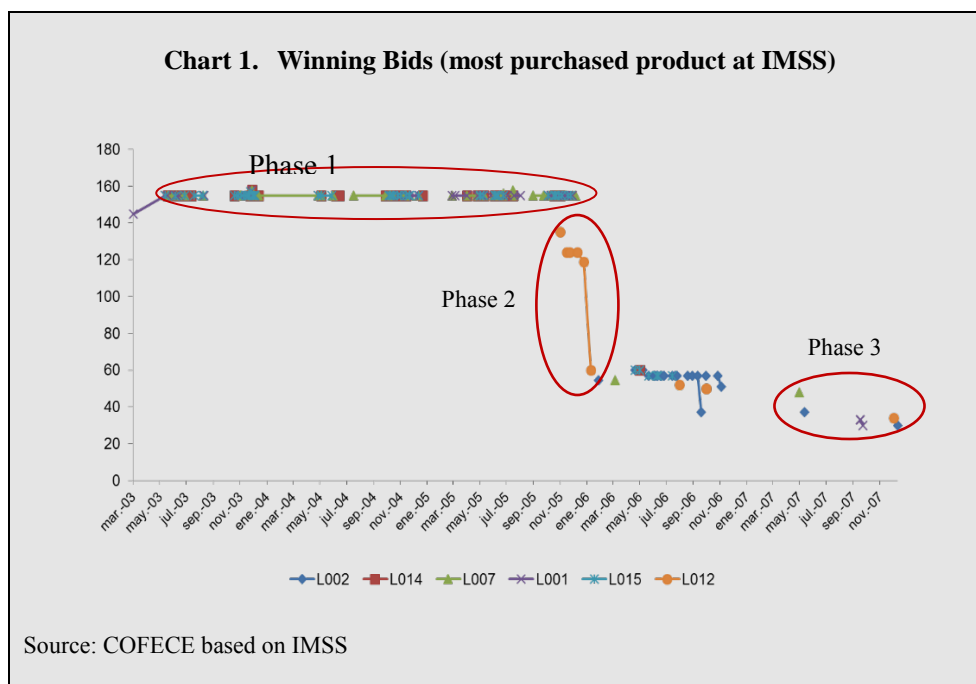
- Contracts were fragmented over time and across departments
- Multiple assignment (split awards) of contracts was used when similar economic proposals were observed
- The reference prices were most likely overestimated

Innovative procurement policies:

- Consolidation was used to attract new competitors for different medicines;
- The number of multiple assignments was reduced;
- Better, lower positioned and more aggressive reference prices (elicited from market studies and other strategies) were calculated.

The following graph describes prices before and after the implementation of consolidated purchases at IMSS, from 2003 to 2007. **Phase 1** (2003-2005) Winning bids were distributed between 4 major bidders. Prices were high, almost identical and stable overtime. **Phase 2** (2006): New competitors enter the tendering process and break the cartel. **Phase 3** (2007): Consolidated purchases bring competitive prices to the process and terminate collusion. The analysis shows how prices went down even by 70% thanks to the innovative procurement policies put in place by IMSS, including consolidation.

⁷¹ SFP, *Primer informe de labores 2012-2013*. Available at: http://www.funcionpublica.gob.mx/web/doctos/temas/informes/informes-de-labores-y-de-ejecucion/Informe_SFP_2012-2013_Web.pdf



According to the SFP, in 2013 there were 49 services, 4 leases and 43 types of goods programmed for consolidation in all Federal institutions.⁷² For this type of contract every purchasing area or entity is required to sign their own contract (PPR Article 13, VIII).

Consolidated purchases can also be used strategically. By using a different combination of purchasing areas and volume every year, any given institution can simultaneously save money, foster niche markets and limit predictability. However, once again, detailed market studies and procurement planning is required in order to maximise these options.

2.2.11 Framework agreements

A framework agreement is a very specific form of consolidated purchase. For this reason it must be organised by the SFP (Article 17 of the PPA). To

⁷²

See: http://www.funcionpublica.gob.mx/web/doctos/ua/sracp/upcp/compras-consolidadas/base_consolidaciones_apf_08072013.pdf

organise a framework agreement, a particular good or service must be required by at least five different public institutions. When this happens, a price is negotiated directly with the most important suppliers, that is to say, without a tender process. The purpose of this negotiation is to set prices and quality standards for a guaranteed volume of sales, so that any institution adhering to the framework agreement can contract directly with the selected suppliers.⁷³ In October 2013, there were eight framework agreements operated by the SFP for the following products: vehicle leases and maintenance, vaccines, paper, protective gear and working clothes, booking flight tickets, and event organisation. Any supplier that wishes to adhere to a framework agreement can do so, as long as competition is not constricted in any way. If any firm offers better terms than those stated in the contract, this would immediately trump the current framework agreement.

Box 2. The CCNPMIS experience

Until 2008, ISSSTE and a number of other Federal institutions, including IMSS and the Secretary of Health, purchased patented pharmaceuticals by direct award, which usually involves some degree of price negotiation. However, this led to large variations in the prices paid by these institutions, sometimes as great as 3,000 per cent. This would suggest that the skills, knowledge and interest of the procurement officials at the various institutions differed greatly and resulted in widespread purchasing inefficiencies.

Given this situation and considering the additional costs for the Mexican Government (and the country's taxpayers) for such a large item in the budget, in 2008 the Mexican Government established the Co-ordinating Commission for Negotiating the Price of Medicines and Other Health Inputs (*Comisión Coordinadora para la Negociación de Precios de Medicamentos y otros Insumos para la Salud*, CCNPMIS in Spanish). The purpose of the CCNPMIS was to have one entity negotiate with each drug manufacturer to establish a single, nationwide price for all public institutions purchasing the selected drugs for one year. The same process applies to other health related single-sourced inputs. From negotiations in this Commission a framework agreement was created that covered over 151 vaccines from 24 suppliers.

⁷³

See section XX of Article 41 of the PPA.

Stage 6: Procurement instruments

The instruments discussed in this section of the report can be used to maximise the number of competitive bidders. In terms of reducing the risk of bid rigging, the instruments that are most useful are the electronic registry, reverse auctions and the use of social witnesses.

2.2.12 Electronic registers

According to Article 56 of the PPA tenders can be completely electronic, face-to-face or a combination of both. Public institutions must use the electronic system CompraNet to register all the contracts over \$15,000 pesos (approximately 1,150 USD). The CompraNet system was first launched in 1997 and it is currently in its fifth version. The SFP administers it. The information available on CompraNet is not systematised and it only starts tracking the information once the tender has been announced.

Avoiding the risk of bid rigging requires accessible and systemised information of all procurement procedures. There is no legal requirement prohibiting electronic systems other than CompraNet from operating and these can help procurement institutions establish internal procedures and databases for the detection of possible bid rigging patterns. In fact, many public institutions have parallel systems that are justified on the grounds of administrative efficiency during the pre-tender phase. In this way, public institutions can better use information to detect bid-rigging patterns, design better market studies and design evaluation indicators for public procurement strategies.⁷⁴

2.2.13 Reverse auctions

In a reverse auction mechanism – in Spanish *ofertas subsecuentes de descuento*, *OSD*- unlike traditional auctions, suppliers compete to sell a good or a service by bidding below the price that they originally proposed without changing the specifications set forth in their technical proposal. In a reverse auction, prices will typically decrease as the sellers undercut each other. Reverse auctions are different from typical public tenders that entail only the submission of one single price. The most relevant benefit of reverse auctions is their ability

⁷⁴

As explained in more detail in Chapter 5, public institutions including CFE should be encouraged to establish and use these databases as complements to CompraNet and consider them an invaluable tool in the fight against bid rigging.

to obtain competitive prices. Another advantage of reverse auctions is that these require an electronic system, which minimises unnecessary bidder interaction. However, as with any other instrument, bid rigging could always happen.

Since 2009, Mexico has made use of reverse auctions as a result of the economic advantages that other countries have experienced.⁷⁵ Reverse auctions are now explicitly mentioned in the Mexican Federal procurement legislations and regulations. Article 28 of the PPA states that if the technical requirements can be assessed immediately after a bid proposal is opened, then goods and services can be purchased using a reverse auction. When the requirements and evaluation criteria are specified so that price reductions do not entail a decrease in the quality of the desired products or services, then reverse auctions are considered one of the most important tools for achieving both best price and quality. Micro, small and medium sized businesses are not permitted to participate on their own in reverse auction tender procedure (Article 28, PPA and article 38, PRA).

According to the guidelines issued by the SFP for the use of electronic reverse auctions,⁷⁶ a contracting authority using the reverse auction mechanism must verify that:

- a) The goods and services are standardised;
- b) The market is competitive (i.e. there are at least five domestic and/or foreign suppliers meeting the technical requirements);
- c) The volume of goods and services to be procured allows for economies of scale;
- d) The official in charge of carrying out the reverse auction is certified by SFP.

⁷⁵ Reverse auctions are used in Brazil, Colombia, Ecuador, Paraguay, Peru, United Kingdom, the United States, France, Italy, Japan, Norway, Chile. See OECD, 2007, *Bribery in public procurement: methods, actors, and counter-measures*. Available at: http://www.oecd.org/document/60/0,3746,en_2649_34859_38446908_1_1_1_1,00.html

⁷⁶ In Spanish *Lineamientos para la utilización de la modalidad de ofertas subsecuentes de descuento en las licitaciones públicas electrónicas*. Available at: http://www.funcionpublica.gob.mx/unaopspfdtoctos/comunes/dof09-09-2010_C4.pdf

Box 3. Reverse auctions in Mexico and their financial benefits

Between September 2010 and June 2011, the Federal Government reported estimated savings of 196.8 million pesos from using reverse auctions.⁷⁷ Additionally, between December 2012 and August 2013 estimated savings represented approximately 122 million pesos.⁷⁸

According to SFP, the Federal agencies that have reported savings by implementing reverse auctions are: the Ministry of National Defence (SEDENA), IMSS, PEMEX and CFE. Between 2009 and 2011, the estimated savings amounted to 6.8 billion pesos. The SFP estimates these savings as the difference between their estimated price in the market studies and the price that was finally paid. These overall figures suggest that the mechanism is efficient. In the period from 2006 to 2009, the use of reverse auctions at IMSS resulted in estimated cumulative savings of around MXN 35 billion.⁷⁹ Between 2009 and 2011, it is estimated that IMSS has saved approximately USD 73 million by implementing reverse auctions.⁸⁰

⁷⁷ SFP, *Quinto Informe de labores*, 2011. Available at: http://www.funcionpublica.gob.mx/web/doctos/temas/informes/informes-de-labores-y-de-ejecucion/5to_informe_labores_sfp.pdf

⁷⁸ SFP, *Primer informe de labores*, 2012-2013. Available at: http://www.funcionpublica.gob.mx/web/doctos/temas/informes/informes-de-labores-y-de-ejecucion/Informe_SFP_2012-2013_Web.pdf

⁷⁹ IMSS, *Fighting Bid Rigging in Public Procurement in Mexico*. A Secretariat report on IMSS' procurement regulations and practices, 2011.

⁸⁰ OECD (2012), *Public Procurement Review of the Mexican Institute of Social Security. Enhancing Efficiency and Integrity for Better Health Care. Highlights*, OECD Publishing. Available at: www.oecd.org/gov/budgeting/49408672.pdf

Table 2. Relevant reverse auctions in Federal agencies (2009-2011)

Goods and services	Year	Amount (Million pesos)	Agency	Savings
Mineral coal	2011	17,972.2	CFE	1,867.1
Mineral coal 1	2009	12,092.7	CFE	1,010.3
Medicines	2010	9,565.5	IMSS	135.4
Mineral coal 2	2009	8,563.8	CFE	1,011.4
Medicines	2009	6,627.6	IMSS	780.3
Gas L.P.	2011	5,573.4	PEMEX (PGPB)	1,300.0
Medicines	2011	1,913.2	IMSS-SEDENA	43.7
Medicines	2010	1,823.3	IMSS	21.9
Medicines	2010	1,492.1	IMSS	6.5
Medicines	2011	903.5	IMSS	124.3
Organic Products	2011	902.9	IMSS	219.4
Health attention care	2010	763.5	IMSS	17.8
Other medicines	2011	762.8	IMSS	26.2
Other generic medicines	2011	758.1	IMSS-SEDENA	11.6
Other concepts				315.6
Total				6,891.6

Source: OECD (2012), Public Procurement Review of the Mexican Institute of Social Security. Enhancing Efficiency and Integrity for Better Health Care. Highlights, OECD Publishing.

The use of reverse auctions provides incentives to bidders to compete on the rebates they offer to Federal institutions, and the change from one auction method to another can also help disrupt potential collusion.

Finally, it should be noted that there exists another procedure similar to a reverse auction that is used in the Federal Administration. This procedure is called a “maximum reference price discount”.⁸¹ It has several characteristics, the first is that it is not electronic. It requires face-to-face meetings, so that communications between bidders are easier. The second is that the PPR (5th paragraph, Section II, Article 39) requires the CFE to disclose the reference price in the call for tender. Finally, there is no account of the procedure in the PPA; it is only regulated in the PPR, which makes its basis somewhat unclear.

2.2.14 Social witnesses

Social witnesses are third parties deemed to have no conflict-of-interest in procurement procedures whose task is to observe the tender process in order to enhance the accountability, legality and transparency of the process. According to the Federal legislation, social witnesses are to be certified by the SFP and are compensated for their services. Social witnesses are solicited when either the contracts in question have a value in excess of 5 million times the minimum wage (324 million pesos or approximately 25 million USD) or because the SFP considers them important (Article 26 Ter, PPA). Social witnesses must write down their observations so they can be recorded and made available to the public.⁸²

2.2.15 Reductions in the amount of a financial guarantee

The purpose of requesting a financial guarantee is to assure the procuring institution that bidders are serious in their intention to participate in the tender process and that they have the capacity to meet the contract requirements. However, if the amount of the guarantee is too high, it could discourage potential bidders from participating to the tender. Studies suggest that a

⁸¹ See also section 2.2, stage 4: Evaluation criteria, 2.2.9 *Pricing Schemes for goods and services* in Chapter 2.

⁸² As it will be discussed later in Chapter 4, Stage 5, social witnesses can be very useful for bid rigging detection if they are properly trained to look for suspicious behaviour.

reasonable performance guarantee of the contract should be between 10% and 30% of the overall value of the contract.⁸³

Article 48 of the PPA specifies that any supplier to whom a public contract is awarded must provide a financial guarantee. The contracting area must determine an appropriate guarantee in light of the track record of the supplier. If necessary it can reduce the amount of the guarantee.⁸⁴ In the case of direct awards or restricted invitations, providers are exempted from this instrument. The heads of the public institutions determine the scale of payment of the financial guarantee as stated in the Internal Procurement Guidelines (POBALINES).⁸⁵

2.2.16 Tie breaker criteria

When bids are tied, the PPA (Article 36 *bis*) and the PPR (Article 54) establish that micro, small and medium sized enterprises should be favoured, in that order. When this is not sufficient to break the tie, then a simple draw with the names of the suppliers that are tied will determine the winners in appearing order. In all cases, the Internal Control Unit must be invited to the draw together with the social witnesses.⁸⁶

⁸³ See UNCITRAL, 2011, *Model Law on Public Procurement*, and OCDE, 2007, *Integrity in Public Procurement GOOD PRACTICE FROM A TO Z*. Available at: <http://www.oecd.org/dataoecd/43/36/38588964.pdf>, Chile, *Ley de bases sobre contratos administrativos de suministro y prestación de servicios y Reglamento*. Available at: http://www.chilecompra.cl/index.php?option=com_phocadownload&view=category&id=10&Itemid=548&lang=es

⁸⁴ See SFP's Guidelines on the reduction of financial guarantees by suppliers, 2010. Available at: http://www.funcionpublica.gob.mx/unaopsp/doctype/comunes/dof09-09-2010_C3.pdf

⁸⁵ This amount should take into account the historical relation of the institution with its providers (Article 48 of the PPA). Moreover, certain exceptions (sections II, IV, V, XI and XIV of Article 41 and Article 42) may be made from a financial guarantee. In legal terms, the guarantees that are specified in the Procurement Regulation Act are guarantees in advance, completion guarantees, guarantees for defects and flaws, and quality guarantees (Articles 81, 85, 86, 87, 91, 96 and 103).

⁸⁶ When it comes to preventing bid rigging, defining the tiebreaker criteria is crucial because it can help isolate the price components that could be associated with bid rigging.

Stage 7: Call for public tenders

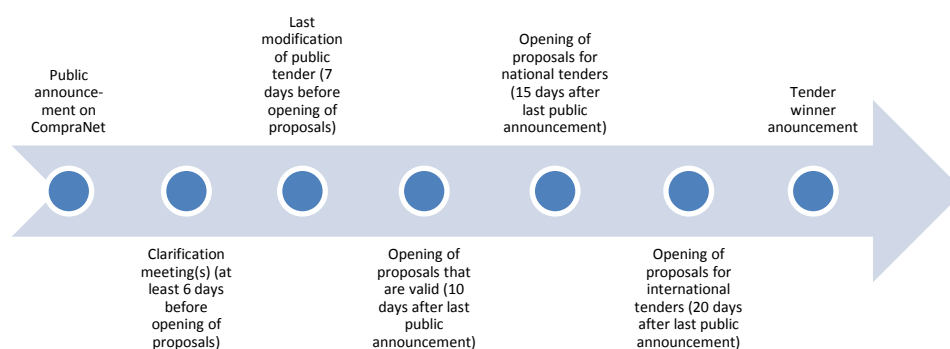
By this stage in the procurement process, procurement officials should have all the legal elements and authorisations that they need to publish a call for tender for any given good or service. Before the announcement is published in its final version, the procurement institution is authorised to publish the draft tender projects on CompraNet for 10 days (Article 29 of the PPA). The purpose of this publication is to receive and incorporate any relevant observations by interested parties. The procuring institution is also mandated to take into account any observations by the COFECE. The PPA specifically states that any proposal should include, among others, the following requirements:

- The corporate and trade name of the procuring institution.
- A detailed description of the goods or services required.
- The specification of the tender process (electronic tender, a face-to-face tender or a mixed tender).
- The requirements that suppliers should meet to participate in the tender process, as long as these characteristics do not limit competition.
- The documents that suppliers should provide in order to confirm their legal status.
- A clause stating that any interested bidder should include with its bid a sworn statement that the exceptions specified under Articles 50 and 60 of the PPA do not apply (i.e. that it does not have an unacceptable track record and there is no conflict of interest).
- A clause stating that any interested party should include a sworn statement that the firm will abstain from interfering with procurement officials in such a way as to influence the tender process in their favour.
- If the contract goods or services must be tested, it should include the test specifications and the approval parameters in accordance with the Federal Standardisation Act.
- A statement specifying whether only one contract will be awarded or if there will be several contracts to bid for.
- The evaluation and awarding criteria.

2.3 The tender phase

The tender phase begins with the public tender announcement (on CompraNet) and ends with the announcement of the tender winner or, where appropriate, with the cancellation of the respective procedure (Article 26, 8th paragraph and Article 29 of the PPA).⁸⁷ The law clearly defines the timeframes in which the tender stages should be carried out. As shown in the diagram below (Fig. 7), the law allows for a flexible timeframe that is contingent on the type of tender.

Figure 7. Timeframe for tenders



Source: PPA

The following sections describe the different stages of the tender phase.

⁸⁷

During this phase procurement officials should make more use of the OECD checklist for bid rigging detection (See section 1.5.2 *Checklist for detecting bid rigging* in Chapter 1). Since by now bidders have submitted their proposals, the strategy against bid rigging shifts from prevention to detection and officials should be more focussed on spotting signs of suspicious behaviour to detect possible bid rigging conspiracies in an early stage of the process.

Stage 1: Clarification meetings and public tender modifications

Bidders are entitled to ask the requiring and contracting areas for technical explanations and propose amendments to the call for tender through clarification meetings. The PPA states that contracting areas shall hold at least one clarification meeting (Article 33). During the clarification meeting, public officials of the requiring and contracting areas should respond to bidders' questions and keep records of the meeting, which are to be made public on CompraNet (Article 33 Bis). Any number of clarification meetings can be scheduled as long as the last clarification meeting is held at least 6 days before the bid openings. Clarification meetings can have three forms. These can be face-to-face, electronic and mixed. The mixed procedure means that both face-to-face and electronic submissions are accepted. Face to face and mixed clarification meetings can be a facilitating factor for bid rigging, as they bring together competitors interested in the same contract opportunity. Electronic meeting reduce this risk to the minimum.

Stage 2: Bid submission and opening of proposals

Once a call for tender has been announced on the CompraNet electronic system, bidders are invited to submit their proposals as stated in the call for tender (Article 35 of the PPA). According to the PPA, bid proposals should be delivered in separate and sealed envelopes (Article 34, of the PPA). At this point bidders must present cover letters that guarantee their seriousness, their capacity to meet the contract requirements and with their commitment to comply with all the clauses mandated in the applicable legal framework (Article 29 of the PPA). During this stage, procurement officials should stay vigilant and make sure that bidders are not engaged in collusive bidding. The opening of individual proposals is the first opportunity to detect suspicious behaviour among potential bidders.

Stage 3: Tender evaluation and contract assignment

The evaluation of bids must comply with the criteria in the call for tender. Procurement officials should be very clear and forthcoming when explaining to the losing bidders the reasons for not awarding the contract to them, even if the deliberative mechanisms are not face-to-face but through written procedures. Clear understandings will most likely translate into fewer disagreements and encourage genuine bidders to continue participating.

2.3.1 *Information and transparency*

Transparency is regulated under the Transparency and Access to Federal Public Information Act.⁸⁸ The law explicitly states that all information that originates in the Government will be subject to transparency guidelines with a few exceptions, mostly regarding national security and personal information. Under section XIII of Article 7 of the Transparency and Access to Federal Public Information Act, the following information regarding procurement must be readily available:

- a) Public works, goods, leasing arrangements and services, as research and specialised studies.
- b) The amount spent.
- c) The name of the supplier, contractor or person or company with whom the contract was made.
- d) The terms of contract enforcement.

Furthermore, it should be noted that in articles 13 and 14 of the Transparency and Access to Information Act, there is information that can be classified and kept from the public for a period or up to twelve years. However, in terms of public procurement, there is no explicit clause that allows for information to be classified or kept from the public unless it is overtly mentioned in another law or if it is considered an industrial, fiscal or banking secret.

Finally, the PPA requires that all information concerning the (winning and losing) bids should be publicly available as soon as possible. The procuring and contracting areas should document all the clarification meetings, the opening of proposals, and the public announcement of the winner. These records must be readily available to the general public after the winner has been awarded the contract (Article 37 bis of the PPA). This means that the identity of bidders, their proposals and proposed prices are readily accessible. The information relating to the contracts must also be made public via CompraNet (Article 25 of the PPA).

⁸⁸

In Spanish: *Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental* (LFTAIPG).

Box 4. The CompraNet system

CompraNet is the e-procurement information system in Mexico.⁸⁹ This system is a free consultation service for procurement in different Federal and state government agencies and institutions. Since June 2011, the registration of procedures and procurement documents on CompraNet is mandatory for every governmental agency- Federal or state level- that uses the Federal budget for its procurement procedures and that exceeds a value threshold of 300 days of minimum wage. CompraNet contains historical information (from 2009) about procurement procedures and leases and services. The following information can be found on the website (Article 2 of the PPA):

- The Annual Procurement Programme,
- Register of suppliers,
- Register of social witnesses,
- A list of sanctioned bidders,
- Calls for tenders (and restricted invitations) and their modifications,
- Records of clarification meetings,
- Records of submissions and opening of proposals,
- Social witnesses' testimonials,
- Data contracts and addenda, and
- Resolutions and instances of disagreement

⁸⁹See www.compranet.gob.mx

2.4 The post-award phase

The last phase of the tender process begins after the contract has been awarded.⁹⁰ The procuring institution supervises the enforcement of the contract and is also responsible for applying penalties if the provider breaches the contract. Penalties are usually in the form of fines and can ultimately entail the termination of contracts. If fines add up to 10% of the value of a contract, then it is immediately terminated. For this reason, Article 48 of the PPA requires bidders to provide a financial guarantee from which the penalties can be taken.⁹¹

2.4.1 Fines and blacklisted providers

Fines can be applied to bidders if they breach any provision in the PPA. These fines range from 50 to 1000 times the minimum wage, on a monthly basis. The SFP is also authorised under Article 60 of the PPA to blacklist providers for a period ranging from 3 months to 5 years when they have failed to comply with contractual obligations, damaged the contracting authority in any way or provided false information.⁹²

2.4.2 Claims for non-conformity and competition issues

If bidders feel that the procurement process was unfair, they can launch a complaint to the Office of the Internal Control Unit (which answers to the SFP). If anybody suspects collusion, bidders can present a complaint to the competition authority, COFECE, as provided for in Article 34 of the PPA.

The SFP is the authority responsible for overseeing the correct application of the law regarding the procurement process. In order to carry out its overseeing tasks, the SFP uses the Internal Control Unit in every public institution. This office has a representative present during every stage of the tender. However, the Internal Control Unit can only observe the proceedings and cannot intervene or veto any process. It can file a complaint and, if the proceedings are found to be

⁹⁰ The contract must be signed at most 20 days after the opening of the bids; unless justified, in which case 40 days is the limit.

⁹¹ See above: section 2.2, Stage 6: Procurement instruments, 2.2.15 *Reductions in the amount of a financial guarantee* in Chapter 2.

⁹² To access the list of sanctioned and disabled bidders see: http://www01.funcionpublica.gob.mx:8080/SanFicTec/jsp/Ficha_Tecnica/SancionadosN.htm

irregular in any way, public officials and providers can be subject to sanctions accordingly.

The enforcement of the Federal Economic Competition Act rests with the two Mexican competition authorities (COFECE and IFT). They can implement sanctions against monopolistic practices, including bid rigging. If a bidder or public official suspects that there has been bid rigging, these institutions are the authorities responsible for investigating those who are suspected of having engaged in these practices.

2.4.3 Contract modification

Under Article 52 of the PPA the law allows contracting areas to modify up to 20% of any contract's value. In these cases, the changes must be explained and substantiated. Moreover, if suppliers present enough evidence to argue that due to unforeseen circumstances they will be unable to comply with the contractual agreement, then the authority can either cancel the contract or modify it for up to 10% of the contract's value. However, the law forbids the modification of prices, payments, advances, progressive payment schemes or any other change that would imply skewing the competition towards the providers. Procurement officials are thus obliged to check that any contractual modifications are not translating into lower quality products and services.

2.5 OECD recommendations on the Mexican legal framework

This section summarises past OECD recommendations intended to improve the Mexican legal framework for procurement. They are relevant because they recognise caveats that will inevitably affect the CFE in its intention to design better procurement practices. In order to distinguish which actions are feasible in the short and medium terms, it is important to recognise the structural limitations that affect all Federal and in some cases regional institutions. These recommendations still hold and more extensive discussions can be found in the previous analytical reports made by OECD aimed at procurement and bid rigging in Mexico- IMSS, GEM and ISSSTE.⁹³ Finally, they may become the basis of procurement at CFE.⁹⁴

⁹³

See:

www.oecd.org/daf/competition/fightingbidrigginggovernmentcontractsmexico-oecdpartnership.htm

⁹⁴

See Box 6 *Energy Reform of 2013* in Chapter 3.

1. Remove preferential treatment in laws and procedures

Current Federal procurement rules governing participation in procurement and granting preferential treatment in certain circumstances may discriminate against foreign bidders and perhaps even national ones. Hence it would be more difficult for them to sell goods and services to public procurement agencies. Current restrictions on participation should be abolished so that all qualified bidders are treated equally, irrespective of their nationality and of the origin of the goods and services they intend to provide. For this reason, studies should be carried out to assess the financial and qualitative benefits to be obtained from opening the markets to additional market participants.

2. Limit the use of the exceptions to public tender

Public agencies should limit the use of exceptions to public tenders that are permitted under the PPA as their excessive and unjustified use results in fewer bidders and lessens the likelihood that “value for money” is being achieved. For this reason, institutions should carry out periodic evaluations of their use of exceptions.

One of the most important lacunae in the current legal framework is the existence of information asymmetry between different procurement departments. On the one hand, the areas that require the purchase of goods and services (“requiring areas”) have very specific or technical demands. On the other hand, the areas that are responsible for the contracting and oversight of the contract (“contracting areas”) generally lack the technical expertise that would allow them to identify when an exception should apply so that they can easily identify the requirements that are overly specific and/or favour a particular provider. When a good or a service is very specialised an independent expert body should approve the technical arguments. If not, an asymmetry in technical knowledge might favour particular suppliers and reduce competition in the procurement process.⁹⁵

⁹⁵

See further discussion and recommendations in Chapter 5.

3. Remove the requirement in the PPA to establish a “convenient price”

The requirement that public buyers in Mexico cannot accept bids below the minimum threshold represented by the “convenient price” may undermine their ability to obtain best value from their purchases. It is recommended that establishing a convenient price no longer be a requirement.

If the PPA is not amended to abolish the convenient price, it is recommended that public agencies should use a larger discount factor than 40 per cent when establishing a convenient price. Alternatively, guarantees that vouch for the seriousness of providers can be used as a better substitute because they do not discard a potential competitive price.

4. Change a number of requirements relating to clarification meetings

The mandatory requirement to hold a clarification meeting for each call for tender at the Federal level should be phased out as it may provide bidders with an opportunity to exchange sensitive information or to reach a collusive arrangement.

During this stage of the tender phase, the risk of bid rigging is highest because the law enables potential bidders to meet each other face-to-face or, at least, identify their competitors. This goes against the OECD recommendation of limiting communication among bidders. For this reason, procurement officials should try to carry out several different clarification meetings so that potential bidders do not meet face-to-face or, alternatively, they should use electronic systems (*e-procurement*) to decrease the likelihood of communication.

Any material released by procurement groups (such as the records of clarification meetings) should not list or identify the participants in the procurement process. Finally, when visits to sites are considered during the process, these should be planned to avoid putting different suppliers together.

5. Eliminate several problematic disclosure requirements

The OECD has previously pointed out that some current disclosure requirements, such as those concerning reference prices, the identity of bidders and the value of the bids they submit can facilitate bid rigging and should be eliminated or substantially circumscribed.

Information about the identity of bidders and the amount they bid should only be released during the tender phase in a form which does not explicitly identify bidders (i.e. bidders should be identified by letters or numbers, not by their names). Fuller information could be made available with a certain time delay, for instance, more than six months after the conclusion of the tender.

Information about contracts awarded to individual suppliers should only be made available to procurement officials or, if that is not possible, to the general public but again with some appropriate time delay.

6. Enact legislative changes to deal with joint bids

Currently, procurement officials at Federal purchasing groups must accept joint bids unless they can justify otherwise. Federal legislation should be amended so that joint bids are permitted only when tender documents expressly mention that they will be accepted. On the one hand, this would require bidders to specify the rationale and expected benefits of the joint bids. On the other hand it would require the procuring institution to determine whether the bids should be allowed.

7. Assess the need for legislative changes relating to split awards

Splitting a contract among multiple suppliers may facilitate collusion. A study should be undertaken with all or a reasonable sample of public buyers in Mexico to assess how often split contracts are used. The justifications for employing split contracts should be examined as against other kinds of relative merits of awarding split contracts and the need for any legislative changes in this area. Such a study should be conducted by the SFP in co-operation with the COFECE.

8. Institute disclosure requirements regarding subcontracting

As noted earlier, subcontracting is not regulated in the PPA. Disclosure requirements should be imposed by law on bidders to make it more difficult for them to use subcontracting as a mechanism to implement a collusive agreement. If subcontracting is to be allowed, this should be stated at the outset. The restrictions on subcontracting should be outlined in the public call for tender and respected in the contractual framework.

Bidders should be legally required to provide certain disclosure requirements in their bid submissions. For example they should: i) advise the contracting area of their intention to subcontract, ii) clearly identify the firms to which they are subcontracting, and iii) explain why subcontracting is necessary for the proper performance of the contract.

9. Allow micro-, small-, and medium-sized companies to participate on their own in reverse auctions (OSD)

The provision in the PPA that prohibits micro-, small- and medium sized companies from participating on their own in reverse auctions should be abolished because it limits competition (Article 28, PPA and article 38, PRA).

10. Amend the PPA and other Federal procurement statutes to require Certificates of Independent Bid Determination (CIBD)

An OECD recommendation to make it easier to prosecute unwilling bidders is the Certificate of Independent Bid Determination (CIBD). A CIBD is a contractual clause that makes the bidders undertake the obligation to present a bid that is independent from other bids. The clause acts as a psychological deterrent on firm executives because it makes them directly responsible if such conduct is established in court. These contracts are operating already in countries such as the USA and Canada. However, they are yet not mandatory by any Law in Mexico.

The PPA should be amended to make it mandatory for bidders to submit a CIBD as part of their bid submissions. Moreover, institutions can easily make them obligatory by including them in their Internal Procurement Guidelines (POBALINES) as they do not contravene the law in any way.

11. Enhance the participation of social witnesses

The role of social witnesses in tendering procedures should be enhanced by having them focus on competition issues in addition to transparency and adherence to laws and procedures. Public institutions and the SFP should ensure that they hire individuals and firms with the background and experience that enable them to provide expert procurement advice to public procurement officials. In addition, training courses for social witnesses that focus on bid rigging and competition issues should be designed.

12. Revise penalties

The current procurement laws and regulations provide a weak framework for penalties concerning the partial or non-fulfilment of contracts awarded via public tenders. The SFP should study the incidence of contract problems of all sorts and recommend changes to the various types of penalties set forth in the Federal public procurement statutes. They should consider whether guarantees should be obligatory in direct award contracts and in those contracts awarded through restricted invitation.

The current framework for penalties should be revised by removing the provision that the amount of the penalty cannot exceed the value of the guarantee and by establishing higher penalties.

Procurement groups at the Federal and state levels should adopt the practice of consistently sharing their lists of problematic and sanctioned suppliers and contractors with the SFP. This would ensure that all Mexican procurement agencies have and easy access to this information.

13. Sanction suppliers convicted of bid rigging in Mexico

Provisions in PPA enable the SFP to prohibit suppliers from participating in public procurement for various reasons. These laws should be amended to prevent firms and individuals convicted of bid rigging by the competition authority from participating in public procurement for a specified period of time. However, before the SFP takes action, it must seek an opinion from the competition authority about the competitive consequences of such a prohibition and abide by its opinion. Agencies that depend on goods and services provided by the convicted companies and individuals should also be sought out.

CHAPTER 3: PROCUREMENT AT CFE

This chapter describes the operational structure responsible for procurement at CFE during the period covered by this report, i.e. from 2008 to prior the approval and implementation of the 2013 Energy Reform. It aims to convey a very general overview of the purchasing activities of CFE, with the exclusion of procurement of public works and infrastructure that is not considered in this report.

3.1 Electricity as a public service and CFE

Before the Energy Reform of 2013, the legal framework established that electricity in Mexico was a public service provided *exclusively* by the State. This legal precept was rooted in the Mexican Constitution (Articles 27 and 28) and the Public Electric Energy Service Law that ensued. This meant that only the State was allowed to conduct, transform, distribute and, on the whole, make electricity available to the general population. These legal objectives are usually divided into three main activities: generation, transmission and distribution (See box 5).

Box 5. The main activities of the electricity sector

Generation is the first step in the electric industry chain. It is the process of producing electrical power from primary sources of energy – including renewables and non-renewables, such as wind and oil respectively.

Transmission is the second step; it is the bulk transfer of high-voltage electrical energy from power plants to electrical substations in the vicinity of demand centres.

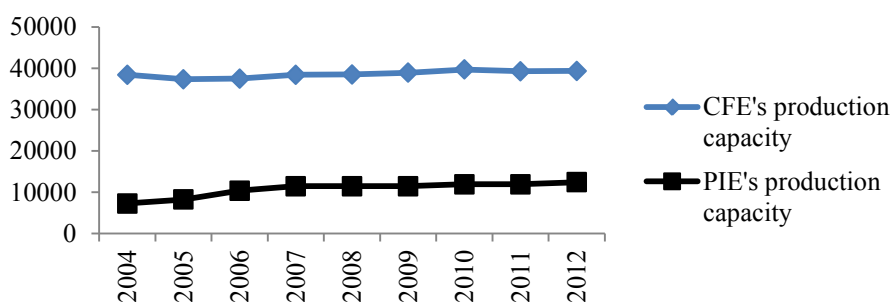
Distribution is the final step, and involves the transfer of medium- and low-voltage electrical energy from substations to consumers.

Countries organise their electricity sectors in different ways. The state may either take on a purely regulatory role or stay directly involved through the existence of a state-operator in one or –as in Mexico – all three activities of the electricity sector.

In order to provide this public service, Mexico established in 1937 the National Electric System (*Sistema Eléctrico Nacional*, SEN), and the *Comisión Federal de Electricidad* (CFE) to manage it. Initially, private producers were still allowed to operate, although in 1960 the industry was completely nationalised. Since then, CFE and *Luz y Fuerza del Centro* (LyFC) – the state-owned utility responsible for providing electricity to Mexico City and neighbouring areas – became the only two electricity producers. Since the extinction of LyFC in 2009, CFE has enjoyed a virtual monopoly as provider of electricity for the public service.

While a legislative amendment in 1992 made it possible for independent producers (*Productores Independientes de Electricidad*, PIE) to sell electricity to CFE, the distribution and transmission of electricity by private investors remained excluded until the Energy Reform of 2013.⁹⁶ In 2011, independent producers had 20% of Mexico's production capacity (See Chart 2). However this production capacity served both private and public purposes—i.e. it was used by the industry and what was unused was sold to CFE.⁹⁷ In 2012, independent producers provided 26.7% of Mexico's production capacity for public service (i.e. not including production capacity for private industry purposes).⁹⁸ In 2012, independent producers generated 31.7% of the electricity that satisfied public service demand.

Chart 2. The production capacity of CFE and independent producers in Mega Watts (MW), 2004-2012



Source: *Prospectiva del Sector Eléctrico 2012-2026*

⁹⁶ See *Box 6 Energy Reform of 2013* in Chapter 3.

⁹⁷ See: *Prospectiva del Sector Eléctrico 2012-2026*, pp. 64.

⁹⁸ See tables 3.7, 3.12, 3.13 in *Prospectiva del Sector Eléctrico 2012-2026*.

Following the Energy Reform of 2013, private investment is allowed in generation and distribution to provide electricity for the general population. One of the most important results is that it will allow the CFE and PEMEX to become “State Productive Enterprises” (See Box 6). This will require new legal provisions governing procurement and public works.⁹⁹ Given this change, the recommendations stated in Chapter 2 (Section 2.5) and the final recommendations in this report (Chapter 5) could be taken as a roadmap for the new legal framework for procurement that deals effectively with bid rigging at CFE.

Box 6. Energy Reform of 2013

On the 20th of December 2013, they were published the amendments to Articles 25, 27 and 28 of the Mexican Constitution in the Federal Official Gazette. This is known as the Energy Reform. This box describes the 10 key aspects of the Reform and emphasises in heavy type those concerned with the electricity sector and the Federal Electricity Commission.¹⁰⁰

1. The hydrocarbons in the subsoil are the property of the Nation. **Granting concessions regarding radioactive minerals, transmission and distribution of electricity, as well as oil and other hydrocarbons is still forbidden. The following are exclusive strategic activities of the State:** the exploration and extraction of oil and other hydrocarbons, radioactive minerals, nuclear power generation, **the planning and control of the National Electric System as well as the transmission and distribution of electricity. The State will be able to enter into contracts with the private sector in the terms established by law.**
2. The State may perform the activities of exploration and extraction of oil and other hydrocarbons through allocations to *Petróleos Mexicanos* (PEMEX) and contracts with PEMEX and/or private companies. Contracts may concern services, as well as shared use, shared production, licenses or any combination of the above. The National Hydrocarbons Commission will be responsible for formulating tenders, as well as of signing and administering contracts.
3. All private or state-owned business shall report for accounting and financial purposes the expected benefits of their assignments and contracts. All documents must clearly state that the hydrocarbons in the subsoil are the property of the Nation.

⁹⁹ Article twentieth Sections III and VI of the Energy Reform decree transitory provisions.

¹⁰⁰ See: www.presidencia.gob.mx/10-puntos-clave-de-la-reforma-energetica/

4. The Mexican Fund for the Oil Stabilisation and Development will be inaugurated. It will receive and administer the oil revenues to ensure the stability of public finances. It will also channel resources to the following: long term savings, the Universal Pension System, science and technology, infrastructure for national development and scholarships, among others.
5. Private investment in the processing and refining of oil will be allowed, as well as in the transport, storage and distribution of petroleum, natural gas, gasoline, diesel and other derivatives. **Private investment may also take part in the petrochemical production chain and all the activities of generation and commercialisation of electricity. Firms will be able to carry out transmission and distribution, under contract with the Federal Electricity Commission (CFE).**
6. The National Commission of Hydrocarbons and **Energy Regulatory Commission will be strengthened to help develop the national energy sector. Both commissions will act as regulators with their own legal status, technical and managerial autonomy, and budgetary self-sufficiency.** The Senate is responsible for the appointment of the commissioners who will be selected from a shortlist proposed by the Federal Executive.
7. **PEMEX and CFE will become each a State Productive Enterprise.**¹⁰¹ **The purpose of this legal figure is to create economic value, with a sense of fairness and social responsibility. These enterprises will have greater technical autonomy in their management and budget. Workers are and will continue to be the main asset of these companies, so that their labour rights will be respected at all times.** PEMEX also will be strengthened through a so-called "round zero", by which the enterprise will be allowed to choose the most productive fields and the most promising areas of exploration for itself.
8. PEMEX and CFE will be subject to a new legal framework or a *special regime* for the acquisitions, leases, services, public works, budget, public debt, and other administrative responsibilities that they carry out in order to pursue that their corporate objectives effectively.¹⁰²
9. The National Centre for the Control of Natural Gas is created as a public agency to operate efficiently the National Pipeline System for transporting and storing natural gas. For its part, **the National Energy Control Centre (CENACE) of the CFE will become a public agency responsible for the operational control of the National Electric System.**

¹⁰¹ In Spanish: *Empresas productivas del Estado*.

¹⁰² It can be found in Section VI of the Twentieth Transitory Provision of the Energy Reform published on the 20th of December 2013 in the Federal Official Gazette or in Spanish: *Diario Oficial de la Federación*, DOF.

10. **The State will ensure the protection and care of the environment by operating with clear sustainability criteria**, promoting cleaner energies and fuels. There will also be measures to promote the reduction of pollutant emissions in the energy industry. In addition, a decentralised environmental protection agency will be created to regulate and supervise the activities of the oil sector and industrial safety.
11. An orderly interaction of the different surface activities is established in the amendments. It states that the energy sector has priority over other activities. Miners retain the right to exploit the gas associated with coal mines. Likewise, miners and farmers, as owners of the surface, will retain the right to receive a fair payment for the occupation or superficial affectation that the energy industry may cause to their properties.

With regard to point 8 above, the Mexican Congress enacted the Federal Electricity Commission Law (LCFE), which was published in the Federal Official Gazette on August 11, 2014. Among other things, this law lays down general provisions for acquisitions, leases, services and works. According to this legislation, procurement procedures at CFE shall be subject to article 134 of the Constitution and the provisions of the LCFE and implementing rules. Therefore, the LAASSP dispositions will not be applicable to CFE's contracting.

The CFE Board of Directors shall adopt specific provisions on the basis of the principles in the LCFE. Moreover, the Board shall also adopt the provisions and policies necessary to prevent, identify, correct and sanction irregular, illegal or negligent acts or omissions in the context of the procurement procedures and in the implementation and execution of contracts. These rules and policies should: a) Identify, organise and manage risk factors that may or be updated during the procurement process or in the execution of the contracts; b) define the general criteria for determining the minimum requirements to be met by those interested in contracting with CFE, as well as mechanisms for their evaluation, and c) identify the mechanisms for implementing a complaint system, including anonymous complaints, by which any interested party may challenge acts or omissions during the various stages of the procurement procedure or during performance of the contract. Likewise, CFE will have to establish a database of public information on its suppliers and contractors to be updated periodically and that contains information on contracts concluded and the record of compliance for the last five years.¹⁰³

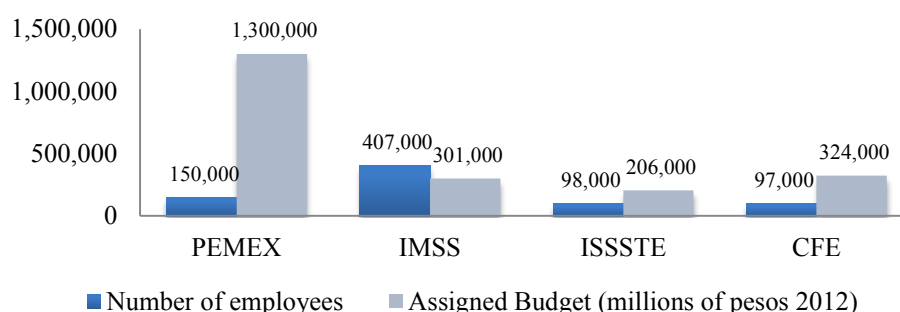
¹⁰³

At the date of completion of this report, the Board had not yet issued these provisions, so that special regime for CFE procurement had not yet entered into force. In this regard, the recommendations made on the procurement laws should be considered by the Board of Directors of the CFE when issuing the provisions referred to in Article 78 of the LCFE.

3.1.1 Importance and structure of CFE

With approximately 97,000 employees and an annual budget of about 324 billion pesos, CFE is one of the largest public entities in Mexico. It is Mexico's second largest state productive enterprise –behind PEMEX,– and is comparable in size to the country's social security institutions – IMSS and ISSSTE.¹⁰⁴

Chart 3. Number of employees and budget in 2012 (millions of pesos 2012)



Source: CFE, PEMEX, IMSS, ISSSTE

In terms of public procurement, CFE has the second largest procurement budget. It is larger than other state companies, as well as all decentralised and regional agencies. For instance, during 2012, the total cost of purchases carried out by Pemex, CFE, IMSS and ISSSTE put together, represented 52% of the overall budget registered on CompraNet (184 billion pesos). If one only considers CFE, its expenditure represented approximately 19% (67 billion

¹⁰⁴ CFE: 97,000 – 324 billion pesos (CFE *Informe Anual* 2012. Available at: <http://www.cfe.gob.mx/ConoceCFE/1AcercadeCFE/Paginas/Publicaciones.aspx>).

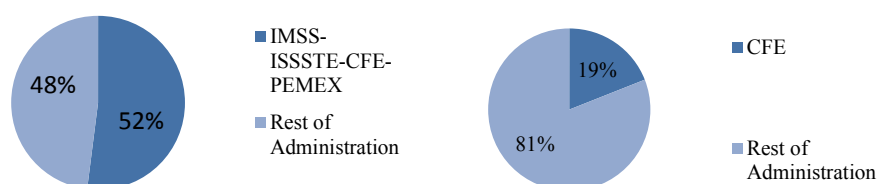
PEMEX: 150,000 – 1,300 billion pesos (Pemex *Anuario Estadístico* 2013. Available at: <http://www.pemex.com/index.cfm?action=content§ionID=1&catID=237>).

IMSS: 407,000 – 301 billion pesos (IMSS *Memoria de Estadística* 2012. Available at: <http://www.imss.gob.mx/estadisticas/financieras/Pages/memoriaestadistica.aspx>).

ISSSTE: 98,000 – 206 billion pesos ((ISSSTE *Anuario Estadístico* 2012. Available at: <http://www2.issste.gob.mx:8080/index.php/mdir-inst-finanzas-anuarios-anos/100-instituto/finanzas/567-dir-finanzas-anuarios-capitulos2012>).

pesos) of the amount assigned to the rest of the administration (Chart 4). In terms of the number of registered contracts, CFE accumulated 39% of all of those contracts carried out by the Federal Public Administration (APF).

Chart 4. : Percentage spent by Federal entities registered on CompraNet in 2012



Source: CompraNet

One of the particular characteristics of CFE is the high purchasing power. Until recently, and before the Energy Reform, CFE had a virtual monopoly of the processes of transmission and distribution of electricity. For this reason, it is the most important customer for certain industries that produce equipment such as residential watt-hour meters, high voltage transformers, turbine rotors and electrical power poles. Besides its importance as a player in the energy market, one of the peculiarities of CFE is the technical nature of the goods and services that it purchases. Unlike other Federal entities, acquisitions made by CFE are diverse and highly specialised, ranging from bond paper, cars and uniforms to coal, surge breakers, hardware, turbine blades, turbines, transformers and transmission towers.

3.2 Procurement structure at CFE

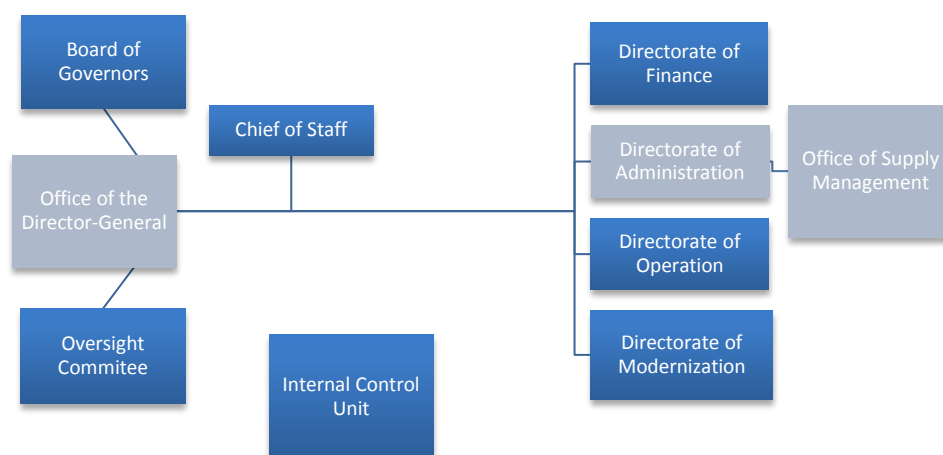
Its size and status as a State productive enterprise make CFE one of Mexico's most important public procurement entities. In terms of accountability, it is particularly important that CFE carries out its purchases with integrity and in competitive circumstances. CFE has an Organic Statute¹⁰⁵ that determines its organisational structure and sets the general directives for its activities. It was held accountable to the Federal Government through a Board of Governors

¹⁰⁵ In Spanish: *Estatuto Orgánico de la Comisión Federal de Electricidad*. It is very likely that this law will change as a consequence of the Energy Reform of 2013.

(*Junta de Gobierno*) and an Oversight Committee (*Consejo de Vigilancia*). The Board of Governors exercised the functions of a corporate board and, among other responsibilities, approved the budget of CFE and its Annual Report. The Board of Governors had nine members from the Ministries of Energy, Finance, Social Development, Environment, and the Economy, as well as the Director-General of Pemex. There were also three representatives from the Electricity Workers Union. The Oversight Committee had three members, two of which are appointed by the Ministry of Energy and the SFP. The Board of Governors appointed the last member. As its name suggests, the Oversight Committee has the responsibility of supervising the internal affairs of CFE (documents and processes).

The Office of the Director-General (*Dirección General*) was in charge of the administration and operation of CFE. It oversaw five Directorates – Finance, Administration, Operations, Investment, and Modernisation. At the same time, the Internal Control Unit – which was accountable only to the SFP – is also part of the General Management. It was appointed to oversee that the activities of CFE complied with Federal level regulations regarding public services. Each of the Directorates had several Subdivisions and Departments.

Figure 8. CFE General structure and central procurement offices (*)

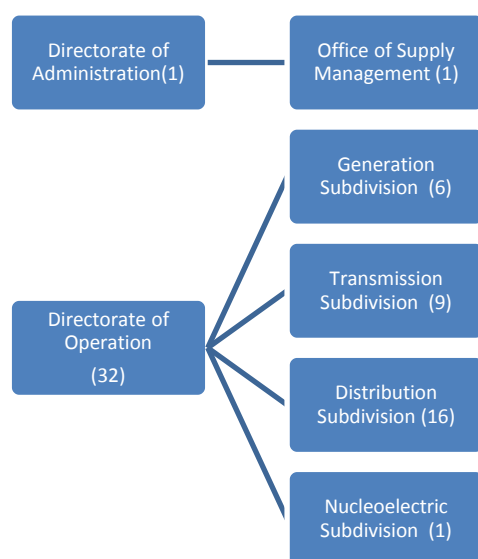


Source: CFE (*)

Note: The boxes in grey tones were the departments directly responsible for the procurement process.

CFE was also present in different regions. Unlike other entities and agencies of the Federal Government, the regional organisations of CFE differed depending on the type of production process. The organisation of the 32 subdivisions -Generation, Transmission and Distribution- it was not fully comparable between regions. Regional offices were divided into different regional subdivisions: one office was responsible for the nuclear electric subdivision; six carried out purchases for generation, nine were tasked with transmission and 16 were responsible for the distribution of electricity (Fig. 9). The structure of each regional office was similar to the Central Administration, and its departments were accountable to its respective Subdivision (Generation, Transmission, and Distribution), Central Directorates, the Board of Governors, the Internal Control Unit, and the Oversight Committee.

Figure 9. Distribution of central and regional procurement areas



Source: CFE

When it comes to public procurement, the Internal Procurement Guidelines (POBALINES) indicated that the Office of Supply Management,¹⁰⁶ under the Directorate of Administration, was responsible for satisfying the needs of the central and corporate offices, with the exception of certain departments that

¹⁰⁶ In Spanish: *Gerencia de Abastecimientos*.

could perform limited tendering procedures and/or direct awards (as allowed under Article 42 of the PPA). For the regional offices, there were different administrative departments responsible for procurement.¹⁰⁷

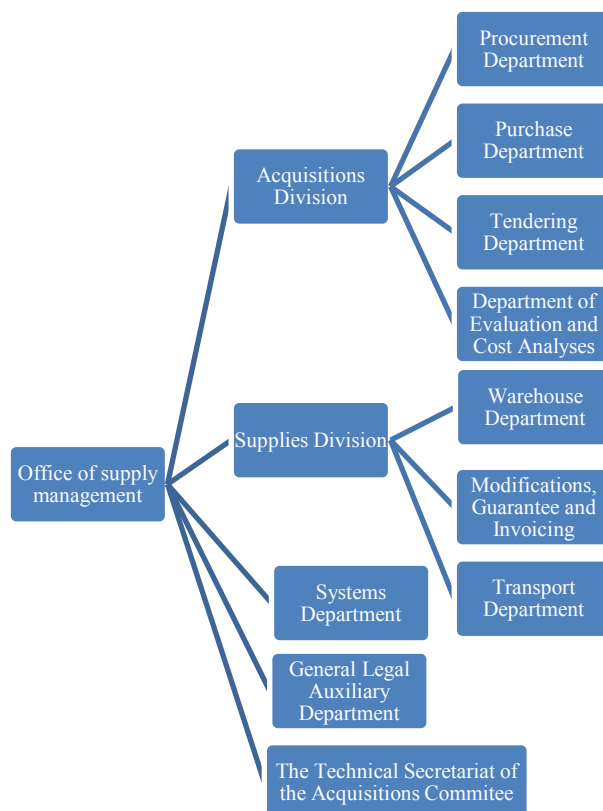
The most important functions of the Office of Supply Management used to be the following:

1. To propose strategies for institutional supply to the CFE Board of Governors;
2. To represent the CFE on committees, commissions, or working groups, connected to public procurement that formed, integrated or summoned the competent authorities;
3. To elaborate and develop programmes for regional administrative departments, in order to standardise the operational process of institutional supply;
4. To provide advice, technical assistance and specialised technical training to contracting areas and central and regional departments, as well as being the only instance to query the competent authorities on procurement;
5. To report of the changes made to the Annual Procurement Programme to the SFP, relevant chambers of commerce, trade associations and working committees.
6. To maintain updated the systems of operation advice and training which should be subject by both central and regional contracting areas.
7. To consolidate information from the various central and regional administrative departments, and prepare reports on the procurement procedures being used, so as to meet the information requirements of the supervising bodies.

The Office of Supply Management had two Divisions and three additional Departments that assisted it with specific administrative chores:

¹⁰⁷ Second Title, Chapter One of the Internal Procurement Guidelines (POBALINES).

Figure 10. Departments of the Office of Supply Management



Source: CFE, 2013

The first Division accountable to the Office of Supply Management was the Acquisitions Division. It included the following four departments:

1. The Procurement Department:¹⁰⁸ Responsible for regulatory activities and legal inquiries regarding central level purchases. It co-ordinated the task of drafting the Internal Procurement Guidelines (POBALINES) and it created models for calls for tender and models for institutional contracts. Among other things, it co-ordinated the

¹⁰⁸

In Spanish: *Aprovisionamiento*.

Subcommittee for reviewing calls for tender, SURECON¹⁰⁹ at the corporate level and assisted regional offices with technical consultations.

2. The Purchase Department:¹¹⁰ This was responsible for planning and organising training workshops and managing the certification of CFE officials authorised to administer purchases (purchasing agents).¹¹¹ Among other tasks, this department was also responsible for carrying out a preventive internal audit within CFE to improve standards in procurement procedures. For this purpose, the department gathered a sample of contracts (and related documents) that were deemed important. They then made observations and wrote formal assessments and recommendations to the areas that were under scrutiny.
3. The Tendering Department:¹¹² Managed the procurement processes for the central level of CFE. It participated in all the steps of tendering from the moment of the call for tender, through the clarification meetings, until the moment when the contract was assigned to the winning bidder. Among other tasks, it participated at the central level SURECON meetings.
4. The Department of Evaluation and Cost Analyses:¹¹³ Responsible for market studies –those deemed most important– to the central and corporate levels of CFE. It also assisted regional offices with their drafting of market studies and, among other things, offered training courses for regional offices and assisted them with market study related inquiries.

The second Division accountable to the Office of Supply Management was the Supplies Division, which included the following three departments:

1. The Warehouse Department: Managed the logistics and computer systems of the different warehouses that CFE used for its many

¹⁰⁹ In Spanish: *Subcomité de Revisión de Convocatorias*, SURECON.

¹¹⁰ In Spanish: *Departamento de Compras*.

¹¹¹ See section 3.2.1. *Training and units responsible for procurement in CFE*.

¹¹² In Spanish: *Departamento de Concursos*.

¹¹³ In Spanish: *Departamento de Evaluación y Análisis de Costos*, DEAC.

activities. For this reason it also administered the general inventory and drafts guidelines relevant to those activities.

2. The Modifications, Guarantees and Invoicing Department: This administered the contracts once they have been signed. It was also responsible for modifying contracts if requested by the contracting areas.¹¹⁴ Among other tasks, this department investigated the validity of the guarantees and distributed invoices for payments. It was also responsible for verifying penalties and sanctions which were the result of breaches of this contract.
3. The Transport Department: Responsible for managing the transportation of goods and equipment to different CFE facilities throughout the country.

In addition to the two divisions described above, the Office of Supply Management had the following departments to assist with other administrative duties:

1. The General Legal Auxiliary Department: Was responsible for managing human resources for the Office of Supply Management. Among other tasks, it was also responsible for registering providers on an internal database to streamline internal authorisations. All providers that had a contract with CFE were registered on this database.
2. The Systems Department: This department assisted the Office of Supply Management with gathering and compiling of information regarding CFE procurement (purchases, contracts and providers) at the central and regional level through the authorised SAP system.¹¹⁵ It had the power to modify the Annual Procurement Programme as it related to different areas and it also organised the Joint Advisory Committee meetings.¹¹⁶
3. Committee's Technical Secretariat: This area assisted the central and regional levels in cases that would proceed to the Procurement Committees. Its responsibility was to see that exceptions to public tenders were correctly justified before the Committee reviewed them.

¹¹⁴ See section 2.4.3 *Contract modification* in Chapter 2.

¹¹⁵ See section 4.6.11 *Electronic Registers* in Chapter 4.

¹¹⁶ See section 3.2.2. *The CFE Joint Advisory Committee* in Chapter 3.

In this way it assisted regional offices with related inquiries and offered recommendations.

In general, the Office of Supply Management defined the main guidelines for the procurement process at CFE and served as a requiring area for consolidated purchases. Its relation to regional offices was of an advisory nature, as each department had its own sphere of power and the autonomy to carry out its purchasing directly. Exceptionally, with previous authorisation of the Office of Supply Management, regional offices may have organised consolidated purchases.¹¹⁷

In line with Federal legislation¹¹⁸ the CFE had established a Central Committee (CAAS). The Committee was responsible for authorising exceptions to public tenders that were governed by Article 41 of the PPA, sections I, III, VIII, IX second paragraph, X, XIII, XIV, XV, XVI, XVII, XVIII and XX.¹¹⁹ At regional level, there were 40 similar committees that were responsible for the local decisions on the use of these exceptions. Of these regional committees, 32 were under the direct supervision of the Directorate of Operation and the remaining 8 were accountable to the Directorate of Investment.

Regional committees basically had the same functions and powers as the Central Committee. Each of them had a technical secretary, a president, and different representatives of the administrative departments. However, the CAAS sat hierarchically above the decentralised or regional committees and was therefore responsible for establishing the operating rules and procedures for the latter. Nevertheless, the recommendations of the CAAS were not binding on the regional committees that acted autonomously. Finally, there were 41 Subcommittees for reviewing calls for tender (SURECON) at CFE: one at the central level and 40 for regional offices. These subcommittees were responsible for analysing and drafting the final versions of the call for tender as well as for reviewing their legal coherence (these meetings were known as “previous revision meetings”, in Spanish *reuniones previas*).

¹¹⁷ Second Title, First Chapter, number 4 of the Internal Procurement Guidelines of CFE.

¹¹⁸ See Chapter 2.

¹¹⁹ See section II, Article 22 of the PPA.

3.2.1 *Training of the units responsible for procurement in CFE*

The requiring area of the Office of Supply Management trained and certified officials who would have the authority to buy and register transactions in the internal electronic systems used by CFE to register procedures.¹²⁰ These officials became *purchasing agents* within CFE. These certifications were valid for two years, and must have been renewed periodically. In 2013, there were approximately 1000 purchasing agents spread throughout 361 departments. During the first half of 2013, there were 290 applicants for the exam that certified them as agents. Of these, 197 were agents who wished to renew their certification.

The training programme schedule was the following:

1. In early November of each year, the training requirements of each department were sent to the requiring area; they were determined by the head of each contracting office.
2. An Annual Training Programme was designed and the courses were announced. Those involved were mainly from contracting areas.

Inside the CFE, there were two types of training. The first was the comprehensive workshops. The second type involved courses on regulations and the legal framework.¹²¹ In addition, outside the Annual Training Programme, the areas requested special courses such as the ones provided by the OECD, together with the COFECCE and international experts for the prevention and detection of bid rigging during 2012 and 2013. The most difficult topics, as mentioned by the Department of Purchases, were the following: criteria of evaluation and the carrying out of market studies.

¹²⁰ See section 4.6.11 *Electronic Registers* in Chapter 4.

¹²¹ To the author's knowledge, none of these training courses have addressed the issue of prevention and/or detection of bid rigging.

Box 7. Annual Training Programme 2013

The 2013 Annual Training Programme included the following training activities:

- 11 workshops on comprehensive supply-procedures, financing, trade, storage, monitoring and enforcing contracts, standards (LAPEM) and risk management (green procurement);
- 11 video conferences regarding price adjustment, complaints and research;
- 5 courses on the PPA offered in five National Training Centres;
- 4 courses on warehouses and storage;
- 2 courses on transportation and shipping;
- 1 course on the operation and functions of procurement committees;
- 5 courses –given by the OECD as a result of the agreement between CFE, the OECD and COFECE- between November 2012 and November 2013 on how to assess the harmful consequences of bid rigging, design tender processes to reduce the risk of collusion and detect bid rigging practices during the tender process.

3.2.2 The CFE Joint Advisory Committee

The Joint Advisory Committee on Supply in the Electricity Sector (hereinafter the Joint Advisory Committee)¹²² was established in 1972. Until the Energy Reform, this advisory body had a mixed composition, consisting of representatives of public and private sector enterprises. The Joint Advisory Committee also included representatives of CFE and the Ministries of Finance, Energy, Economy and Public Administration (SFP). The most important national chambers of the industry with links to the electrical industry represented the private sector in this committee.

According to its own manual, this Joint Advisory Committee was the first consultation body between suppliers and the Federal Government. The objective of this Committee was to enhance communication between CFE and the domestic industry. Both parties would collaborate to seek the simplification of

¹²² In Spanish: *Comisión Consultiva Mixta de Abastecimientos del Sector Eléctrico*, CCMASE.

administrative procedures in procurement, publicise the regulations governing procurement, and improve the competitiveness of the domestic industry.

Article 23 of the PPA provides the legal basis for the activities of the Committee. It is governed by the “Agreement establishing the basis Integration and Operation of Committees Acquisitions, Leasing and Services, and the Joint Consultative Committees Supply agencies and entities of the Federal Public Administration” published in the Federal Official Gazette on Thursday, August 5, 1999.

The Committee had four subcommittees that met prior to the monthly meetings of the Committee itself:¹²³

- **The Subcommittee for Analysis and Supply Management** which included the Office of Supply Management staff of and officials from the Programming Subdirectorate. The representatives of industrial associations and chambers were also members of this subcommittee. Its purpose was to publish changes to the Annual Procurement Programme. It was also responsible for making public the figures related to the tenders called by CFE and to communicate the energy consumption trends in the country.
- **The Subcommittee for Simplification and Administrative Improvements** had the greatest impact on procurement decisions. Some examples of decisions originated in this subcommittee were the obligation to establish the same requirements for any payment and the acceptance of the credentials of accredited providers, among others.
- **The Subcommittee on Competitiveness and Quality Analysis** which determined the indicators or factors (technology, energy costs and production, certification, standardisation etc.) that contributed to the national and international competitiveness of the main goods produced by the national industries. Moreover, it monitored the degree of competitiveness of the electricity sector and informed on new technological developments.
- **The Subcommittee for Turnkey Projects** which dealt with public works projects and Public-Private Partnerships.

¹²³

Based on CFE, 2012 “Structure and operation Manual of the Joint Advisory Committee”, March 30, 2012.

In addition to CFE personnel, different industrial associations sent representatives to these subcommittees. The main chambers represented in the Committee and subcommittees were: the National Federation of Chambers of the Industry (CONCAMIN), the National Chamber of Electrical Manufacturers (CANAME), the National Chamber of the Transformation Industry (CANACINTRA), the National Chamber of Electronics Telecommunications and Informatics (CANIETI), the National Chamber of the Iron and Steel Industry (CANACERO), National Association of Manufacturers of Electrical Conductors (ANFACOE), the National Association of Manufacturers of Power Transformers (ANFATE), the Mexican Association of Manufacturers of Electrical Conductors (AMEFACE), the Mexican Galvanizers Association. (AMEGAC) and the Mexican Association of Manufacturers of Valves, AC (AMEXVAL).

Since its creation there have been over 550 meetings of the Joint Advisory Committee. At these meetings, participants heard reports on the procurement plans and strategies of CFE. In addition they shared information about the plans for both domestic and international procurement, as well as the goods CFE intended to purchase and the timeframes for consolidated purchases, and the tenders to be held through reverse auctions. The Committee also discussed the “*Short, medium and long term forecasts for material and equipment requirements*” (also known as a prognosis) which included projections of what CFE would buy in these areas the years to come.¹²⁴

The Joint Advisory Committee was generally perceived within CFE to be a useful instrument because it helped to promote transparency and dialogue with the private sector, as well as being an important conduit for market research. While CFE has been a pioneer in establishing a forum for ongoing communication and collaboration with the private sector, the Committee and its activities may potentially facilitate bid rigging. It is of particular concern that the Committee does not discriminate between sensitive and non-sensitive information. For example, while administrative improvements and project ideas are valid topics for discussion with a view to improve procurement at CFE, disclosing dates, quantities, contracting procedures and market studies potentially opens the possibility of price-fixing and other collusive practices.¹²⁵

¹²⁴ The latest version extends until 2021 and it can be found at: http://www.cfe.gob.mx/Provedores/1_Adquisicionesarrendamientosyservicios/Paginas/Pronosticoderequerimientos.aspx.

¹²⁵ Similarly, the fact that the discussions of the Committee tend to focus on international tenders increases the risk that the legitimate activities of the Committee accrued in agreements to favour domestic suppliers by introducing measures to reduce international competition.

CHAPTER 4: PROCUREMENT PROCESS AT CFE

This chapter focuses on the procurement process in CFE, before the energy reform. It begins with a general overview of procurement using the available statistics, then it takes into account the legal framework and internal guidelines (POBALINES¹²⁶). It includes observations collected during 38 interviews that were carried out with public officials during the summer of 2013. To facilitate the identification of practices and rules that are specific to CFE, the chapter mirrors the sections set out in Chapter 2.¹²⁷

4.1 Authorised amounts for direct awards and restricted invitations

Public officials had different thresholds for procurement expenses. Depending on the authorised annual procurement budget for each office, officials were allowed to choose among different procurement procedures depending on thresholds. These were set by Congress each year in the Federal Budget. The following table shows the thresholds valid during 2013 for each procedure.

¹²⁶ Effective at the time of the preparation of this report.

¹²⁷ However, it must be noted that several sections were not repeated because of one of two reasons. First, their relevance to preventing and detecting bid rigging had already been considered in the previous chapter. Second, because there was no available information during the elaboration of this report to assess the effect of certain instruments or contracts on bid rigging.

Table 3. Authorised thresholds for direct awards and restricted invitations in 2013
(Thousand Mexican pesos, value added tax not included)

Authorised procurement budget			
Upward	To	Direct Awards threshold (for each contract)	Restricted Invitations threshold (for each contract)
	15,000	147	504
15,000	30,000	168	725
30,000	50,000	189	945
50,000	100,000	210	1,166
100,000	150,000	231	1,391
150,000	250,000	263	1,680
250,000	350,000	284	1,890
350,000	450,000	305	2,006
450,000	600,000	326	2,226
600,000	750,000	336	2,342
750,000	1,000,000	368	2,562
1,000,000		389	2,678

Source: The 2013 Federal Budget

4.2 Number and value of contracts

Every year from 2008 to 2012 CFE authorised approximately 61 thousand contracts with a yearly average of 37 billion pesos. However, in 2012, CFE signed five very large contracts for the purchase of coal that amounted to 38 billion pesos. This was one billion pesos more than every other contract put together.¹²⁸

Table 4. Contracts and value of contracts (2008-2012)

Year	Number of contracts	Nominal value of Contracts
2008	65,525	\$ 25,154,719,200
2009	63,403	\$ 44,274,419,715
2010	63,484	\$ 37,853,275,030
2011	57,432	\$ 26,671,746,410
2012	56,929	\$ 70,283,332,072
Average	61,254	\$ 37,980,084,057
Total	306,773	\$ 204,237,492,427

Source: CFE Systems Department

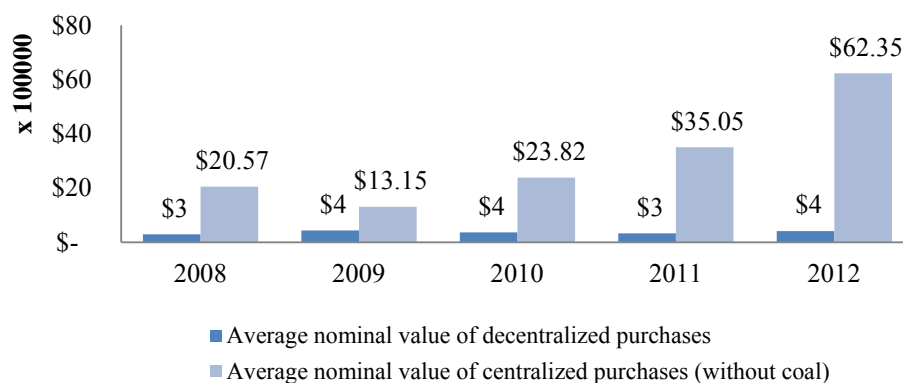
¹²⁸

Before 2012 an average of 6.6 billion pesos were spent every year on coal. In 2012, 38.4 billion pesos was purchased through reverse auctions.

4.3 Central and regional procurement

Central level contracts at CFE, on average have a much higher value than decentralised contracts. Even excluding coal contracts—these skew the sample because of their size—in 2011 and 2012, the average value of a centralised contract was still much higher than a decentralised contract for every year (see Chart 5). Moreover, central purchases were predominantly acquired through public tenders (96%) while most decentralised purchases were low value transactions acquired through direct awards.

Chart 5. Average nominal value of centralised –without coal- and decentralised purchases (2008-2012) in thousands of pesos



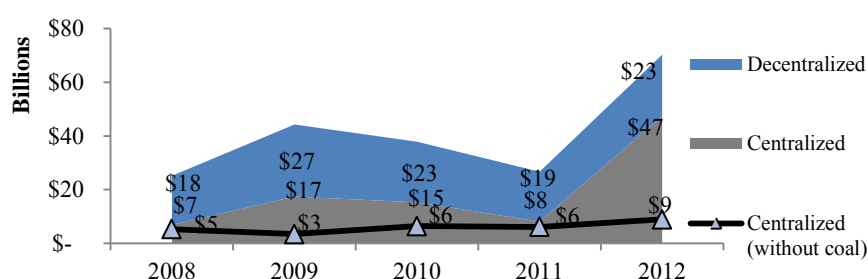
Source: CFE Systems Department

While centralised contracts are worth on average significantly more than decentralised contracts during the 2008-2012 period, these represented fewer contracts (4%). Including the contracts for the purchase of coal, these few high value contracts accounted for 47% of the value of all CFE contracts. However, this means that decentralised contracts were both more numerous and amounted to 53% of the value all the contracts examined.

Since the procurement of CFE was actually highly decentralised in both number and value of contracts, this tendency was further accentuated when contracts for coal were excluded from the analysis. If coal is not taken into account, the aggregated value of all the centrally administered contracts drops from 47% to 22%. At the same time, the value of the contracts administered by the regional offices increased from 53% to 78%.

From 2008 to 2012 the decentralised procurement offices at CFE spent on average 31% more than centralised offices. The exception is in 2012, when centralised offices spent nearly twice as much. However, since most of this is accounted for by coal, centralised purchases without this commodity accounted for less than half the added value of decentralised purchases (Chart 6).

Chart 6. Yearly procurement by centralised and decentralised offices (2008-2012)



Source: CFE Systems Department

In terms of bid rigging, a significant number of decentralised purchases may increase the difficulty of monitoring spending patterns and evaluating procurement procedures. The importance of a reliable electronic system that updates all procedures throughout CFE should not be underestimated.

4.4 Contract distribution based on office functions

CFE performed a variety of duties, many of which required procurement activities by the offices responsible for achieving a particular corporate objective. CFE office functions could be divided into the following categories:

1. **Administration:** In general, these were offices responsible for running the standardised functions of CFE. These offices were present at central and regional levels, and they were not directly responsible for the provision of electricity services.
2. **Control:** These offices were indispensable for providing the National Electric System with an adequate strategy for the supply of electricity. They monitored, calculated and optimised processes for the three offices directly responsible for providing electricity (generation, transmission and distribution).

3. **Generation:** See Box 5
4. **Transmission:** See Box 5
5. **Distribution:** See Box 5
6. **Construction:** These offices were responsible for the public works carried out on behalf of CFE. While public works are subject to the PWA and the PPAA, the construction sites still require many different purchases that are regulated by the PPA.
7. **Others:** These offices were responsible for miscellaneous tasks such as operating a museum, developing human capital in training facilities, preparing draft projects and operating a specialised laboratory.

Aside from the contracts for the acquisition of coal, the most valuable contracts originated from the following offices: Distribution (36%) and Generation (34%). The Administration offices spent about 18%, followed by Transmission with eight per cent. Finally, taken as a whole, the rest of the offices (Control, Construction and Others) averaged less than five per cent (5%) of the expenses each year. The following table illustrates the spending patterns for different office functions.

Table 5. Yearly distribution of procurement by office function—without coal (2008-2012)

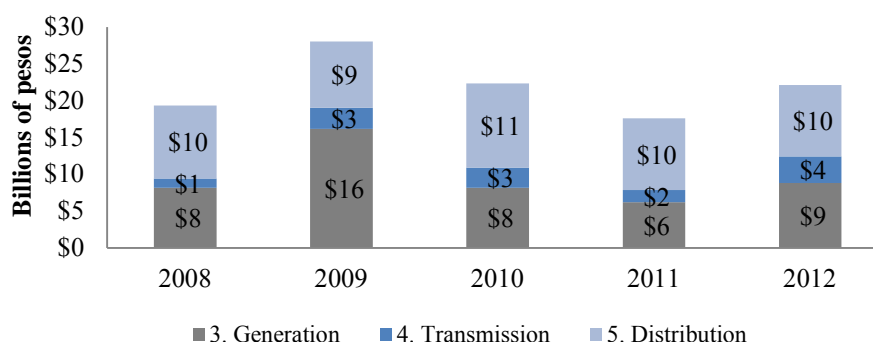
Office function	2008	2009	2010	2011	2012	Average	Coefficient of variation
Distribution	42%	30%	39%	39%	30%	36%	0.09
Generation	35%	53%	28%	25%	28%	34%	0.40
Administration	12%	5%	20%	25%	28%	18%	0.58
Transmission	5%	10%	9%	7%	11%	8%	0.40
Construction	3%	2%	3%	4%	2%	3%	0.14
Control	3%	0%	0%	0%	0%	1%	1.39
Others	0%	0%	0%	0%	0%	0%	0.30
TOTAL	100%	100%	100%	100%	100%		

Source: CFE Systems Department

According to this information, from 2008 to 2012, the main CFE functions (Generation, Transmission and Distribution) accounted for 78% of the total procurement expenses. The coefficient of variation indicates that the Control and Administration functions observe the most significant variation in their procurement patterns. That is to say, these functions are less predictable in their expenses, although not significantly so.

Chart 7 below shows the distribution of procurement expenses across the three offices responsible for the supply of the electricity. The most significant change observed in the chart occurred in 2009, when the *Gerencia De Centrales Nucleoeléctricas* –responsible for operating the nuclear plant of Laguna Verde– purchased 7.4 billion pesos of uranium hexafluoride for its operations. Generation did not appear to have a very variable spending pattern over the years, averaging around 8 billion pesos a year.

Chart 7. Procurement for Generation, Transmission and Distribution (2008-2012)



Source: CFE Systems Department

4.5 Goods, services and leasing arrangements at CFE

4.5.1 Energy fuels

Most of the CFE spending went towards the purchase of energy fuels, primarily fuel oil, thermal coal, gas and diesel. Based on figures provided by the Subdirectorate of Energy Fuels, the budget assigned in 2013 for these commodities was approximately 71.5 billion pesos, distributed as follows:

Table 6. Budget for energy fuels in 2013 by CFE

Energy Fuels	Budget in 2013
Fuel oil	\$ 39,825,848,437
Coal	\$ 15,754,867,000
Gas	\$ 12,554,926,946
Diesel	\$ 3,350,468,381
Total	\$ 71,486,110,764

Source: Subdirectorate of Energy Fuels, CFE

According to Article 1 of the PPA, purchases which take place between public institutions and other Federal Government agencies are not subject to tendering procedures. This is the case of energy such as fuel oil, diesel and natural gas used by CFE for production processes in their power plants. Approximately 78% of these purchases were carried out without a competitive process, mostly through direct contracting with PEMEX.

Regarding gas, before the Energy Reform of 2013, the secondary law derived from Article 27 of the Constitution granted PEMEX the exclusive right to sell gas produced in Mexico. In the case of gas derivatives, foreign intermediaries were allowed to sell these through local subsidiaries with few restrictions.

In this context, until 2013, there were few restrictions on importing gas to CFE power plants. In fact, contracts already existed with foreign firms. This is, for example, the case of the purchase of Liquefied Natural Gas (LNG) for the power plants of Manzanillo and Altamira.¹²⁹ Similarly, private firms could also import gas for their plants and use their own duct system, such as is the case of the power plants in Tamaulipas and Baja California.

However, there are two main restrictions limiting the provision of natural gas to CFE and, in general to private firms. The first has to do with the limited production of gas in Mexico and the second with the insufficient transportation capacity.

Regarding the first point: natural gas is a scarce resource in Mexico. The limited production is mainly due to the fact that within the available portfolio of

¹²⁹ The terminals are owned by foreign concerns.

investment projects, oil extraction is more profitable and therefore gas projects lack sufficient funding. This deficiency in the domestic production of natural gas, coupled with a growing demand for electricity, meant that energy fuel imports have increased and will continue to grow. Between 2001 and 2011, the net imports of gas increased by approximately 17% every year.¹³⁰ Given these conditions, CFE increased the consumption of more expensive (and more pollutant) fuels such as oil fuels. CFE pays approximately 17 USD per million BTU of fuel oil to PEMEX, while natural gas is sold in the international market at approximately 4 USD per million BTU.¹³¹

Regarding the second restriction, the limited infrastructure for transporting gas—i.e. ducts—means that CFE is forced to purchase an increasing amount of fuel oil as a substitute for its power plants. According to figures from the Energy Information System (SIE) in the period between 2009 and 2012 fuel oil consumption grew by 21% while that of natural gas increased by 18%.

The recent Energy Reform opens the door to solving the problems surrounding the provision of natural gas and allows new investments to be made in infrastructure to distribute this commodity. It also opens opportunities for designing an adequate legal framework for acquiring gas through competitive procedures.¹³²

CFE also consumes large amounts of thermal coal. However, it is intended for only 3 power plants. According to the Subdirectorate of Energy, approximately 10% of consumption is supplied from quarries in Coahuila. The remaining CFE requirement is served by thermal coal imported from overseas. Finally, it should be added that in 2013 CFE spent approximately 71.5 billion pesos for the purchase of fuels, which is approximately equivalent to 78% of the total amount spent registered on CompraNet during 2012 for all entities that receive money from the Federal Government. For this reason, fuel energy purchases are extremely relevant to public spending in general.

¹³⁰ SENER, 2012, *Prospectiva de gas natural 2012-2026*.

¹³¹ It should be noted that the prices paid in Mexico for locally produced gas, fuel oil and diesel were regulated by the Energy Regulatory Commission (In Spanish: *Comisión Reguladora de Energía*, CRE).

¹³² See box 6 *Energy reform in 2013* in Chapter 3.

4.5.2 *Distribution of goods, services and leasing arrangements*

CFE's procurement was goods-intensive both in number and value of contracts. For every 40 pesos that CFE spends on coal—which is a good—CFE spends 100 pesos on every other good. Additionally, CFE spent 4.5 times more on goods than services and 127 times more on goods than on leasing arrangements (Table 7).

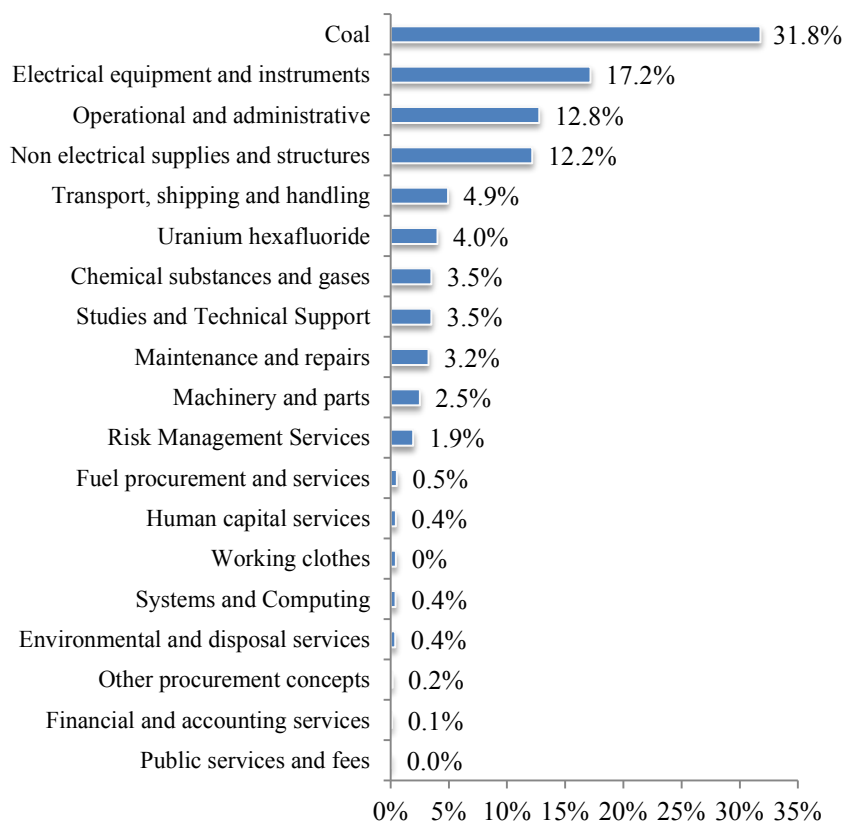
Table 7. Contracts and accumulated nominal value for goods, services and leasing arrangements (2008-2012)

Good, services or leasing arrangements	Number of contracts	Value of Contracts (Pesos)	Amount spent on goods for every other concept
1. Goods	162,811	\$166,277,964,566	1
1.1 Goods without coal	162,774	\$101,377,815,782	1.6
2. Services	142,070	\$36,647,455,579	4.5
3. Leasing arrangements	1,892	\$1,312,072,282	126.7
Total	306,773	\$204,237,492,427	-

Source: CFE Systems Department

4.5.3 *Basic procurement categories*

A convenient way of looking at the procurement of CFE is to visualise the different procurement categories it requires for its operations. As might be expected, once coal is set aside, the main expenses concerned electrical equipment and instruments. This covers 64 different objects including watt-hour meters (26%), distribution transformers (11%) and power switches (8%), among others.

Chart 8. Distribution of procurement categories (2008-2012)

Source: CFE Systems Department

The offices responsible for providing electricity (Generation, Transmission and Distribution) purchase more goods than services; and neither the department for Administration nor the department for Construction—which are not directly responsible for the primary objective of supplying electricity—took part in a large number of high monetary transactions, either using public tenders or exceptions using one of the provisions in Article 41 of the PPA. Finally, construction sites used by CFE make the largest use of leasing arrangements, in particular for specialised machinery and land.

4.6 The pre-tender phase at CFE

Stage 1: Procurement planning at CFE

As discussed in Chapter 2, correct planning is essential to designing strategies for preventing bid rigging and for efficient purchases. The primary mission of CFE was to provide an adequate¹³³ supply of electricity to residential and industrial customers. Therefore, it was very important that planning was carried out carefully to avoid duplications in procurement as well as avoiding overpriced and unnecessary purchases. Planning problems can be originated either by overestimating the needs or by underestimating the available resources.

Like many other public institutions, one of the most significant challenges to effective procurement planning at CFE is **the delay in the approval of the budget**. Although the Annual Procurement Programme was drawn up at the end of the previous procurement year, in practice purchases were subject to the availability of the resources at the moment the purchase is authorised. The authorisation depended on the discretion of the heads of the contracting areas.

Throughout the year, the Annual Procurement Programme was subject to modifications originating from the existing budget. So more than a strategic document, the programme had become over time, an administrative requirement. This programme, as required by law, was available on the website of CFE and it was updated each month on CompraNet. The publication of the Annual Procurement Programme ensured that all potential suppliers had the same information about the expected procurement spending of CFE. This pursued a legitimate objective of reducing information asymmetry between bidders. However, the publication and regular updates of the Annual Procurement Programme can increase the predictability of the procurement of CFE and as such facilitate collusive bidding.

CFE also made significant information available to the most important chambers and industrial associations through the Joint Advisory Committee. In this Committee every month CFE officials disclosed, for example, figures about the past tenders and the changes of the Annual Procurement Programme.¹³⁴ While detailed information can help potential bidders plan their bidding strategy,

¹³³ i.e. Regulated with sufficiency, competitiveness and sustainability

¹³⁴ See section 3.2.2 *The CFE Joint Advisory Committee* in Chapter 3.

and as such can be procompetitive, a frequent and detailed disclosure of quantities or expected prices to business representatives may facilitate collusion.

4.6.1 *Technical specifications and standards at CFE*

One of the most typical characteristics of a company such as CFE is the specialised nature of the goods that it requires for the different production processes (generation, construction, transmission, distribution and control). In 1952, CFE began to operate an internal set of laboratories (LAPEM), which had until the Energy Reform, the responsibility for monitoring the quality of all equipment used by CFE. The LAPEM laboratories were also responsible for ensuring the quality of the supplies sold to CFE by external providers.

As explained in Chapter 2, there are three levels of technical standards in Mexico: the Mexican official standards, the international standards and the industry reference standards. In the specific case of CFE, when the existing standard proves unsatisfactory, CFE determines new standards. LAPEM was responsible for approving the parameters of any internal standards.¹³⁵ All the goods that must have met predetermined standards must have been approved by LAPEM. Once approved, a certificate of supplier reliability was awarded by CFE. If equipment had not been tested by LAPEM, suppliers could provide technical descriptions to demonstrate the quality of the product. Tests could be performed by the following entities: (1) LAPEM, (2) any accredited laboratory or (3) examinations in another certified laboratory, but with witnesses present.

LAPEM also provided technical support for large procurement contracts. These represent 50% of the total procurement of CFE (over 500 tenders per year). The laboratories checked that the standards were met and the tender requirements were satisfied. Sometimes the laboratory prepared a technical opinion for the purchasing areas. However, these opinions were not binding and, according to interviews with LAPEM officials, were sometimes overruled. Personnel at LAPEM also pointed out that purchasing areas sometimes defined their own technical specifications, even when parameters had been previously set by LAPEM standards and tests. These cases were rare, but when detected, they were pointed out to the purchasing areas. In order to reduce the use of unnecessary requirements that could limit competition, when internal standards exist, they should be used instead of creating new, superfluous, requirements.

¹³⁵ See 13th section, first subsection, number 75 of The Internal Procurement Guidelines of CFE.

In the past, LAPEM participated in all tendering procedures. Its main responsibility was to define requirement guidelines for the purchasing areas and the Warehouse Department. Today this is no longer the case because regulatory cutbacks¹³⁶ have eliminated this function.

Stage 2: Market studies at CFE

The PPA (Article 30) stipulates that a specialised group should undertake market studies. If such a group does not exist, then the work is the joint responsibility of the requiring and contracting area, unless the requiring area is also in charge of the contract.¹³⁷ In the case of CFE, the Internal Procurement Guidelines (POBALINES) (Article 20) specified that market studies are the joint responsibility of both these areas for most purchases. However, in the case of consolidated and central level purchases, market studies were the joint responsibility of the requiring area and the Office of Supply Management through the Department of Evaluation and Cost Analysis.

Neither the PPA nor the Internal Procurement Guidelines specify the particular responsibilities of each area, which can lead to some ambiguity in the process. Based on interviews with different procurement officials, it appears that the requiring areas were sometimes not very interested in obtaining the most competitive outcome, while the contracting areas were sometimes not very interested in finding out if the requirements set by the requiring areas were biased in favour of one potential supplier. These limitations might pose a serious risk to the procurement process. The risk could be reduced with better market studies.¹³⁸

None of the regional offices had specialised staff dedicated to the preparation of market studies. However, at the central level, the **Department of Evaluation and Cost Analysis** was responsible for conducting market studies for *some* of the consolidated and corporate purchases. This Department was the highest authority at CFE when it comes to market studies. However, there is no particular reason as to why some market studies at central level were conducted by this area and others are not. The decision about which market studies would

¹³⁶ See: <http://www.funcionpublica.gob.mx/index.php/ua/ssfp/upmgp/tala-regulatoria.html>

¹³⁷ See section 2.2 the pre- tender phase, stage 2: *Market studies* in Chapter 2.

¹³⁸ See recommendation 5.3 in Chapter 5.

be carried out was made by the head of the Office of Supply Management and there is no pre-determined criteria for selecting which market studies will be this department's responsibility. According to the interviewees, this Department carries out an average of 30 market studies per year (in contrast to over nine hundred tenders carried out each year by CFE), and had an overall staff of 18 employees, out of which only 6 were assigned to drafting market studies. By all accounts this number of specialised market studies is insufficient.

This department also offered training courses and it had recently developed a draft document on how to improve market studies at CFE.¹³⁹ Such courses, however, were not mandatory and were only available upon request. It also appears that communication –and / help- to regional offices was still very sparse.

The procedure for conducting a market study at CFE included three steps. The process started with the requiring area filling a request sheet and passing it to the contracting area. This area then reviewed (i) the information available on CompraNet, (ii) historical purchases and (iii) information obtained through questionnaires directed to chambers of industry as well as individual suppliers and retailers.

The market studies carried out by CFE do not seem to extend their range beyond Mexico. There seems to be very little foreign research or business-to-business comparison in their market studies¹⁴⁰. Hence, in practice, CFE market studies do not compared prices and the purchasing conditions to those of other electrical companies or companies that purchased similar goods and services. Hence, there is no comparison of increases in prices. This is largely due to the fact that CFE was a virtual monopoly and could not compare itself to private sector electricity companies or local level equivalents.¹⁴¹

Moreover, there was also limited communication between regional and central offices regarding procurement strategies and variations in prices. In particular, enquiries about prices could also be made through the Reference Price Database of CFE.¹⁴² However, despite its existence, this database was not

¹³⁹ In Spanish: *Modelo Guía para la Elaboración de Estudios de Mercado*.

¹⁴⁰ See recommendation 5.3.6 in Chapter 5.

¹⁴¹ This could be expected to change as a result of the recent Energy Reform, with new suppliers starting to operate.

¹⁴² The history of this database dates back to the '70s when prices of inputs were changing so frequently that companies and government agreed on adjustment

widely used by CFE officials,¹⁴³ which may lead to overestimated prices. In contrast, other Mexican institutions, such as ISSSTE or IMSS, constantly compare their purchasing strategies to those of other (private sector) hospitals or local state-level health services.¹⁴⁴ A similar procedure would allow CFE to acquire more objective assessments of the costs of goods and services. If the recent Energy Reform allows for new suppliers to enter the market, it could mean that business-to-business comparisons may become easier for the CFE.

Stage 3: Selection of procurement procedures at CFE

The majority of the contracts of CFE (95%) were originated from procurement procedures with limited competition, i.e. direct awards and restricted invitations. However, public tenders represented almost 80% of the overall value of the procurement contracts. This means that the largest purchases were usually bought through competitive procedures.

Table 8. Distribution and value of contracts by procurement method (2008-2012)

	Public Tenders	High value (Art. 41)	Restricted Invitation (Art. 42)	Direct Award (Art. 42)	Total
Contracts	5%	2%	8%	85%	100%
Value of Contracts	78%	12%	5%	5%	100%

Source: CFE Systems Department

Chart 9 below shows the average procurement distribution by office function and procurement procedure. Several things stand out. First, the department of Administration had the largest proportion of public tenders in the whole organisation. Second, the departments of Control and Generation have the largest proportion of use of the high monetary exceptions. Third, the department

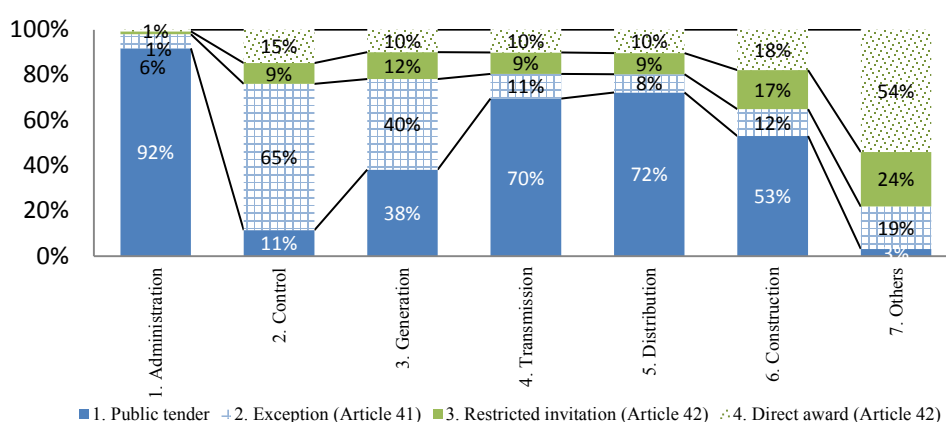
formulas updated monthly with information from the National Institute of Statistics, Geography and Informatics and the Mexican Central Bank.

¹⁴³ One reason for this is the excessive number of codes for goods and services that the database uses, and double registration of the same items seems to be a problem. CFE has spent 12 years trying to simplify and put this catalogue in order without great success so far.

¹⁴⁴ See ISSSTE and IMSS OECD reports.

of Construction has the largest proportion of low monetary restricted invitations and the second largest use of direct awards. Finally, the remainder of CFE rarely used public tenders and procures primarily within the exceptions for the low monetary transactions.

Chart 9. Average procurement distribution by office function and procurement procedure (2008-2012)



Source: CFE Systems Department

4.6.2 The use of the exceptions in Article 41 by CFE

Two per cent of all contracts regulated under the PPA were exempted using one of the provisions in Article 41 of the PPA. These are high monetary exceptions and represent 12% of the overall value of all CFE contracts (See Table 11). In particular, there were five exceptions that represented almost 90% of the aggregated value of all contracts exempted. These were, in descending order, sections I, III, VIII, II and XIX of Article 41 of the PPA (see Table 9).¹⁴⁵ Another 8% was divided among the exemptions found in section IV¹⁴⁶ and V.¹⁴⁷

¹⁴⁵ These are examined in detail in the following section.

¹⁴⁶ Several concepts appeared in the category of national security such as private security, and specialised equipment and services. An intriguing registry in 2010 was a contract for \$480,000 pesos for gardening services exempted using this section.

Finally, between 2008 and 2012, no case was justified using the exception found in section XVIII of Article 41 PPA.

Table 9. Distribution of contracts that were exempted using a section of Article 41 of the PPA and their value (2008-2012)

Section in Art.41	Explanation	% of Number of Contracts	% of Value of Contracts
I	If there are no substitutes in the market or there is an intellectual property right (e.g. patent) dispute.	26.85%	45.78%
II	If social order is at risk or one of the following is disrupted: the economy, public services, health, safety, or a protected environment because of some external uncontrollable situation.	26.32%	8.52%
III	If the cost of a competitive tender is higher than the cost of a non-competitive tender.	10.39%	15.52%
IV	If a public tender is considered a threat to national security.	0.31%	3.73%
V	If a public tender takes too long and a good or service is urgent.	16.88%	4.40%
VI	If a contract derived from a public tender was terminated, it can then be assigned directly to other bidders as long as their price is not 10% higher than the original contract.	0.13%	0.06%
VII	If a public tender was declared void or was uncontested.	1.98%	1.03%
VIII	If there are justified arguments for buying from a particular company or trademark.	10.91%	13.15%
IX	If the procurement consists of perishable goods, grains, repaired or second-hand goods.	0.04%	0.01%
X	For consultancy services, studies and research, institutions are allowed to use restricted invitations that favour public institutions of higher education and research centres. Direct awards are only available when the Transparency Act protects the information required for the service in question.	0.27%	0.26%

147

Generation concentrated 86% of the most valuable contracts using this exemption. The purchases focused on machinery and non-electrical equipment, as well as services for specialised repairs and technical assistance.

XI	If the procurement will be supplied by rural workers and other impoverished populations.	2.23%	0.03%
XII	If the goods or services will be sold for profit, or when they are part of a productive function.	0.09%	0.42%
XIII	If a supplier is selling cheap because it is bankrupt or under judicial impairment.	0.04%	0.01%
XIV	If a service is to be provided by a contractor with the help of a technical assistant.	1.31%	0.12%
XV	If the labour or expenses required for maintenance cannot be foreseen from the outset.	0.05%	0.01%
XVI	If the procurement consists of a prototype, and as long as the State can participate in the ownership or patent of the design. If the prototype is successful, a larger quantity can be assigned through direct contracting.	0.04%	0.00%
XVII	If the procurement refers to specialised equipment or chemical substances and materials for scientific research.	0.09%	0.18%
XVIII	If goods and services are offered as a way of paying debt.	0.00%	0.00%
XIX	If the goods and services are intended for nuclear power plants.	1.02%	6.20%
XX	If there is a constraining framework agreement for a specific good or service.	1.07%	0.57%
Total		100.00%	100.00%

Source: CFE Systems Department

As observed in Chapter 2, the Procurement Committee did not regulate all exemptions. Regional authorities authorised eight out of twenty exemptions. For example, CFE regional managers usually had the authority to purchase goods and services in case of emergencies.

Concerning emergencies, CFE signed an agreement with a chamber of industry (the National Chamber of Electrical Manufacturers, CANAME) with the objective of identifying the availability of certain goods and avoiding price rises in case of unforeseen events. The agreement guarantees the availability of supply at a pre-determined price for a basic set of goods and services.

This agreement was first signed on 13 December 2005 and has thus been renewed until 13 December 2013. The main provision in the contract is that—in case of an emergency or natural disaster—the CANAME members agree to

inform the CFE which companies have the required assets needed to restore the provision of electricity. A second provision is that CANAME members will keep the *same prices* as the ones paid during the last tender. Because of this agreement, the risk of CFE paying higher prices in case of disasters is significantly reduced.

While, in theory, this agreement stops prices from increasing unreasonably during an emergency, the conditions of the agreement should be revised by the competition authority. In particular, because prices should be determined through the market and not by agreements arranged by suppliers, industrial lobbies or associations.¹⁴⁸

4.6.2.1 *Exemptions that used sections I, II, III, VIII and XIX of Article 41*

These sections found in Article 41 accounted for over 90% of the value of the exempted contracts at CFE. The distribution of these exceptions is uneven. For instance, in 2010 CFE made an intensive use of cases using **section II**. This can be explained by the fact that CFE had to ensure the adequate provision of electricity when a natural disaster affected certain regions, most likely seasonal floods and hurricanes. To meet these unexpected situations CFE had to purchase large quantities of goods to guarantee the electricity service.¹⁴⁹

¹⁴⁸ In chapter 5, recommendation 5.28 points to certain areas to which the competition authority can advise CFE in order to avoid anticompetitive practices.

¹⁴⁹ According to the information provided by CFE, the main goods purchased in descending order of value were: transformers, wire, posts, and objects for control, protection, measurement, furniture, industrial security instruments and communication devices.

Table 10. Distribution of procurement exemptions in sections I; II, III, VIII, XIX of Article 41 of the PPA over time (2008-2012)

Section	2008	2009	2010	2011	2012
I	22%	21%	23%	14%	20%
II	1%	16%	78%	4%	0%
III	52%	9%	10%	3%	26%
VIII	35%	41%	14%	6%	4%
XIX	0%	0%	5%	85%	9%

Source: CFE Systems Department

In 2011, procurement for nuclear plants accounted for 85% (over one billion pesos) of all cases exempted found in Section XIX.¹⁵⁰ These contracts mainly concerned specialised maintenance (80%) and technical assistance (20%).

Section I is not only the most used exception both in number of contracts and their value; it was also widely used by decentralised departments.¹⁵¹ All in all, the Generation department has exempted contracts for 90% of the budget spent using this section. In particular, the Generation areas bought 11 billion pesos worth of products for which there were no reasonable substitutes in the market. However, considering the limited use of market studies in CFE, it is possible that some of these cases would have been better put out for competitive public tendering.

Similarly, the Generation areas accounted for almost all the contracts exempted found in section VIII of Article 41, which allows contracts to be assigned directly to certain distributors or trademark providers.

¹⁵⁰ For purposes of this report, nuclear energy production is considered part of the Generation process.

¹⁵¹ 88% of the decentralised contracts concentrated 90% of their overall value.

Table 11. Distribution of procurement exempted using sections I; II; III; VIII and XIX of Article 41 of the PPA by office function (2008-2012)

Section	Adm.	Ctrl.	Gen.	Trans.	Dist.	Const.	
I	10%	0%	82%	1%	4%	2%	100%
II	12%	0%	3%	13%	69%	2%	100%
III	64%	0%	21%	2%	12%	1%	100%
VIII	3%	1%	79%	12%	6%	0%	100%
XIX	0%	0%	100%	0%	0%	0%	100%

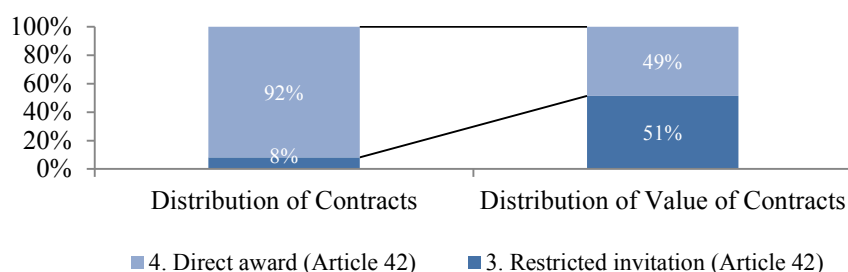
Source: CFE Systems Department

The use of section III had its peaks in 2008 and 2012. The central administration considered that the use of this exception would avoid potential losses in relative terms. In 2008, CFE applied Section III to the acquisition of coal and, in 2012, to the purchasing of telecommunication services.

4.6.3 Low monetary exceptions

Low monetary exceptions were mostly used for operational and administrative tasks. In contrast, very little coal or uranium hexafluoride is purchased using this method. The use of the exceptions for low monetary transactions is mostly decentralised (93%) and mostly (92%) contracted through direct awards. However, 8% of restricted invitations accounted for 51% of the value of all contracts exempted as low monetary transactions (see Chart 10). This is because decentralised offices account for the largest number of CFE officials with authorisation to carry out purchases and they need flexibility to carry out the small, day-to-day operations, required for the supply of electricity.

Chart 10. Distribution of low monetary transactions by direct awards and restricted invitations (2008-2012)



Source: CFE Systems Department.

Finally, it should be noted that until 2011 the Online Procurement System (In Spanish: *Sistema de Adquisiciones por Internet*, SAI) was used to make purchases through the direct awards procedure based on the first paragraph of Article 42 of the PPA. This system was highly praised when it came out and was awarded several prizes. In 2004, it won the Award for Innovation and Technological Development (CFE-SUTERM); in 2005, it won the INNOVA Recognition, which is awarded by the President of Mexico; in 2006, it was awarded the Recognition of Excellence in Training and Development for the "Distance training in Online Procurement System (SAI)".¹⁵² CFE strategically used its SAI to achieve competition for low-value transactions, providing significant benefits to the organisation. In particular it achieved better prices, increased the number of deals and streamlined purchasing processes and savings. This system also produced benefits for registered suppliers by reducing the indirect costs of doing business with CFE. The system was terminated in 2011 and replaced by the new version of CompraNet (5.0), which would have duplicated its functionality.

4.6.4 International tenders at CFE

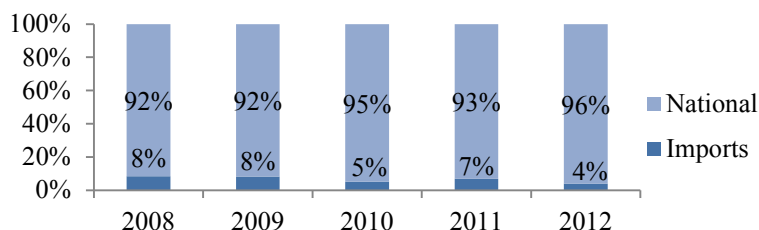
Chart 11 below shows the limited presence of international suppliers in CFE tenders. From 2008 to 2012, on average, each year only 6% of the contracts were assigned to foreign suppliers, mostly from the United States, Switzerland, Japan and Germany. However, since CFE has no systematised information that distinguishes between different types of international public tenders (subject to treaties or open to all countries), it would be challenging to draw up an accurate report of the number of international tenders that are used by the institution. The only available information is that all public tenders—of which international tenders are an unknown subset—represent approximately 5% of the contracts, and concentrate 95% of all costs (See Table 9). Moreover there is evidence to suggest that not many foreign firms are being awarded contracts (See Chart 11).

¹⁵²

See:

http://www.cfe.gob.mx/ConoceCFE/12_Ventadebienes/Lists/Casos%20de%20xito/Attachments/3/SAIjun2011.pdf

Chart 11. Yearly distribution of value of contracts assigned to international suppliers (2008-2012)



Source: CFE Systems Department

To decide whether or not to organise an international tender procedure several preconditions must be met.¹⁵³ First the goods and services must be included in the international treaties and the value of the expenditure must be above the value threshold specified in these treaties (Article 28 of the PPA). This way, businesses belonging to countries with whom Mexico has an on-going treaty can benefit initially through the so-called *international tender subject to a treaty*. Finally, if a *national tender* is declared void and the contract is not subject to an international treaty, CFE can use an *open international tender*, i.e. firms from countries that do not have a treaty with Mexico are allowed to participate. This option is also available when it is a specified condition in a procurement that is being financed with external credit granted to Mexico. Since the OECD always recommends that tenders open up to the largest number of genuine bidders, open international tenders should be sought whenever possible.

4.6.5 International tenders (*Differentiated 1 and 2*) at CFE

In addition to the general rules on international tenders described above and in Chapter 2, CFE had one additional possibility. Under its own rules,¹⁵⁴ CFE could organise 2 types of international tenders, the so-called *Differentiated 1* and

¹⁵³ See section 2.2, stage 3 *Selection of procurement procedure* in Chapter 2.

¹⁵⁴ 13th section, first subsection, number 77 of the Internal Procurement Guidelines.

the *Differentiated 2*. These contract types are exclusive to CFE and are not used by any other Mexican public institution.¹⁵⁵

The Differentiated 1 was used when national suppliers could provide the demand for goods and services, and when these were not covered by a permanent economic reservation in a treaty.¹⁵⁶ The Differentiated 1 type used pesos, so contractors were subject to fluctuations in the Mexican currency exchange rate. Under the Differentiated 1, CFE could not provide the foreign supplier with the certificate as an authorised importer of CFE. This means foreign companies must have first invested resources to acquire this certificate, which is costly.¹⁵⁷

The Differentiated 2 was used when there are no suppliers in the country. It did not require past or present existence of economic reservations, and it allows for dollars to be used in the proposals. Under the Differentiated 2, foreign companies were allowed by CFE to use the certificate as an authorised importer of CFE.¹⁵⁸

The practical implication of such a contractual arrangement is that CFE is limiting foreign competition. In other words, it seems that CFE is only allowed to use the tender procedure that maximises the participation of foreign bidders when resources are locally unavailable, (Differentiated 2). Otherwise, CFE makes the participation of foreign suppliers more costly (Differentiated 1). Because of these differences, the final beneficiaries of this policy are the local suppliers and not the CFE, because the institution could be paying lower prices for its goods and services as a result of more competitive procedures. Since the

¹⁵⁵ According to the interviews, it appears that these contract types were the created during the nineties, when the NAFTA was negotiated.

¹⁵⁶ See section 2.2.4 *International tenders* in Chapter 2.

¹⁵⁷ A similar requirement was abolished in the pharmaceutical industry in 2008. Before this pharmaceutical industries were forced to own facilities in Mexico. See: *Reforma Art. 168 del Reglamento de Insumos para la Salud*. DOF 05 agosto de 2008. Available at: <http://www.cofepris.gob.mx/AS/Documents/RegistroSanitarioMedicamentos/ESTRUCTURA%20DE%20EXPEDIENTES/8%20ELIMINACI%C3%93N%20DE%20PLANTA.pdf>

¹⁵⁸ In these cases the provider must to apply by written request to the CFE for customs clearance and administrative support. CFE will not provide any economic resource for the payment of import duties and taxes for customs clearance.

Differentiated 2 allows for a larger number of competitors, this type of procedure should be used as the default procedure, and not as an exception.

Stage 4: Evaluation criteria at CFE

In addition to the evaluation criteria set out in the Federal legislation (i.e. binary criterion, points and percentages, cost benefit)¹⁵⁹ and the pricing schemes,¹⁶⁰ the CFE Internal Procurement Guidelines also specified the different tasks that must have been carried out during the different stages of the bid evaluation:

- Approval of the technical and economic criteria was the responsibility of whoever signed the contract or of the requiring area.
- The technical and economic evaluation was the responsibility of the requiring area which should have used comparative tables. It must have passed on the results to the contracting area within 48 hours before the winner is announced. This avoided any last minute changes.
- The financial evaluation was the responsibility of the CFE Credit Division.
- The evaluation of the legal section of the bid was the responsibility of the contracting area, supported by the legal department of CFE.¹⁶¹
- In the procurement of goods, CFE must have given preference to products that do not impact negatively on the environment, or do so minimally.¹⁶²

Based on the information available, in 2012 the most commonly used criterion within CFE was the binary system. Of the 981 public tenders registered on CompraNet, 93% were assessed with the binary criterion. In the same year, approximately 7% of CFE public tenders were evaluated with the point-based criterion, and only three tenders (0.31%) with the cost-benefit criterion.

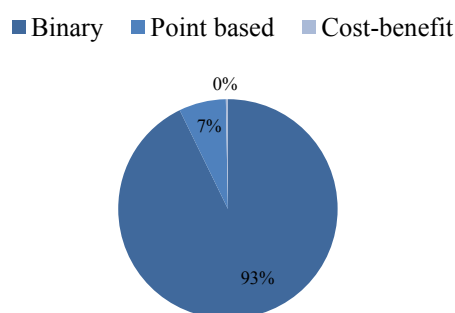
¹⁵⁹ See section 2.2, Stage 4: *Evaluation criteria* in Chapter 2.

¹⁶⁰ See section 2.2.9 *Pricing schemes for goods and services*. Chapter 2.

¹⁶¹ This and the above statements were included in the eighth section, subsection D of the CFE Internal Procurement Guidelines (POBALINES).

¹⁶² See ninth section of the CFE Internal Procurement Guidelines (POBALINES).

Chart 12. Percentage of public tenders according to the evaluation criteria, 2012



Source: Office of Supply Management

4.6.6 Pricing schemes for goods and services at CFE

For the pricing schemes outlined in Chapter 2 (Stage 6), CFE used the following guideline: if the assessment was binary, and the difference in prices with the median price in the market research (or the average of the top three economic proposals accepted technically) was over 10%, then a written explanation was required from the requiring to the contracting area, to justify the benefits of such a transaction. That is to say, this provision gave contracting areas enough flexibility to procure goods and services at an extra charge, provided that the purchasing areas justified the benefits for CFE. However, CFE officials reported that no such cases had ever been allowed. Moreover, they were considering removing them from the Internal Procurement Guidelines.

For the calculation of the prices used in the binary evaluation criterion, Article 26 of the Internal Procurement Guidelines (POBALINES) at CFE states the following:

- To determine whether a price is not acceptable, the price analyses shall be the same as the one stated found in section XI of Article 2 of the PPA and clause A of Article 51 of the PPR. If the price difference with the median price estimated in the market studies is higher than 10%, the requiring area must explain the overall benefits of such a purchase with a written justification.

- The convenient price is calculated using the maximum percentage allowed by the law¹⁶³ -i.e. 40%.

To avoid bias in the technical evaluation and unnecessary requirements, there were certain specialised departments, such as LAPEM and the Department of Evaluation and Cost Analyses that could verify that the requirements adhere to the technical specifications or standards, as well as identifying when other requirements are unnecessary.¹⁶⁴

In order to maximise the number of genuine competitors, CFE officials are recommended to make inquiries about prices with individual firms. It is recommended that CFE officials never discuss prices with the bidders collectively and avoid disclosing information about the structure of future tenders.

What should be avoided at all costs is determining the non-acceptable price **exclusively** from the following: (i) questionnaires sent to potential suppliers or industrial associations or (ii) previous tenders, or (iii) tenders with an inconsequential number of bidders. This recommendation is important because, in the case of (i) bidders have little incentive to quote lower prices if they know they are few who will be required to quote and that the non-acceptable price could be based on their contributions. This risk is maximised if the information is requested through industrial chambers. In this sense, it would be advisable to request recommendations to a large number of potential bidders. In the case of (ii) and (iii) whenever a cartel exists, the non-acceptable price would be based on the cartelised price.

The non-acceptable price can be determined by market studies or through reference prices found in the Reference Price Database. The CFE should try to guarantee that the sources of these prices are as independent from each other as possible to increase impartiality. The problem with requesting quotes to a reduced number of bidders or to an industrial chamber is that prices tend to be overestimated as providers have little incentive to reveal their actual prices over time. That is, prices in the market studies should be calculated from as many sources as possible, especially considering the yearly *price increases* from purchases of other companies that procure the same goods and services as CFE. This would allow CFE to learn more about the products and services it is

¹⁶³ Based on Article 2, XII PPA and Article 51, number B, section III PPR.

¹⁶⁴ See recommendation 5.5 in Chapter 5.

acquiring obtain more objective prices and increase its knowledge of the market, thus solving problems of information asymmetry.

The consequences of bid rigging can be very harmful for an institution. The following Table 12 summarises data from six economic surveys. The table shows the number of cartels and the average price that was overcharged. On average, the presence of a collusive agreement can increase prices by over 30%.¹⁶⁵ That is to say, if CFE is currently a victim of a collusive arrangement for any product or service, it could be paying a third more than it should. Moreover, if non-acceptable prices were being calculated from prices in previous tenders that were affected by a cartel, this overcharge would be sustained over time.

Table 12. Average overcharge by number of cartels in different economic surveys

Reference	Number of Cartels	Average Overcharge	
		Mean (per cent)	Median (per cent)
Cohen and Scheffman (1989)	5 – 7	7.7 – 10.8	7.8 – 14.0
Werden (2003)	13	21	18
Posner (2001)	12	49	38
Levenstein and Suslow (2002)	22	43	44.5
Griffin (1989), private cartels	38	46	44
OECD (2003), excluding peaks	12	15.75	12.75
Total, simple average	102-104	30.7	28.1
Total, weighted average	102-104	36.7	34.6

Source: Table 1 in John M. Connor and Yulija Bolotova, “Cartel overcharges: Survey and meta-analyses”, *International Journal of Industrial Organization*, vol. 24, issue 6, November 2006, pp. 1109-1137.

¹⁶⁵

As shown in Chart 1, sometimes this estimate reveals quite conservative. In bid rigging cases in IMSS procurement, for example, bidders lowered their average bid for goods that were previously subject to a monopoly agreement, even by 70% after the intervention of the competition authority.

Stage 5: Contract framework at CFE

4.6.7 Consolidated purchases at CFE

According to the CFE Internal Procurement Guidelines (POBALINES), the Office of Supply Management, together with the requiring areas of corporate and regional offices, should have decided on the goods, leasing arrangements and services to be integrated into a single procurement procedure (so-called consolidation). Since 2007, CFE has started consolidating more products and services. According to the CFE Internal Procurement Guidelines, the goods and services subject to consolidation are:¹⁶⁶

- Goods: Watt-hour meters, caustic soda, chlorine, sulphuric acid, communication equipment, cables and transformers.
- Services: Telecommunications (telephone, cell phone, satellite spectrum, long distance connectivity and networking), computer security, air tickets, photocopying, elimination of polychlorinated biphenyls; the Insurance Programme, helicopters, airplanes, software (Microsoft, Lotus and AutoCAD) and information technology, among others.

In addition to the consolidation at central level, CFE has made efforts to carry out consolidated purchases in the regional office of Mexico City and its metropolitan area. These purchases have mostly been used to buy conductors and poles. Until 2013, the CFE had not undertaken any consolidated purchases with any other public institutions. This is mostly because the goods and services required by CFE are relatively specialised and are not usually bought in the same quantity by other institutions. In the case of more standardised products, CFE used framework agreements.¹⁶⁷ Additionally, the CFE does not currently have systematised statistics of its consolidated purchases, so a detailed analysis was not possible.

¹⁶⁶ This list is only illustrative.

¹⁶⁷ Besides the internal consolidation strategy, CFE has taken advantage of the following framework agreements with other institutions: leasing of land vehicles, vehicle maintenance, booking services, issuance and delivery of air tickets, integral event organisation, electric dashboards, pruning of trees, and call centres.

To make a consolidated purchase within CFE, every purchasing area that would be included in the process must have sent an individual request to the office that was organising the purchase. To make a timely consolidated purchase, a tremendous amount of organisation was required. An untimely consolidated purchase could put at risk the adequate provision of public services or cost more than the savings that one would want to achieve. CFE officials consider that the CFE consolidation strategy might not be as efficient as it should be. The explanations offered for such a conclusion were the following:

- First, the lack of co-ordination and communication (i.e., a clear division of responsibilities) between central and regional offices, as well as the limited understanding of the day-to-day operations by the central administration, affected the overall planning of the consolidation process because it did not address the priorities of both parties. Hence, regional offices seemed to be unsatisfied with central level decisions.
- Second, since the obligation of regional offices was to send their purchasing request by individual areas, the late delivery of only one request could delay the entire process. Since the operation of the electricity system depended mostly on regional areas, one of the consequences of a delayed consolidated purchase is that these areas are forced to duplicate purchases because they could not wait any longer. This means CFE could be spending twice as much on certain consolidated goods. Further still, if a regional office wished to retain procurement rights for any reason, it has incentives to delay handing over its paperwork in order to set back the consolidation process. Especially since central offices had few instruments to monitor and sanction regional offices.

Experiences in other public institutions, in Mexico and in other countries, have clearly shown the benefits of consolidation when it comes to reducing the incentives of potential bidders to collude.¹⁶⁸ Consolidation increases the incentives to compete and attracts new bidders. It also reduces the number of bidding opportunities over time or geographically, making it more complex for bidders to devise effective rotation schemes or retaliation mechanisms that would help sustaining the collusive agreement over time.

¹⁶⁸

See *Box 1. Consolidated purchases in Mexico and their financial benefits* in Chapter 2.

Consolidation should be supported by an appropriate cost-benefit analysis. For example, in markets where there is little competition, it might not be desirable to proceed with consolidation procedures, since several smaller consolidation procedures could increase competition by allowing smaller firms to participate. In this case, an analysis should indicate if this is an optimal strategy and depict different scenarios for CFE. Any cost-benefit analyses should be able to rely on evidence provided by the market study.

4.6.8 Joint bids at CFE

As mentioned in Chapter 2, joint bids occur when two or more independent bidders put forward a single bid for a tender without formalising their relation into a long-term partnership. At CFE, following the PPA, joint bids were generally accepted. In the Internal Procurement Guidelines (POBALINES) there is no particular provision on when joint bids should be allowed. CFE had no systematised information regarding the number of accepted (or rejected) joint bids.¹⁶⁹ This is an area where CFE could improve, especially in understanding how extensively bidders bid jointly with their competitors, so that it can adopt the necessary measures to stop the anti-competitive use of joint bids and limiting them only to those cases where this practice is pro-competitive effects. That is, when through these offers the entry of a new bidder is guaranteed, which could be a useful policy to maximise competition.¹⁷⁰

4.6.9 Split awards at CFE

As with joint bids, CFE had no systematised information regarding split awards. As mentioned in Chapter 2, split awards were allowed by Article 39 of the PPA as long as they do not interfere with competition. However, as with consolidated purchases and reverse auctions, CFE did not have specific strategies or criteria for split awards. CFE could improve its internal procurement by splitting awards *only* in cases where allowing this practice is in the best interest of the institution.¹⁷¹ This means that procurement officials at CFE should always double-check the justification for allowing split awards and

¹⁶⁹ See recommendation 5.1 in Chapter 5.

¹⁷⁰ See section 2.5, recommendation 7 in Chapter 2 and recommendation 5.15 in Chapter 5.

¹⁷¹ See section 2.5, recommendation 8 in Chapter 2 and recommendation 5.25 in Chapter 5.

limit the use of this procedure, when possible, by diversifying risk through other means.

Stage 6: Procurement instruments at CFE

4.6.10 Social witnesses at CFE

CFE was the first institution in Mexico to make use of social witnesses in public procurement. Beginning in 2001, CFE started recruiting and using them for its most important purchases. It is an initiative that has extended to the rest of the Federal Government. In 2004, the SFP issued guidelines on the use of social witnesses and this arrangement was subsequently included in the PPA. Today the statements of the social witnesses are published on CompraNet although can also be found on the website of CFE.¹⁷² As noted in Chapter 2, CFE should take more advantage of social witnesses, although this requires providing them with specialised training focused on how to prevent and detect collusion in tender processes to ensure their most effective use.¹⁷³ Greater collaboration with the SFP and the COFECE is advisable in this respect.

4.6.11 Reverse auctions at CFE

CFE was the third public entity in Mexico to use reverse auctions in procurement tenders.¹⁷⁴ Until 2013, CFE had only used reverse auctions for the purchasing of thermal coal. This is the second largest procurement item after fuel oil at CFE.¹⁷⁵ However, the draft Internal Procurement Guidelines

¹⁷² Available at: http://www.cfe.gob.mx/Proveedores/4_Informaciongeneral/Paginas/Testigos-sociales-.aspx

¹⁷³ It appears that there have been cases in which CFE asked SFP for permission to use social witnesses and the Ministry refused them. In one particular case, SFP argued that there was insufficient evidence to determine whether the contract would have such a significant impact on CFE for the expense to be justified. See: No. de Oficio UNCP/309/BMACP/0466/2013 dated 26 June 2013. Without proper market studies, these requests should be considered very carefully by both parties, taking into consideration the relative risks to competition.

¹⁷⁴ See *Box 3 Reverse auctions in Mexico and their financial benefits* in Chapter 2.

¹⁷⁵ Fuel oil was acquired through a direct contract with PEMEX and was not subject to a competitive tender as explained in Chapter 3.

(POBALINES) for 2014 was considering making the 41 largest purchasing areas of CFE¹⁷⁶ use at least two reverse auctions every year. While this report does not question the intention of CFE to make a more extensive use of reverse auction in the future, we emphasise that such a decision should be on a case by case basis and justified on the grounds that it is the best strategy for the purchase of a particular good or service and following the criteria established by SFP.

At the time of this report it was not possible to calculate the savings achieved by the use of reverse auctions, as CFE did not maintain systematised information. According to CFE officials, the current estimates for its savings were calculated by comparing the estimated price in the market studies against the winning bid. However, it should be noted that a more accurate estimation of savings might result by comparing the price paid when using the reverse auctions against the price (adjusted) paid during the last tender that did not use a reverse auction.

4.6.12 *Electronic registers at CFE*

CFE had an internal electronic system for storing the data of its own procurement contracts. This system was specifically designed for CFE by the German firm SAP AG. A lot of the information used for preparing this report was gathered through this system. However, most of the information that would be necessary to detect pricing and bidding patterns is still missing from the system. This is particularly the case of volumes required and unitary prices. It appears that adding new “modules” into the system is possible.¹⁷⁷

4.6.13 *Guarantees and penalties at CFE*

According to CFE Internal Procurement Guidelines (POBALINES), guarantees were governed by the following considerations:

- There were three types of guarantees: (i) the performance guarantee, (ii) the completion guarantee and (iii) a guarantee for defects.
- If goods or services were delivered within 10 days of signing the contract, a performance guarantee was not required.

¹⁷⁶ See section 3.2 *Procurement structure at CFE* in Chapter 3.

¹⁷⁷ See recommendation 5.1 in Chapter 5.

- Direct awards did not require a completion guarantee.
- Procurement officials should have always used the CFE institutional template for providing a guarantee.
- The awarded supplier must have presented a performance guarantee within 10 calendar days of signing the contract.¹⁷⁸
- In the case of coal and hydrocarbon fuels which are intended for the generation of electricity, the head of the requiring area could authorise the guarantees. Percentages may have varied from 0.5% to 2% of the total contract amount.¹⁷⁹

Penalties should be applied whenever possible to guarantee compliance. They create a fairer environment that can increase the number of competitors in tenders in the medium run. If fines or penalties are too lax for suppliers, they will not deter suppliers from breaching their contract. According to the CFE Internal Procurement Guidelines, penalties were governed by the following considerations:

- A contractual penalty should have been established in the event of a delay in the delivery of goods or provision of services.
- The financial department applied the contractual penalties.
- Penalties should amount to 0.5% multiplied by the number of days of the contractual breach. The result is in turn multiplied by the value of goods or services excluding Value Added Tax (VAT).
- In contracts for the procurement of goods and/or services, CFE established the contractual penalty for late compliance. This penalty should have not exceeded the amount of the contract guarantee.¹⁸⁰

¹⁷⁸ Article 48, last paragraph, PPA.

¹⁷⁹ Seventeenth section, number 50 of the Internal Procurement Guidelines (POBALINES) of CFE.

¹⁸⁰ Seventeenth section number 100, 102 and 104 of the Internal Procurement Guidelines (POBALINES) of CFE.

Suppliers of goods could be rewarded by CFE with reductions in the amount of the guarantees¹⁸¹ when they had a good track record of compliance.¹⁸² The percentage of the reduction of the guarantee depended on points earned by each supplier, and reductions were determined as follows:

Table 13. Reduction on amount of guarantees

Historical compliance score	Percentage of reductions allowed for in the amounts of guarantees
80 to 84	10%
85 to 89	20%
90 to 94	30%
95 to 99	40%
100	50%

Source: SFP

4.6.14 Certificate of Independent Bid Determination

As required in the PPA, CFE required suppliers to provide a statement of integrity (Article 29, section IX). This statement made clear that the supplier would refrain from collaborating in anti-competitive or unlawful behaviour with the public officials in order to induce or alter the evaluations of bids or the outcome of the procedure. This is a good practice and should be fostered across the CFE organisation. However, it would be beneficial to extend the commitment to have the bidder state that he has not engaged in anti-competitive conduct with other bidders (e.g. by exchanging bid information related to their offers, or by discussing the bid strategy). As mentioned in Chapter 2, this instrument is good practice and it is recommended by the OECD Guidelines because it makes the legal representatives of firms aware of and directly accountable for the unlawful behaviour. As such, it becomes an important deterrent to bid rigging. The OECD highly recommends that CFE should make

¹⁸¹ See section 4.8.3 *Contract modification* in this Chapter.

¹⁸² That is, as long as for the previous five years they have an average of between 80 out of 100 points in their track record. (See *Acuerdo por el que se emiten diversos lineamientos en materia de adquisiciones, arrendamientos y servicios y de obras públicas y servicios relacionados con las mismas*.) This decision has advantages over awarding points only for past experience and it is preferable since it stimulates genuine competition and consequently limits the risk of collusive tendering.

this requirement mandatory in its Internal Procurement Guidelines, which should ideally include a template of such a CIBD.¹⁸³ The final wording of the Certificate could be agreed with COFECE.¹⁸⁴

Stage 7: Calls for public tender at CFE

Once the technical requirements were established, the contracting areas were mandated to publish the draft call for tender on CompraNet.¹⁸⁵ From this moment, potential bidders had 10 days to submit comments before the final call is announced. The call for tender was the guiding document for the entire procurement process, since it breaks down the contract requirements, the payment scheme, the terms of delivery, and the guarantees. CFE has developed forms or models of calls for tender, which is a good procurement practice. According to the Internal Procurement Guidelines, the Office of Supply Management—through the Procurement Department—was responsible for developing such models. The Central Acquisitions Committee must have then approved them. These models allowed CFE to streamline procedures and set common standards for evaluating suppliers. This increases genuine competitive bidding and thus complies with the OECD Guidelines.

Finally, the SURECON (Subcommittees for reviewing calls for tender)¹⁸⁶ organised *revision meetings* in order to examine drafts before the final version of the call for tender.¹⁸⁷ These meetings were another good practice by CFE. They are organised by the SURECON at the central level. These meetings allowed different administrative areas to assess the technical requirements and the type of procedure jointly.

¹⁸³ See section 2.5, recommendation 10 in Chapter 2 and recommendation 5.23 in Chapter 5.

¹⁸⁴ The version of this certificate recommended by COFECE is included in Annex 2 of this report.

¹⁸⁵ Based on Article 29, last paragraph PPA and Article 41, PPR.

¹⁸⁶ See *section 3.2.1 Training and units responsible for procurement in CFE* in Chapter 3.

¹⁸⁷ In previous years this part of the procedure included the participation of the laboratories (LAPEM). However, for reasons of administrative simplification their participation was cutback. Including LAPEM again could also help reduce arbitrary decisions and increase certainty. This in turn would increase competition and reduce the risk of bid rigging.

It was a standard practice at CFE to give interested bidders between 15 and 20 days from the date of the publication of the call for tender to present their proposals. According to the Procurement Department, while national tenders legally required less time (10 days)¹⁸⁸ this area was usually asked for more time to carry out the tender by the requiring areas.

Finally, in the calls for tender currently published by CFE, there is no explicit mention of collusion, bid rigging or the sanctions and consequences of such behaviour. In this respect, the OECD Guidelines strongly suggest that calls for tender include a warning regarding the sanctions for bid rigging. Further still, COFECE has a clause for precisely that purpose which could henceforth be included in all calls for tender.¹⁸⁹

4.7 The tender phase at CFE

Stage 1: Clarification meetings and public tender modifications

When the procurement process allows potential competitors to communicate, it may facilitate the formation of bid rigging schemes. For this reason, the OECD Guidelines recommend that the identity of the bidders should be kept secret during the tender phase. If clarification meetings bring interested bidders into the same physical place there is a potential risk of collusion. The OECD Guidelines suggest that procurement officials should avoid bringing potential suppliers together in regularly scheduled pre-bid meetings. If these meetings are necessary (or required by law) for the effective administration of the procurement procedure, officials should consider alternative means such as the use of online or other electronic systems (such as emails) for communication. Several CFE officials pointed out during the interviews that mixed procedures are sometimes used instead of the electronic system because CompraNet does not allow certain variables to be uploaded into the system. In particular, registering pesos and dollars. This technical limitation is problematic because it clarification meetings that could be held at a distance are not. The management and improvement of CompraNet depends on SFP.¹⁹⁰

¹⁸⁸ See Article 32, PPA.

¹⁸⁹ See recommendation 5.24 in Chapter 5.

¹⁹⁰ See recommendation 5.10 in Chapter 5.

According to CFE statistics, in 2011 around 30% of CFE public tenders was performed electronically; 69% through a mixed mode (face-to-face and electronically), and in only 5 cases was it required that bids used face-to-face procedures. The use of electronic bidding systems increased slightly in 2012, when nearly 35% of all public tenders used it; 65% of all tenders were mixed, and there was only one case where CFE used exclusively face-to-face procedures. The Subdivision of Transmission appears to be the most intensive user of electronic tendering: in 2012, 43%. While the Office of Supply Management had the largest concentration of face-to-face clarification meetings, the trend in the increased use of electronic systems is positive, and it is expected to continue into the future.¹⁹¹

Stage 2: Bid submission and the opening of proposals

At CFE, bid submission and opening followed the general legal provisions described in Chapter 2. The timelines and criteria for submitting and opening of the bids received by CFE were described in the call for tender. There is no special provision or practice that would include forms of detection of possible bid rigging conspiracies.¹⁹²

Stage 3: Tender evaluation and contract assignment

As will be discussed in the section on claims for non-conformity, one of the main concerns of CFE providers was that CFE did not always respect the evaluation criteria as determined in the calls for tender. While the overall number of claims for non-conformities was limited, it suggests that evaluation criteria and/or requirements are sometimes unclear. This can be explained by the nature of the processes at CFE, and by the information asymmetry between different public officials responsible for procurement. Technical specialists and/or LAPEM could play a strategic role in guaranteeing that the requirements

¹⁹¹ See recommendation 5.9 in Chapter 5.

¹⁹² See recommendation 5.14 in Chapter 5. Most of the interviewees claimed not to have seen any suspicious patterns or behaviour. The few that did notice unusual patterns or behaviours were reluctant to comment further or present evidence to substantiate their claims. This reinforces the importance of creating incentive schemes for public officials and establishing mechanisms for whistle-blowing.

adhere to the appropriate standards and are not biased towards one or more suppliers.¹⁹³

4.8 The post-award phase at CFE

During this phase of the tender the CFE officials should try to apply the OECD Guidelines on detection of bid rigging. In this case, officials should examine suspicious patterns in past procurement and prepare strategies for analysing patterns in future tenders.

In addition, CFE officials should take into account feedback from suppliers through interviews and non-conformity claims in order to improve the procurement methods. Such a strategy could also help CFE officials design strategies to maximise the number of competitive tenders by identifying barriers to entry and administrative bottlenecks in its procurement strategies. In many ways the Joint Advisory Committee and its subcommittees address these issues. However, as noted in Chapter 3, the information disclosed should be chosen strategically to improve the procurement process and not to favour any potential bidders over the others.

4.8.1 Fines and blacklisted providers at CFE

At CFE there were two procedures to deal with breaches of contract that could end with either the termination of the contract or with penalties, as defined in Chapter 2 for the Federal Government:

- The first are breaches in the contractual agreements and justify the imposition of fines and deductions.¹⁹⁴ In this case, the provider in breach can continue to provide the goods or services but it is fined accordingly. In general, the suppliers give their assent to the sanction, although there is no systematised data available to draw any conclusions.

¹⁹³ See recommendations 5.5 in Chapter 5.

¹⁹⁴ See section 4.8.3 *Contract modification* in this Chapter. Fines are applied when goods are not delivered as agreed. The Internal Procurement Guidelines (POBALINES) of CFE state that fines are calculated as 0.5% of the value the contract, multiplied by the number of delayed days. Deductions are a pre-determined fine concerning particular breaches in contract. These must be clearly stated in the call for tender.

- The second procedure can lead to the termination of the contract. Termination can be triggered either by a severe contractual breach or because the penalties imposed have exceeded the threshold stated in Article 53bis of the PPA. As can be seen in Table 14 below, 2011 was the year with the highest number of early contract terminations.

Table 14. Number of contractual terminations 2008-2013

Year	Contractual terminations
2008	18
2009	7
2010	4
2011	33
2012	27
2013	7

Source: CFE, MOGAF Department.

Most fines were due to delays in the delivery of the purchased goods, while fines due to delay in services are uncommon. It is important that CFE officials look closely into why there are breaches in contracts as well as learning from these cases to foster competition and increase efficiencies in the provision of goods and services.

CFE procurement officials were mandated to verify that potential suppliers had not been sanctioned by the SFP. This information was available on CompraNet. Checking the status of interested bidders is a good practice. However, the information on CompraNet does not take into consideration whether providers have been sanctioned for anti-competitive or monopolistic practices in Mexico or in other jurisdictions. Collecting this information and including it in the market studies could prove beneficial to CFE.¹⁹⁵ While this information should not exclude interested bidders automatically from tenders, it should raise the degree of vigilance of CFE officials.¹⁹⁶

¹⁹⁵ In particular, market studies should include, where possible, references to international cases to ensure that the contracting authority is alerted of the fact that some bidders have been found to have engaged in bid rigging in other jurisdictions.

¹⁹⁶ See section 2.5, recommendations 12 and 13.

4.8.2 *Claims for non-conformity at CFE*

One of the options available to providers participating in procurement procedures was the possibility of filing claims in case of non-conformity with the procurement procedure. The area responsible for receiving the claims was the CFE Internal Control Unit and its regional offices.¹⁹⁷ The administrative departments must have reported the following information to the Office of Supply Management:

- a) Claims for non-conformity (filing date and identity of the dissatisfied supplier).
- b) Claims for non-conformity that were accepted and rejected.
- c) Status of pending claims.
- d) Summary of the reasons for the claims, if these are due to administrative or technical reasons.
- e) The name of the offices involved in the claims for non-conformity.

Between January 2008 and November 2013 there were 771 claims for non-conformity against different CFE procurement areas.¹⁹⁸ Most of them (32%) were contracts that ranged between 1,000,001 pesos and 10,000,000 pesos.

Data for the third quarter of 2013 showed that most of the non-conformity claims (93%) refer to the contract awarding stage. The most cited reason was an unjustified disqualification (33%), followed by the non-compliance with the evaluation criteria set out in the call for tender (27%). This suggests that CFE should make greater efforts to draw up clear-cut requirements and evaluation criteria.

CFE did not have a *complaint mechanism* for firms to convey competition concerns. Such a mechanism could also help the CFE increase its co-operation with the competition authority, something which is also recommended in the OECD Guidelines.

¹⁹⁷ See *section 2.4.2 Claims for non-conformity and competition issues* in Chapter 2.

¹⁹⁸ Information provided by the Directorate General of Disputes and Penalties in Public Procurement of Ministry of Public Administration.

4.8.3 Contract modification

Within the CFE, the Modifications, Guarantees and Invoicing Department was responsible for monitoring the management of contracts. This department was a central area in CFE, and it was responsible for monitoring contracts made centrally and regionally. It also served as a strategic department to guide and advise regional offices. Any contract modification was subject to the prior authorisation of this department. As established by Article 52 of the PPA, CFE could expand the volume of goods or services, as well as the time frames for distribution. However, it could not modify the price, offer unforeseen advance payments, progressive payments or modify the contract specifications.

If a requiring area wished to modify a contract, it first submitted a request to the provider asking for its approval. The most common type of contractual modification was the increase in the volume of goods or services up to a maximum of 20% of the original contract, as foreseen in Article 52 of the PPA. Given the nature of the assets acquired by CFE, there were circumstances where during the life of the contract providers could offer better products or better technological specifications than those originally agreed in the contract.¹⁹⁹ In these cases, the requiring area could request a change in the contract claiming that the better technology would benefit CFE. This could require a price adjustment, every time no additional benefit was granted to the supplier and that the SFP was informed.²⁰⁰

4.8.4 Evaluating procurement strategies at CFE

CFE is considered a pioneer in the implementation of risk management tools at the Federal level. It had a specialised department (accountable to the Management of Financial and Control Evaluation), which administered a comprehensive control system with the objective of identifying operational risks, and strategic management.

The system was intended to reduce existing risks in the different CFE functions and to detect inefficiencies and bad practices. The system was only geared to detect risks connected with CFE managerial and operational decisions which might contravene existing laws or regulations, or cost the institution money. Currently, there was no methodology in place that could alert CFE of malpractices to a possible bid rigging conspiracy.

¹⁹⁹ According to the interviews, this was the case of a contract concerning fibre optics. Reference: *Contrato para el suministro, instalación y prestación del servicio de un sistema de Red*. oficio número 242.02-177/2011.

²⁰⁰ Reference: *Oficio No. UNCP/309/NC/0-459/2011*.

CHAPTER 5: RECOMMENDATIONS TO CFE ON HOW TO FIGHT BID RIGGING IN PROCUREMENT PROCEDURES

CFE is the second largest public procuring entity in Mexico, with over 300 purchasing units throughout the country.²⁰¹ CFE has always innovated and improved its procurement methods more than any other public institutions. For example, CFE was the first Mexican institution to use social witnesses, to establish a Joint Advisory Committee and, among the first to use reverse auctions. CFE also regularly certified and trained its staff to ensure that they complied with the law and improved their productivity. CFE is also renowned for pushing forward new kinds of contracts and for using new technologies to improve procurement (i.e. it introduced early on online bidding systems like the Online Procurement System, SAI and the Reference Price Database, BDPR). Some of these innovations have subsequently been introduced and formalised in the public administration and point to a constant effort by CFE to improve the way in which it purchases goods and services. Therefore, it is considered that the CFE has always been a pioneer when developing new practices on public procurement.

However, when it comes to enhancing competition in tenders and to reducing the risk of collusion in public procurement, there are important areas for improvement for CFE.²⁰² In general, there is no one-fits-all strategy or solution in reducing the risk of collusion. CFE, as any other public institution, should find the best solutions that are adapted to its own situation and needs. The OECD Guidelines were designed as a benchmark for Governments and they have to be considered and implemented in a way that is tailored to each institution.

²⁰¹ See Chapter 3.

²⁰² See section 2.5 *OECD Recommendations on the Mexican Legal Framework* in Chapter 2 and the OECD previous reports for public procurement available at: <http://www.oecd.org/daf/competition/fightingbidrigginggovernmentcontractsmexico-oecdpartnership.htm>

The Energy Reform approved by Congress at the end of 2013, and the LCFE require CFE to adopt a special regime for procurement.²⁰³ As a state productive enterprise, CFE must carry on its objectives generating economic value and profitability for the Mexican state. This implies the establishment of a procurement process that can maximise the output and reduce costs for CFE in order to guarantee competitive prices for consumers. In order to achieve this, CFE needs a new legal framework that allows it to design better procurement resources and strategies. The implementation of the Energy Reform offers CFE a great opportunity to design an improved procurement framework based on the international experience and best practices with the aim of reducing the risk of bid rigging and of creating a better regulatory structure for competitive procurement.²⁰⁴

Pursuant to the Agreement signed in December 2012, CFE agreed to work with the OECD to identify areas for improvement based on OECD best practices on how to reduce the risk of collusion in public tenders. This chapter includes a number of recommendations developed by the OECD Secretariat which are designed to enhance procurement procedures at CFE, to foster competition in its procurement processes, and to create a better informed organisation so that CFE procurement officials find themselves in a better position to prevent and detect bid rigging conspiracies.

In order to facilitate their implementation, each recommendation is linked to at least one part in the OECD Guidelines (e.g. checklist 1 or 2). All of the recommendations include an estimated timeframe for implementation (short, medium or long term), the procurement instruments affected (the new legal procurement framework for CFE, its Internal Procurement Guidelines, electronic registers such as SAP or CompraNet, internal directives, the Annual Training Programme, and so on), the type of change required by the recommendation (normative, managerial, inter-institutional, organisational), and the phase in the procurement affected by it (pre-tender, tender or post-award).

To successfully tackle collusive practices, the recommendations included in this report should be read and implemented in a flexible way. No single recommendation is likely to be valid for all tender situations or to remain valid

²⁰³ See Box 6 *Energy reform of 2013* in Chapter 3.

²⁰⁴ The OECD Guidelines for fighting bid rigging in public procurement and the different OECD reports carried out in Mexico (IMSS, State of Mexico and ISSSTE) can represent a good starting point for this exercise.

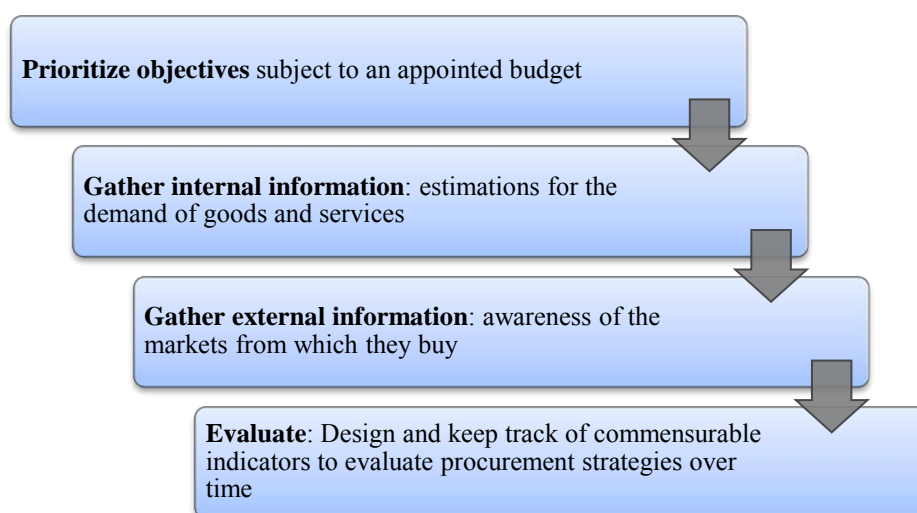
over time. Bidders who have colluded in the past (or are determined to do so in future) may be expected to react to policy and procedural changes implemented by procurement officials and to explore new and more secretive ways to collude. CFE should be constantly vigilant and prepared to assess, revise and adapt these recommendations to reflect the changing reality of its procurement.

5.1 Strategic planning aimed at fighting bid rigging

Strategic planning is probably the most important **preventive measure** that an institution can implement to reduce the risk of bid rigging. It requires clear, feasible and measurable objectives over a period of time. In order to **design such a strategy** and in consideration of Section VII of the Article 78 of the LCFE, the process requires any institution to satisfy four conditions:

- It must **prioritise its objectives** subject to its budget and other internal restrictions;
- The institution must gather **internal information** to determine its demand for goods, services and leases;
- It must be aware of relevant **external information** –usually an assessment of how competitive a market is- that should set a benchmark for market prices, substitutes and quality standards. In combination with internal information, this should make it easier for procurement officials to make informed decisions about their procurement.
- Information must be systematised and indicators designed to **evaluate** the progress of the procurement strategies over time. Without indicators, procurement officials are not able to evaluate strategies or assess if these are currently enabling CFE to achieve its objectives.

Figure 11. Minimum conditions for a strategy against bid rigging



The implications of weak or deficient planning should not be taken lightly. Efficient strategic planning enables procurement officials to enhance competition and limit predictability in many ways. For instance, it provides procurement officials with the basis for choosing the most advantageous form of procurement, including deciding to whether to opt for regional consolidated purchases. Accurate market information also helps procurement officials determine the most advantageous type of contract pricing schemes for the goods or services needed.²⁰⁵

5.2 Gathering and organising procurement information

The primary requirement for any effective procurement strategy aimed at fighting bid rigging and improving procurement efficiency is the systematisation of information. In particular, CFE should document all the administrative procedures from its procurement processes. Starting with the requests of different areas to the signing of the contract. For instance, CFE should retain and

²⁰⁵

Information such as the demand elasticity of different products and services, market concentration, as well as patents and other economic considerations, all contribute to choosing the most appropriate form of contract pricing schemes.

classify information such as: the product, dates, number and identity of participants in the tender, number and identity of participants in clarification meetings, quantities purchased and their unitary price, number of tender batches, rejected proposals, appeals for reconsideration, evaluation criteria, submission of joint bids and split awards, indication of whether it was a consolidated purchase or not, among many others. Some of this information is available on CompraNet. However, it is hard to access because there are no registers or the information does not have a digital copy. This reduces its usefulness when it comes to designing effective procurement strategies.

The following recommendations are aimed at improving the availability and classification of the information:

5.2.1 CFE should distinguish sensitive information

Public information can be released publicly by CFE. Non-public information should be made available only internally within CFE and it should include information concerned with the procurement strategies, non-acceptable prices, quantities, procurement procedures, as well as information of the winner providers and prices of the contracts, among others. Dissemination of sensitive information such as this increases the likelihood of collusive agreements among potential participants in CFE tenders.

This distinction between public and sensitive information must be aligned with and comply with the Federal Law of Transparency and Access to Public Government Information (LFTAIPG). The design of the special regime should contemplate a balance between transparency and competition. Therefore, sensitive information could be considered in terms of Article 114 of the LCFE as confidential business information (at least for a period which hinders the development and achievement of collusive agreements) to prevent collusion and increase competitiveness in the procurement process.

Checklist	Priority	Instruments	Type of change	Phase
Checklist 1, 4. Reduce communication among bidders	Short term	POBALINES SAP LFTAIPG Special regime	Normative / Management	Pre-tender, tender, post-award

5.2.2 Documents concerned with the procurement processes should be systematised in order to facilitate research of collusive patterns

In order to detect bid rigging patterns, it is important that information and documents on all procurement procedures within CFE be systematised and digitalised.

All documents and information about procurement procedures should be systematised and have an electronic search mechanism that allows easy access to documents and information for proper analysis. The information should not be limited to suppliers who have been awarded a contract, but should include all participants in the procedures, including information on the conditions attached to their proposals.

The information about suppliers and contractors prescribed in Article 87 of the LCFE should not be limited to the awarded contracts, but should include all participants to the procurement process, including technical information on the goods and services offered and their prices. This information should be recorded regardless of whether a contract was awarded or not. This, will ease the search of possible collusive patterns.

With the aim of strengthening the co-operation between CFE and the competition authorities (COFECE and IFT), it is essential that information is susceptible of being certified by CFE and that it meets the qualification standards required by the Judiciary for judicial evidence. There must be physical records that allow that process. This means that certified documents will have legal standing in court. Systematising information is the first step in this process.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 2, 7, steps procurement officials should take if bid rigging is suspected	Medium term	Special Regime Internal directive on records management	Normative/ Management	Pre-tender, tender, post-award

5.2.3 *Products and services purchased by CFE should be identified by only one reference code and this information should be replicable between CFE systems and CompraNet*

As mentioned before (Stage 2, market studies, Chapter 4), the Reference Price Database at CFE has an excessive number of codes for goods and services. A single product code would facilitate the comparison of institutional purchases of the same product on a regional/central level, as well as with the rest of the public administration. This would facilitate detection of differences in prices for the same product. This information should be replicable and comparable between the internal systems of CompraNet and CFE.

CFE could become a pioneering institution in this effort and lead the process of standardisation of reference codes for all procurement agencies that are obliged to use CompraNet.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1 Be informed before designing the tender process 3. Use clear requirements and avoid predictability	Short term	Internal directive on records management, POBALINES, SAP, CompraNet	Management	Pre-tender, tender, post-award

5.2.4 *Implement an automatic system for detecting high risk purchases*

This could be based on indicators of high risk markets (from product and market characteristics) and historically low competitive tenders. This information should be readily available for the competition authorities whenever necessary.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 1. Know your market and 6. Train the Staff on bid rigging and public procurement	Medium term	SAP	Normative/Management	Pre-tender

5.3 Create a specific administrative unit for Market Studies

In order to design an efficient procurement strategy, officials must assess the degree of competition in the procurement market and determine the relative position and bargaining power of their institution. Information regarding the dispersion and behaviour of suppliers is very important. In this case, the information requirements in the PPR²⁰⁶ do not seem to be sufficient. CFE's special regime should provide the necessary means to develop its own market analysis and allow its procurement departments to make the best decisions concerning the purchasing method and strategy. During the preparation of this report, it was noted that the Department of Evaluation and Cost Analysis (DEAC) did not have the capacity or the hierarchical level necessary to perform this work.²⁰⁷ The creation of a specialised department dedicated to market studies and market research for all central level purchases would improve significantly the ability of CFE to detect markets and industries at higher risk of collusion and allow it to plan its procurement strategy accordingly. This department should work closely with the requiring areas because these have the necessary specialised knowledge. The special regime should also strengthen this activity. The following recommendations are intended for this area:

²⁰⁶ (1) CompraNet, (2) Industrial or commercial lobbies or associations, as well as individual producers, providers, distributors and retailers, and (3) Internet or telephone calls with a legitimate and reliable source.

²⁰⁷ See section 4.6, *stage 2: Market studies* in Chapter 4.

5.3.1 *Creating a new unit or strengthen the Department of Evaluation and Cost Analyses, and establish it as an independent administrative unit of the Management of Supply and assign it the responsibility to develop all market studies at the centralised level*

Ideally, the Department of Evaluation and Cost Analyses (In Spanish: DEAC) –which was currently responsible for market studies of centralised offices- could be either strengthened or it could be given a more independent role and be tasked with identifying high risk purchases and preparing the necessary market studies. It could also randomly monitor regional purchases and offer technical advice on market studies methodology to the rest of the organisation.

Regarding this last point, the CFE should consider the desirability or viability to entrust this unit/department with powers to supervise/instruct CFE's productive subsidiaries enterprises or otherwise replicate the scheme in each of them.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 1. Know your market	Short term	POBALINES, Special regime	Normative / Management / Organisational	Pre-tender

5.3.2 *Establish minimum requirements and basic principles for conducting market research*

The OECD Guidelines should serve as guidance to elaborate better market research. Below are the recommended minimum requirements and principles that should be included:

Recommended minimum requirements:

1. Identify the characteristics of markets that could facilitate bid rigging: identical or simple products or services, few if any substitutes, little or no technological change, small number of companies, little or no entry to the market, presence of strong industry associations, repetitive bidding.
2. Include information on domestic and foreign supply.
3. Assess the existence of substitute products.
4. Describe different procurement options (buying, leasing, etc.).
5. Basic assessment of competition in the market.

Recommended principles for market studies:

6. Trustworthy information- Information must come from official sources and be readily available or be the result of a trusty investigation of the Unit.
7. Confidentiality- Information regarding the market studies must be kept secret from suppliers at all time.
8. Transparency- Market studies require frequent interactions between both parties. A documented account of all meetings, i.e. the Joint Advisory Committee (if kept), is an invaluable tool for transparency of the meetings.
9. Preparedness- Market studies must be considered with anticipation so that they can be properly crafted and ready for use when required.
10. Differentiation- Not all market studies require the same in-depth analyses. Procurement officials must be prepared to decide on the extent of the analysis required depending on the structure of the market and the characteristics of goods or services.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 1. Know your market	Short term	POBALINES Special regime	Normative / Management /Organisational	Pre- tender

5.3.3 *Perform analysis on the conditions of procurement of other public and private entities to benchmark the procurement conditions of various goods and services, and detect possible bid rigging schemes*

Because of the preeminent position in the energy sector that CFE has enjoyed so far, CFE has been the only or the biggest Mexican purchaser of a number of products required for the generation and distribution of energy in Mexico. The first step towards gathering trustworthy information on market studies is to analyse the procurement conditions of other companies (even internationally) that procure the same goods or services. This should allow CFE officials to estimate prices more objectively and to learn about new procurement strategies.

This increases the need of CFE -specifically through New Market Studies Unit/DEAC and purchasing units- to analyse experiences and devise new strategies. They could also identify new potential bidders, learn new purchasing strategies and identify suspicious collusive patterns.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 1. Know your market	Short term	Internal directive on market studies	Management	Pre-tender

5.3.4 *Market studies should use information from different sources to estimate the reference prices*

CFE should to avoid determining its price estimates solely on information from companies through requests of quotes to industry chambers and associations or on the basis of previous awards especially in the case of goods or services with characteristics that are known to facilitate collusion or in the case of markets where there has been historically a low level of competition.

The first steps in collecting information for market studies is to look at procurement strategies of other companies that require the same products and services to reduce the risk of restricted price estimations.

Price information from industry associations may not necessarily provide an objective reference point, as trade associations will most likely aggregate and average price information from their members.

It is also essential that when CFE requires the assistance of external consultants to estimate prices or costs, that it requires them to sign a confidentiality agreement.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 1. Know your market	Short term	POBALINES Special regime	Normative / Management / Organisational	Pre-tender

5.3.5 *Favour first-price sealed bid auctions over “maximum reference price discount” procedures*

The OECD Guidelines (Checklist 1, point 4, Reduce communication among bidders), specifically recommend using a first-price sealed bid auction when the industrial characteristics of the good or service are such to facilitate collusion, so bidders do not know the price the entity is willing to pay. When this information is published, it becomes easier for bidders to agree on prices and rig bids. For this reason, procurement officials are advised to favour price sealed bid auctions over “maximum reference price discount” procedures.

Checklist	Priority	Instrument	Feasibility	Phase
Checklist 1, 2. Maximise the number of genuinely competing bidders and 4. Reduce communication among bidders	Short term	POBALINES Special regime	Normative	Pre-tender

5.3.6 *CFE should introduce two different types of market studies for respectively high and low risk purchase*

High risk purchases should include the procurement of goods and services in markets which are more prone to collusion, as well as the procurement of goods which have shown low levels of competition or are provided by suppliers who have incurred in monopolistic practices. In these cases, market studies should be more in-depth to allow CFE procurement officials to design the necessary countermeasures.

It is necessary to study the behaviour of the industry and its actors. This information could prove very useful in identifying how contested and concentrated a market is. This information should also include blacklisted providers in local or foreign jurisdictions for violation of competition laws, specifically collusive acts. Additionally, the high risk market studies could be shared with the competition authorities whenever necessary.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 1. Know your market	Short term	POBALINES Special regime SAP - Internal directive on market studies	Management/ Normative	Pre-tender

5.3.7 *Design a particular certificate for high risk market studies*

Market studies require specific expertise and skills. CFE should introduce a new professional certification for staff tasked to prepare market research for products and services in markets where the risk of collusion is high. These professionals should be part of the New Market Studies Unit and should work together with the requiring area to design tenders that limit the risk of collusion in accordance with best practices in the OECD Guidelines.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 6. Train the Staff on bid rigging and public procurement	Short term	Annual Training Programme	Management	Pre-tender

5.3.8 *Carry out a cost-benefit analysis of procurement strategies in order to obtain value for money over time*

To determine the most efficient procuring method, CFE should develop short-term and long-term pricing strategies and measure their success over time with indicators. This implies changing procurement methods or experimenting with the size of tenders or with aggregation and disaggregation of contracts, and comparing the different outcomes of these tenders. It also implies using different procurement tools such as consolidated purchases, framework agreements, reverse auctions, open and closed contracts and multiyear contracts. The idea is to make a comparison between procurement types, and estimate the most efficient form of procurement for different processes.

In terms of Section VII of Article 78 of the LCFE, CFE could also design indicators to evaluate the efficiency of its procurement strategy over time. The indicators should help CFE measure savings, identify best purchasing strategies and increase administrative efficiency.

In order to facilitate entry of new competitors in concentrated markets, CFE—through the New Market Studies unit—should consider disaggregating contract opportunities and organise tenders with multiple batches for smaller volumes where appropriate. These opportunities would be specifically addressed to new bidders and they would allow them to introduce their products, develop their technology, adapt to the requirements of CFE and consolidate their production process. While prices initially might not be more competitive, over time competition would generate incentives for innovation, better quality, new standards, and added services.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 2. Maximise the number of genuinely competing bidders and 3. Use clear requirements and avoid predictability	Medium term	Internal directive on strategic purchases	Management	Pre-tender, tender and post-award

5.4 *Eliminate or avoid regulations, criteria or practices that discriminate or give preferential treatment to any sort of provider*

There are good reasons for eliminating the use of the *Differentiated 1* or any similar procedure that creates an additional barrier for foreign bidders' participation in CFE international tenders, and it implies a preferential treatment for national industry when compared to the *Differentiated 2*. CFE should always maximise the number of genuinely competitive bidders and eliminate any preferential treatment.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 2. Maximise the number of genuinely competing bidders	Short term	POBALINES Special regime	Normative	Pre-tender

5.5 *Create a list or a record of industry specialists for internal consultation and allow the LAPEM to comment on and/or object to technical requirements that do not follow existing standards.*

Given the very technical nature of the different CFE production processes, CFE should create a list of approved technical staff from different CFE departments (although external consultants could also be included) for consultation and assistance to procurement departments, especially in the pre-tender phase.

For example, the LAPEM laboratories have in the past participated in all tendering procedures. Their general responsibility was to define guidelines, methodologies and internal standards to help the requiring areas choose their requirements carefully before issuing the call for tender. This responsibility, however, was taken away from LAPEM for administrative reasons. LAPEM's role should be reinstated to reduce the number of unnecessary requirements that could lead to a biased selection of providers.

Consultation and assistance should focus on the definition of tender requirements to avoid unclear or biased specifications, especially in the case of high-risk purchases. This would increase certainty, empower supervising bodies and increase the perception of competition.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 2. Maximise the number of genuinely competing bidders	Short term	SAP / POBALINES Special regime	Management/ Normative	Pre-tender, tender and post award

5.6 *Design and establish specific training modules on prevention and detection of collusion as part of regular training of CFE procurement officials, and organise specific training sessions as a requirement for certified purchasing agents*

CFE should include regular training on the OECD's Guidelines for Fighting Bid Rigging in Public Procurement (Checklist 1 and 2). Higher education institutions as well as the competition authorities (COFECE and IFT) could help design these courses. Moreover, as part of the certification process for purchasing agents, CFE should include specific training on prevention and detection of collusion as one of the conditions for obtaining the accreditation. This would enable all CFE procurement officials to be aware of the international best practices and techniques in managing the risk of collusion.

This could be done in accordance with Article 84 of the LCFE under the necessary provisions and policies for the CFE and its productive subsidiaries enterprises in order to have mechanisms that enable them to prevent, identify and remedy illegal acts.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 6. Train staff on the risks of bid rigging	Short term	Annual Training Programme Certification for purchasing agents	Management / Inter-Institutional	Pre-tender, tender and post award

5.7 *Establish an open, documented and one-on-one dialogue with losing bidders, as well as with suppliers that have not participated to tenders although they had been identified in market studies as potential participants*

Officials in charge of public procurement should routinely interview losing bidders, as well as bidders that have ceased to participate to CFE tenders or who have never submitted bids. This should enable CFE to know potential problems with its procedures and identify clues of possible collusive arrangements. The information collected would be very useful in designing future tenders and would convey to bidders the commitment of CFE to fair and perfectible procurement procedures. This would also contribute to a possible reduction in the number of appeals for reconsideration. The purpose of this exercise should be (i) to improve tender requirements; (ii) to help the selection of the most suitable awarding criteria in future tenders; and (iii) to provide increased certainty to tender participants. It is important to point out that any information obtained through this process should be considered classified information and kept undisclosed to all interviewed parties.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 2. Maximise the number of genuinely competing bidders	Medium term	Internal directive on strategic purchases	Management	Post award

5.8 *Establish a plan and a strategy for increasing the number of remote (electronic) tenders*

With regard to the provisions of section X of article 78 of the LCFE, CFE should do all the necessary to facilitate bidding, preferably by using electronic bidding systems. Adopting electronic bidding procedures more frequently (especially for decentralised offices) will help reducing communications among bidders, and at the same time reducing costs of potential bidders and maximising participation in the tender. This will support the current tendency towards more online bidding, especially at regional level.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 2. Maximise the number of genuinely competing bidders; 1, 4. Reduce communication among bidders	Medium term	CompraNet, records on procedures	Management	Pre-tender

5.9 *Avoid bringing potential suppliers together in clarification meetings*

For the same reasons as in the previous recommendation, CFE should limit whenever possible clarification meetings which gather bidders in the same physical space. When these clarifications cannot be made electronically, CFE shall ensure that the identity of potential competitors remains secret, at least until the bids are submitted.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 4. Reduce communication among bidders	Short term	CompraNet, records on procedures	Management	Pre-Tender

5.10 *Expand the use of public and international tenders and include an English version of all the international calls for tender.*

To the extent possible, CFE should always favour the use of public tenders. In particular, the special regime should specify that international tenders should be favoured over national tenders because this would increase the expected number of suppliers.

Furthermore, all international tenders should have a version of the document written in English to decrease the participation costs of potential bidders from non-Spanish speaking countries increase the likelihood of their participation.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 2. Maximise the number of genuinely competing bidders	Short term	Internal directive Special regime	Management / Inter-Institutional	Pre-Tender

5.11 *The special regime should consider adopting the Central Acquisitions Committee practice related to the so-called “previous revision meetings” (reuniones previas)*

This practice should increase clarity on tender requirements, reduce the number of unnecessary exceptions to public tenders and increase the number of competitive bids. This practice should be extended to regional level/productive subsidiaries enterprises.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 3. Use clear requirement and avoid predictability and 2. Maximise the number of genuinely competing bidders	Short term	POBALINES Special regime	Normative	Pre-Tender

5.12 *Establish incentives (awards and sanctions) for the procurement departments at CFE*

To make purchasing processes a strategic activity it is important to create the appropriate incentives for procurement officials. According to Section VI of Article 106 of the LCFE, procurement officers could be **rewarded** for complying with best practices in purchasing activities when savings can be proven. The award could vary, for example, from career recognition to financial rewards. Incentives should also include **penalties** for purchasing units that are not operating according to CFE standards. For instance, the CFE could require purchasing agents to achieve certain savings throughout the year in order to renew their certificate. Units or individuals not generating positive results should be trained in order to obtain better results, all this, taking into account the externalities of the case.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1 General	Medium and long term	Internal directive on strategic purchases	Budgetary / Management	Pre-tender, tender and post-award

5.13 *Create procedures and incentives for CFE staff to raise concerns relating to bid rigging in their procurement procedures, i.e. whistle blower programme*

CFE has no reporting of whistle-blowing mechanism in place. CFE officials lack incentives to report possible acts of bid rigging and to gather evidence that could involve a collusion scheme. In contrast, during the interviews with officials, many CFE officers assumed or suspected that these illegal acts occur frequently. However, they were reluctant to further discuss possible instances of suspicious collusions. This is understandable, because officials lack of guarantees that protect them against any form of retaliation. In other words, officials have little to gain and much to lose.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 6. Train the staff on the risk of bid rigging and Checklist 2, 6. A caution about indicators of bid rigging and 7. Steps procurement officials should take if bid rigging is suspected	Medium term	POBALINES Special regime	Normative /Management / Inter-Institutional/ Budgetary	Pre-tender, tender and post-award

5.14 *Regulate joint bids to ensure a pro-competitive use of this practice*

CFE should introduce stricter internal rules to ensure that joint bids do not translate into a reduction in the number competitors. For example, the special regime should make it clear that joint bids will only be accepted when there are pro-competitive justifications such as:

- two or more suppliers combining their resources to fulfil a contract which is too large for any of them individually;
- two or more suppliers active in different products markets providing a single integrated service which none of them could supply independently; or two or more suppliers active in different geographic areas submitting a single bid for all of Mexico or for multiple states that include areas that no single supplier can accommodate on its own.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 2. Maximise the number of genuinely competing bidders	Short term	POBALINES Special regime	Normative	Tender

5.15 *Reserve the right to suspend the tender procedure or not to award the contract if it is suspected that the bidding outcome is not competitive*

One of the OECD recommendations (Checklist for designing the procurement process, recommendation “Define clear criteria for awarding contracts”) states that if those responsible for public procurement observe that the bidding outcome is not competitive, procurement officials should have the ability to reserve the right not to award the contract.

The Articles 84 and Section I of article 85 of the LCFE, require CFE and its production subsidiaries enterprises, to detect, prevent and correct any action that could affect or impact on the operations of the company. This could be used as legal basis for CFE to reserve the right to suspend proceedings or alternatively, not award the contract when it appears that there are strong suspicions that the participation of bidders in the tender is not genuine and that the process has been tampered to avoid it delivering competitive results.

Checklist	Priority	Instrument	Feasibility	Phase
Checklist 1, 5. Define clear criteria for awarding contracts and Checklist 2, 6. A caution about indicators of bid rigging and 7. Steps procurement officials should take if bid rigging is suspected	Short term	Special regime Internal directive on strategic purchases	Normative	Pre-tender, Tender

5.16 *Avoid the public release of confidential information in the Annual Procurement Programme (as well as any other document with sensitive information)*

In order to reduce the risk of collusion, CFE should redesign the Annual Procurement Programme to determine the most efficient purchasing strategy, to reduce predictability and increase competition in its procurement procedures. However, to avoid sensitive information being disclosed through the publication of the program (or any document such as *Prognosis*), CFE should create two versions of the Annual Procurement Program: one for the general public without sensitive information, and a non-public version for internal use by CFE only. This would ensure transparency and avoid disclosing sensitive information that could assist dishonest bidders in organising anti-competitive schemes.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 3. Use clear requirements and avoid predictability	Short and Medium term	Special regime Internal directive on strategic purchases	Normative / Management	Pre-tender

5.17 *Create or adhere to consolidated purchases with other agencies and institutions*

CFE has not yet carried out any consolidated purchases with other institutions. The implementation of consolidated purchases between several institutions would translate into significant benefits for public institutions: maximising purchasing power, generating more competition and encouraging lower prices. Consolidated purchases are also an effective way of disrupting possible collusive agreements. CFE should analyse, through the New Market Studies Unit/DEAC, the advantages of adhering to established purchasing processes with other government entities and institutions to achieve savings in the procurement of goods and services.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 2. Maximise the number of genuinely competing bidders and 3. Use clear requirements and avoid predictability	Short and Medium term	Internal directive on strategic purchases	Management / Inter-Institutional	Pre-tender, tender, post-tender

5.18 *Include regional departments and productive subsidiaries enterprises in the planning of consolidated purchases and framework agreements*

CFE should include also the requirements of regional offices, or where feasible its productive subsidiaries enterprises in its planning of consolidated purchases. Regional processes are not always currently aligned with the priorities of the centralised offices. For this reason, CFE should strengthen communication and co-ordination between regional and central areas.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 3. Use clear requirements and avoid predictability	Short and Medium term	Internal directive on strategic purchases	Management	Pre-tender

5.19 *Encourage regional offices and productive subsidiaries enterprises to carry out consolidated purchases*

The Internal Procurement Guidelines (POBALINES) (Article 4, Second Title) establish that the Office of Supply Management was responsible for authorising any regional consolidated purchases. However, there should be more flexible mechanisms for further consolidation, and regional consolidation procedures should be allowed more easily and without excessive bureaucratic procedures. The variation and combination of regional/and productive subsidiaries enterprises consolidation procedures, can reduce procurement predictability, help discourage anticompetitive behaviour and generate savings for CFE. The special regime should encourage this type of consolidation where feasible and appropriate for the interests of the CFE.

These mechanisms should also include monitoring and supervising mechanisms to guarantee accountability.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 3. Use clear requirements and avoid predictability	Short term	Special regime POBALINES	Normative	Pre-Tender

5.20 *Avoid sharing sensitive information with the Joint Advisory Committee and with industry chambers and associations.*

CFE should establish that only public, non-strategic information should be shared within the Joint Advisory Committee. The dialogue and exchange of information at the Joint Advisory Committee meetings should be focussed on technical requirements and not on CFE strategic issues. Hence information on prices, quantities, and procurement methods should not be disclosed during these meetings to avoid collusion.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 4. Reduce communication among bidders	Short term	POBALINES	Normative	Pre-tender, tender and post-award

5.21 When using the point based awarding criteria or regarding the minimum requirements to be met by those interested in contracting with CFE, procurement officers should not favour incumbency or overemphasise the importance of past performance

With regard to subparagraph d) of Section II of Article 78 and paragraph b) of Section II of Article 85, of the LCFE, CFE procurement officials should not over-emphasise the importance of performance records or favour incumbents when using the point-based awarding criteria or regarding the minimum requirements to be met by those interested in contracting with CFE. This recommendation is meant to facilitate entry of new suppliers and to increase rivalry in public tenders.

CFE should explore other ways to ensure good contract performance, such as sanctioning a breach of contract through effective and dissuasive sanctions.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 2. Maximise the number of genuinely competing bidders and 5. Define clear criteria for awarding contracts	Short term	Special regime Internal directive on strategic purchases POBALINES	Normative	Pre-Tender/ Tender

5.22 Include a Certificate of Independent Bid Determination (CIBD) as one of the mandatory requirements to participate in CFE public tenders

One way to make it more costly and risky for dishonest bidders to collude is to require them to sign a CIBD. CFE should make CIBDs mandatory for every interested bidder. Senior corporate officials should sign CIBDs. The use of CIBD should be included in the special regime.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 2. Maximise the number of genuinely competing bidders and 4. Reduce communication among bidders	Short term	POBALINES Special regime	Normative / Inter-Institutional	Pre-tender and tender

5.23 Include a warning against collusion and publish the sanctions included in the Federal Law of Economic Competition and the Federal Criminal Code in the calls for tender

Just as calls for tender make a direct reference to the OECD Convention on Fighting the Bribery of Foreign Public Officials in International Business Transactions, there should also be a clause warning potential bidders of the sanctions established by law for collusive tendering.

The COFECE has already approved of a written clause that states the following: *“Participants in public tenders are subject to the provisions of the Federal Economic Competition Act. In particular, Section IV of Article 53 of the Act prohibits any contract, agreement, arrangement or combination among competitors that have the intention to establish, agree upon or co-ordinate bids or abstention in tenders, contests, or public auctions. The Act also empowers the COFECE to impose fines of up to 10% of their income to those that incur this practice; or to impose fines of up to one million five hundred thousand times the general minimum wage for the Federal District if it is the case of economic agents that do not declare or to whom has not been determined a taxable income for Tax purposes, who incurred in this practice.”*

Moreover, the Federal Criminal Code establishes in Article 254bis that these crimes are punishable with imprisonment of five to ten years, and one thousand to ten thousand day fine, for those who celebrate, order or execute contracts, agreements or arrangements or combinations between economic agents that are competitors, and whose aim or effect any of the following:

- I.- To fix, raise, agree upon or manipulate the purchase or sale price of the goods or services supplied or demanded in the markets;
- II.- To establish the obligation to produce, process, distribute or market only a restricted or limited amount of goods, or to render a specific volume, number, or frequency of restricted or limited services;
- III.- To divide, distribute, assign or impose portions or segments of the current or potential market of goods and services, through customers, suppliers, time or spaces;
- IV.- To establish, agree upon or co-ordinate bids or to abstain from tenders or auctions;
- V. - The exchange of information with some of the objects or purposes from the above.”

This language should be updated regularly to take into account of any changes made to the Federal Law of Economic Competition or the Federal Criminal Code.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 2. Maximise the number of genuinely competing bidders, 4.Reduce communication among bidders and 6. Train the staff on the risk of bid rigging and Checklist 2, 6. A caution about indicators of bid rigging and 7. Steps procurement officials should take if bid rigging is suspected.	Short term	POBALINES Special regime	Normative / Management	Pre-tender and tender

5.24 *Limit the use of split awards*

CFE should only split a single contract between multiple suppliers in exceptional circumstances where there is concern about security of supply and considering always avoiding similar or identical values in the respective contracts. The CFE should consider whether issuing tenders with various batches and involving smaller amounts or consolidating purchases in order to attract large bidders

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 5. Define clear criteria for awarding contracts	Short and medium term	Special regime Internal directive on strategic purchases	Management /	Pre-tender, tender and post award

5.25 *Deter the use of sub-contracting as an anti-competitive practice*

In order to deter the use of sub-contracting as a means to implement collusion, CFE should require bidders before the bidding process to: i) disclose their intention to use sub-contractors in the bidding documentation submitted to CFE, ii) clearly provide details about the identities of the subcontracting companies, and iii) explain why sub-contracting is necessary for the proper performance of the contract. .

Checklist	Priority	Instrument	Type of change	Phase
Checklist 1, 5. Define clear criteria for awarding contracts	Short term	POBALINES Special regime Internal directive on strategic purchases	Management / Normative	Pre-tender,

5.26 *Adopt a policy of seeking damages in established bid rigging cases*

It is recommended that CFE proactively seeks opportunities to obtain compensation for damages under the Federal Law of Economic Competition whenever CFE has been a victim of any collusive conduct investigated and successfully prosecuted by the competition authorities.

The OECD recommends that CFE takes advantage of the legal right to compensation to recoup the losses it has suffered as a result of bid-rigging activity. If CFE and other public procurement groups actively and regularly seek damages from colluding parties, this would deter companies from engaging in bid rigging in public tenders. Moreover, it would send a clear message that public procurement groups were fighting back in the battle against bid rigging.

Checklist	Priority	Instrument	Type of change	Phase
Checklist 2, 7. Steps procurement official should take if bid rigging is suspected	Short and medium term	Internal directive on strategic purchases	Management / Inter-Institutional	Pre-tender, tender and post award

5.27 *Formalise an agreement of collaboration between the competition authorities (COFECE and IFT) and CFE to establish an open dialogue and communication channels for issues regarding competition in procedures and agreements*

As part of this agreement CFE officials should be able to consult the competition authorities in matters regarding tenders, agreements or any other procurement-related activities.

Competition authorities could also advise CFE regarding the information that should be disclosed at meetings of the Joint Advisory Committee (see Recommendation 5.20).

The agreement should allow CFE to approach the competition authorities on the way in which it should approach cases in which potential bidders are not participating in tenders (see Recommendation 5.7). They could also ask for counsel about high risk markets (see recommendation 5.3.7).

Checklist	Priority	Instrument	Type of change	Phase
Checklist 2, 7. Steps procurement official should take if bid rigging is suspected	Short and medium term	Inter-Institutional agreement	Management / Inter-Institutional	Pre-tender, tender and post award

ANNEX 1
OECD RECOMMENDATION FOR FIGHTING BID RIGGING IN
PUBLIC PROCUREMENT AND THE RELATED GUIDELINES

(17 July 2012 - C (2012) 115/CORR1
17 July 2012 - C (2012) 115)

THE COUNCIL,

HAVING REGARD to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

HAVING REGARD to the Recommendation of the Council concerning Effective Action Against Hard Core Cartels, which invites “Member countries [to] ensure that their competition laws effectively halt and deter hard core cartels”, which include “an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices [or] make rigged bids (collusive tenders)” [C(98)35/FINAL];

HAVING REGARD to the Recommendation of the Council on Enhancing Integrity in Public Procurement, which lists collusion among the “integrity violations” in the field of public procurement and recognises that efforts to enhance good governance and integrity in public procurement contribute to an efficient and effective management of public resources and therefore of taxpayers’ money [C(2008)105];

HAVING REGARD in particular to Principle 1 (Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers) and Principle 7 (Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly) of the Council Recommendation on Enhancing Integrity in Public Procurement;

HAVING REGARD to the Third Report on the Implementation of the Council Recommendation concerning Effective Action Against Hard Core Cartels, which lists the fight against anticompetitive behaviour in auctions and in procurement among the enforcement priorities that Members should pursue in their fight against hard core cartels [C(2005)159];

RECOGNISING that public procurement is a key economic activity of governments that has a wider impact on competition in the market, both short term and long term, as it can affect the degree of innovation and the level of investment in a specific industry sector and the overall level of competitiveness of markets, with potential benefits for the whole economy;

RECOGNISING that, in public procurement, competition promotes efficiency, helping to ensure that goods and services offered to public entities more closely match their preferences, producing benefits such as lower prices, improved quality, increased innovation, higher productivity and, more generally, “value for money” to the benefit of end consumers, users of public services and taxpayers;

RECOGNISING that collusion in public tenders, or bid rigging, is among the most egregious violations of competition law that injures the public purchaser by raising prices and restricting supply, thus making goods and services unavailable to some purchasers and unnecessarily expensive for others, to the detriment of final users of public goods and services and taxpayers;

RECOGNISING that some public procurement rules may inadvertently facilitate collusion even when they are not intended to lessen competition;

RECOGNISING that rules that unduly restrict competition often can be revised in a way that promotes market competition while still achieving public policy objectives; and

RECOGNISING the efforts to disseminate the Guidelines on Fighting Bid Rigging in Public Procurement adopted by the Competition Committee in 2009 [DAF/COMP(2009)1/FINAL];

NOTING that a number of OECD Members have developed tools to detect and limit bid rigging in public procurement tenders;

On the proposal of the Competition Committee:

I. RECOMMENDS that Members assess the various features of their public procurement laws and practices and their impact on the likelihood of collusion between bidders. Members should strive for public procurement tenders at all levels of government that are designed to promote more effective competition and to reduce the risk of bid rigging while ensuring overall value for money.

To this effect, officials responsible for public procurement at all levels of government should:

1. Understand, in co-operation with sector regulators, the general features of the market in question, the range of products and/or services available in the market that would suit the requirements of the purchaser, and the potential suppliers of these products and/or services.

2. Promote competition by maximising participation of potential bidders by:

- i) establishing participation requirements that are transparent, non-discriminatory, and that do not unreasonably limit competition;

- ii) designing, to the extent possible, tender specifications and terms of reference focusing on functional performance, namely on what is to be achieved, rather than how it is to be done, in order to attract to the tender the highest number of bidders, including suppliers of substitute products;

- iii) allowing firms from other countries or from other regions within the country in question to participate, where appropriate; and

- iv) where possible, allowing smaller firms to participate even if they cannot bid for the entire contract.

3. Design the tender process so as to reduce the opportunities for communication among bidders, either before or during the tender process. For example, sealed-bid tender procedures should be favoured, and the use of clarification meetings or on-site visits attended personally by bidders should be limited where possible, in favour of remote procedures where the identity of the participants can be kept confidential, such as email communications and other web-based technologies.

4. Adopt selection criteria designed i) to improve the intensity and effectiveness of competition in the tender process, and ii) to ensure that there is always a sufficient number of potential credible bidders with a continuing interest in bidding on future projects. Qualitative selection and award criteria should be

chosen in such a way that credible bidders, including small and medium sized enterprises, are not deterred unnecessarily from participating in public tenders.

5. Strengthen efforts to fight collusion and enhance competition in public tenders by encouraging procurement agencies to use electronic bidding systems which may be accessible to a broader group of bidders and less expensive, and to store information about public procurement opportunities in order to allow appropriate analysis of bidding behaviour and of bid data.

6. Require all bidders to sign a Certificate of Independent Bid Determination or equivalent attestation that the bid submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded.

7. Include in the invitation to tender a warning regarding the sanctions for bid rigging that exist in the particular jurisdiction, for example fines, prison terms and other penalties under the competition law, suspension from participating in public tenders for a certain period of time, sanctions for signing an untruthful Certificate of Independent Bid Determination, and liability for damages to the procuring agency. Sanctions should ensure sufficient deterrence, taking into account the country's leniency policy, if applicable.

II. RECOMMENDS that Members ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour and unusual bidding patterns which may indicate collusion, so that these suspicious activities are better identified and investigated by the responsible public agencies.

In particular, Members should encourage competition authorities to:

1. Partner with procurement agencies to produce printed or electronic materials on fraud and collusion awareness indicators to distribute to any individual who will be handling and/or facilitating awards of public funds;

2. Provide or offer support to procurement agencies to set up training for procurement officials, auditors, and investigators at all levels of government on techniques for identifying suspicious behaviour and unusual bidding patterns which may indicate collusion; and

3. Establish a continuing relationship with procurement agencies such that, should preventive mechanisms fail to protect public funds from third-party collusion, those agencies will report the suspected collusion to competition

authorities (in addition to any other competent authority) and have the confidence that competition authorities will help investigate and prosecute any potential anti-competitive conduct.

Members should also consider establishing adequate incentives for procurement officials to take effective actions to prevent and detect bid rigging, for example by explicitly including prevention and detection of bid rigging among the statutory duties of procurement officials or by rewarding the successful detection of actual anti-competitive practices in the assessment of the career performance of procurement officials.

III. RECOMMENDS that Members encourage officials responsible for public procurement at all levels of government to follow the Guidelines for Fighting Bid Rigging in Public Procurement set out in the Annex to this Recommendation, of which they form an integral part.

IV. RECOMMENDS that Members develop tools to assess, measure and monitor the impact on competition of public procurement laws and regulations.

V. INVITES Members to disseminate this Recommendation widely within their governments and agencies.

VI. INVITES non-Members to adhere to this Recommendation and to implement it.

VII. INSTRUCTS the Competition Committee to:

- i) serve as a forum for sharing experience under this Recommendation for Members and those non-Members adhering to this Recommendation;
- ii) promote this Recommendation with other relevant committees and bodies of the OECD; and
- iii) monitor the implementation of this Recommendation and to report to the Council no later than three years following its adoption and, as appropriate, thereafter.

OECD GUIDELINES FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT

1. Introduction

Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process. Public and private organisations often rely upon a competitive bidding process to achieve better value for money. Low prices and/or better products are desirable because they result in resources either being saved or freed up for use on other goods and services. The competitive process can achieve lower prices or better quality and innovation only when companies genuinely compete (i.e., set their terms and conditions honestly and independently). Bid rigging can be particularly harmful if it affects public procurement.²⁰⁸ Such conspiracies take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.

Bid rigging is an illegal practice in all OECD member countries and can be investigated and sanctioned under the competition law and rules. In a number of OECD countries, bid rigging is also a criminal offence.

2. Common forms of bid rigging

Bid-rigging conspiracies can take many forms, all of which impede the efforts of purchasers - frequently national and local governments - to obtain goods and services at the lowest possible price. Often, competitors agree in advance who will submit the winning bid on a contract to be awarded through a competitive bidding process. A common objective of a bid-rigging conspiracy is to increase the amount of the winning bid and thus the amount that the winning bidders will gain.

²⁰⁸

In OECD countries, public procurement accounts for approximately 15% of GDP. In many non- OECD countries that figure is even higher. See OECD, *Bribery in Procurement, Methods, Actors and Counter-Measures*, 2007.

Bid-rigging schemes often include mechanisms to apportion and distribute the additional profits obtained as a result of the higher final contracted price among the conspirators. For example, competitors who agree not to bid or to submit a losing bid may receive subcontracts or supply contracts from the designated winning bidder in order to divide the proceeds from the illegally obtained higher priced bid among them. However, long-standing bid-rigging arrangements may employ much more elaborate methods of assigning contract winners, monitoring and apportioning bid-rigging gains over a period of months or years. Bid rigging may also include monetary payments by the designated winning bidder to one or more of the conspirators. This so-called compensation payment is sometimes also associated with firms submitting “cover” (higher) bids.²⁰⁹

Although individuals and firms may agree to implement bid-rigging schemes in a variety of ways, they typically implement one or more of several common strategies. These techniques are not mutually exclusive. For instance, cover bidding may be used in conjunction with a bid-rotation scheme. These strategies in turn may result in patterns that procurement officials can detect and which can then help uncover bid-rigging schemes.

- *Cover bidding.* Cover (also called complementary, courtesy, token, or symbolic) bidding is the most frequent way in which bid-rigging schemes are implemented. It occurs when individuals or firms agree to submit bids that involve at least one of the following: (1) a competitor agrees to submit a bid that is higher than the bid of the designated winner, (2) a competitor submits a bid that is known to be too high to be accepted, or (3) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Cover bidding is designed to give the appearance of genuine competition.
- *Bid suppression.* Bid-suppression schemes involve agreements among competitors in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner’s bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration.
- *Bid rotation.* In bid-rotation schemes, conspiring firms continue to bid, although they agree to take turns being the winning (*i.e.*, lowest

209

In most instances the compensation payment will be facilitated by the use of a fraudulent invoice for works. In fact, no such work takes place and the invoice is false. The use of fraudulent consulting contracts can also be used for this purpose.

qualifying) bidder. The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company.

- *Market allocation.* Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm. In return, that competitor will not competitively bid to a designated group of customers allocated to other firms in the agreement.

3. Industry, product and service characteristics that help support collusion

In order for firms to implement a successful collusive agreement, they must agree on a common course of action for implementing the agreement, monitor whether other firms are abiding by the agreement, and establish a way to punish firms that cheat on the agreement. Although bid rigging can occur in any economic sector, there are some sectors in which it is more likely to occur due to particular features of the industry or of the product involved. Such characteristics tend to support the efforts of firms to rig bids. Indicators of bid rigging, which are discussed further below, may be more meaningful when certain supporting factors are also present. In such instances, procurement agents should be especially vigilant. Although various industry or product characteristics have been found to help collusion, they need not all be present in order for companies to successfully rig bids.

- *Small number of companies.* Bid rigging is more likely to occur when a small number of companies supply the good or service. The fewer the number of sellers, the easier it is for them to reach an agreement on how to rig bids.
- *Little or no entry.* When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support bid-rigging efforts.

- *Market conditions.* Significant changes in demand or supply conditions tend to destabilise ongoing bid-rigging agreements. A constant, predictable flow of demand from the public sector tends to increase the risk of collusion. At the same time, during periods of economic upheaval or uncertainty, incentives for competitors to rig bids increase as they seek to replace lost business with collusive gains.
- *Industry associations.* Industry associations²¹⁰ can be used as legitimate, pro-competitive mechanisms for members of a business or service sector to promote standards, innovation and competition. Conversely, when subverted to illegal, anticompetitive purposes, these associations have been used by company officials to meet and conceal their discussions about ways and means to reach and implement a bid rigging agreement.
- *Repetitive bidding.* Repetitive purchases increase the chances of collusion. The bidding frequency helps members of a bid-rigging agreement allocate contracts among themselves. In addition, the members of the cartel can punish a cheater by targeting the bids originally allocated to him. Thus, contracts for goods or services that are regular and recurring may require special tools and vigilance to discourage collusive tendering.
- *Identical or simple products or services.* When the products or services that individuals or companies sell are identical or very similar, it is easier for firms to reach an agreement on a common price structure.
- *Few if any substitutes.* When there are few, if any, good alternative products or services that can be substituted for the product or service that is being purchased, individuals or firms wishing to rig bids are more secure knowing that the purchaser has few, if any, good alternatives and thus their efforts to raise prices are more likely to be successful.
- *Little or no technological change.* Little or no innovation in the product or service helps firms reach an agreement and maintain that agreement over time.

²¹⁰

Industry or trade associations consist of individuals and firms with common commercial interests, joining together to further their commercial or professional goals.

CHECKLIST FOR DESIGNING THE PROCUREMENT PROCESS TO REDUCE RISKS OF BID RIGGING

There are many steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging. Procurement agencies should consider adopting the following measures:

1. Be informed before designing the tender process

Collecting information on the range of products and/or services available in the market that would suit the requirements of the purchaser as well as information on the potential suppliers of these products is the best way for procurement officials to design the procurement process to achieve the best “value for money”. Develop in-house expertise as early as possible.

- Be aware of the characteristics of the market from which you will purchase and recent industry activities or trends that may affect competition for the tender.
- Determine whether the market in which you will purchase has characteristics that make collusion more likely.²¹¹
- Collect information on potential suppliers, their products, their prices and their costs. If possible, compare prices offered in B2B²¹² procurement.
- Collect information about recent price changes. Inform yourself about prices in neighbouring geographic areas and about prices of possible alternative products.

²¹¹ See “Industry, product and service characteristics that help support collusion” above.

²¹² Business-to-Business (B2B) is a term commonly used to describe commerce comparisons between and among businesses.

- Collect information about past tenders for the same or similar products.
- Co-ordinate with other public sector procurers and clients who have recently purchased similar products or services to improve your understanding of the market and its participants.
- If you use external consultants to help you estimate prices or costs ensure that they have signed confidentiality agreements.

2. Design the tender process to maximise the potential participation of genuinely competing bidders

Effective competition can be enhanced if a sufficient number of credible bidders are able to respond to the invitation to tender and have an incentive to compete for the contract. For example, participation in the tender can be facilitated if procurement officials reduce the costs of bidding, establish participation requirements that do not unreasonably limit competition, allow firms from other regions or countries to participate, or devise ways of incentivising smaller firms to participate even if they cannot bid for the entire contract.

- Avoid unnecessary restrictions that may reduce the number of qualified bidders. Specify minimum requirements that are proportional to the size and content of the procurement contract. Do not specify minimum requirements that create an obstacle to participation, such as controls on the size, composition, or nature of firms that may submit a bid.
- Note that requiring large monetary guarantees from bidders as a condition for bidding may prevent otherwise qualified small bidders from entering the tender process. If possible, ensure amounts are set only so high as to achieve the desired goal of requiring a guarantee.
- Reduce constraints on foreign participation in procurement whenever possible.
- To the extent possible, qualify bidders during the procurement process in order to avoid collusive practices among a pre-qualified group and to increase the amount of uncertainty among firms as to the number and identity of bidders. Avoid a very long period of time between qualification and award, as this may facilitate collusion.

- Reduce the preparation costs of the bid. This can be accomplished in a number of ways:
 - By streamlining tendering procedures across time and products (e.g. use the same application forms, ask for the same type of information, etc.).²¹³
 - By packaging tenders (i.e. different procurement projects) to spread the fixed costs of preparing a bid.
 - By keeping official lists of approved contractors or certification by official certification bodies.
 - By allowing adequate time for firms to prepare and submit a bid. For example, consider publishing details of pipeline projects well in advance using trade and professional journals, websites or magazines.
 - By using an electronic bidding system, if available.
- Whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof, rather than bids on the whole contract only.²¹⁴ For example, in larger contracts look for areas in the tender that would be attractive and appropriate for small and medium sized enterprises.
- Do not disqualify bidders from future competitions or immediately remove them from a bidding list if they fail to submit a bid on a recent tender.
- Be flexible in regard to the number of firms from whom you require a bid. For example, if you start with a requirement for 5 bidders and receive bids from only 3 firms, consider whether it is possible to obtain

²¹³ Streamlining the preparation of the bid nevertheless should not prevent procurement officials from seeking continuous improvements of the procurement process (procedure chosen, quantities bought, timing, etc.).

²¹⁴ Procurement officials should also be aware that, if wrongly implemented (e.g. in an easily predictable manner), the ‘splitting contracts’ technique could provide an opportunity to conspirators to better allocate contracts.

a competitive outcome from the 3 firms, rather than insisting on a re-tendering exercise, which is likely to make it all the more clear that competition is scarce.

3. Define your requirements clearly and avoid predictability

Drafting the specifications and the terms of reference (TOR) is a stage of the public procurement cycle which is vulnerable to bias, fraud and corruption. Specifications/TOR should be designed in a way to avoid bias and should be clear and comprehensive and not discriminatory. They should, as a general rule, focus on functional performance, namely on what is to be achieved rather than how it is to be done. This will encourage innovative solutions and value for money. How tender requirements are written affects the number and type of suppliers that are attracted to the tender and, therefore, affects the success of the selection process. The clearer the requirements, the easier it will be for potential suppliers to understand them, and the more confidence they will have when preparing and submitting bids. Clarity should not be confused with predictability. More predictable procurement schedules and unchanging quantities sold or bought can facilitate collusion. On the other hand, higher value and less frequent procurement opportunities increase the bidders' incentives to compete.

- Define your requirements as clearly as possible in the tender offer. Specifications should be independently checked before final issue to ensure they can be clearly understood. Try not to leave room for suppliers to define key terms after the tender is awarded.
- Use performance specifications and state what is actually required, rather than providing a product description.
- Avoid going to tender while a contract is still in the early stages of specification: a comprehensive definition of the need is a key to good procurement. In rare circumstances where this is unavoidable, require bidders to quote per unit. This rate can then be applied once quantities are known.
- Define your specifications allowing for substitute products or in terms of functional performance and requirements whenever possible. Alternative or innovative sources of supply make collusive practices more difficult.

- Avoid predictability in your contract requirements: consider aggregating or disaggregating contracts so as to vary the size and timing of tenders.
- Work together with other public sector procurers and run joint procurement.
- Avoid presenting contracts with identical values that can be easily shared among competitors.

4. Design the tender process to effectively reduce communication among bidders

When designing the tender process, procurement officials should be aware of the various factors that can facilitate collusion. The efficiency of the procurement process will depend upon the bidding model adopted and also on how the tender is designed and carried out. Transparency requirements are indispensable for a sound procurement procedure to aid in the fight against corruption. They should be complied with in a balanced manner, in order not to facilitate collusion by disseminating information beyond legal requirements. Unfortunately, there is no single rule about the design of an auction or procurement tender. Tenders need to be designed to fit the situation. Where possible, consider the following:

- Invite interested suppliers to dialogue with the procuring agency on the technical and administrative specifications of the procurement opportunity. However, avoid bringing potential suppliers together by holding regularly scheduled pre-bid meetings.
- Limit as much as possible communications between bidders during the tender process.²¹⁵ Open tenders enable communication and signalling between bidders. A requirement that bids must be submitted in person provides an opportunity for last minute communication and deal-making among firms. This could be prevented, for example, by using electronic bidding.
- Carefully consider what information is disclosed to bidders at the time of the public bid opening.

²¹⁵ For example if the bidders need to do a site inspection, avoid gathering the bidders in the same facility at the same time.

- When publishing the results of a tender, carefully consider which information is published and avoid disclosing competitively sensitive information as this can facilitate the formation of bid-rigging schemes, going forward.
- Where there are concerns about collusion due to the characteristics of the market or product, if possible, use a first-price sealed bid auction rather than a reverse auction.
- Consider if procurement methods other than single stage tenders based primarily on price can yield a more efficient outcome. Other types of procurement may include negotiated tenders²¹⁶ and framework agreements.²¹⁷
- Use a maximum reserve price only if it is based on thorough market research and officials are convinced it is very competitive. Do not publish the reserve price, and keep it confidential in the file or deposit it with another public authority.
- Beware of using industry consultants to conduct the tendering process, as they may have established working relationships with individual bidders. Instead, use the consultant's expertise to clearly describe the criteria/specification, and conduct the procurement process in-house.
- Whenever possible, request that bids be filed anonymously (e.g. consider identifying bidders with numbers or symbols) and allow bids to be submitted by telephone or mail.
- Do not disclose or unnecessarily limit the number of bidders in the bidding process.

²¹⁶ In the negotiated tenders the procurer sets out a broad plan and the tenderer(s) then work out the details with the procurer, thereby arriving at a Price.

²¹⁷ In framework agreements, the procurer asks a large number of firms, say 20, to submit details of their ability in terms of qualitative factors such as experience, safety qualifications, etc., and then chooses a small number, say 5 tenderers, to be in a framework- subsequent jobs are then allocated primarily according to ability or may be the subject of further 'mini' tenders with each of the tenderers submitting a price for the job.

- Require bidders to disclose all communications with competitors. Consider requiring bidders to sign a Certificate of Independent Bid Determination.²¹⁸
- Require bidders to disclose upfront if they intend to use subcontractors, which can be a way to split the profits among bid riggers.
- Because joint bids can be a way to split profits among bid riggers, be particularly vigilant about joint bids by firms that have been convicted or fined by the competition authorities for collusion. Be cautious even if collusion occurred in other markets and even if the firms involved do not have the capacity to present separate bids.
- Include in the tender offer a warning regarding the sanctions in your country for bid rigging, e.g. suspension from participating in public tenders for a certain period, any sanctions if the conspirators signed a Certificate of Independent Bid Determination, the possibility for the procuring agency to seek damages, and any sanctions under the competition law.
- Indicate to bidders that any claims of increased input costs that cause the budget to be exceeded will be thoroughly investigated.²¹⁹
- If, during the procurement process, you are assisted by external consultants, ensure that they are properly trained, that they sign confidentiality agreements, and that they are subject to a reporting requirement if they become aware of improper competitor behaviour or any potential conflict of interest.

218

A Certificate of Independent Bid Determination requires bidders to disclose all material facts about any communications that they have had with competitors pertaining to the invitation to tender. In order to discourage non-genuine, fraudulent or collusive bids, and thereby eliminate the inefficiency and extra cost to procurement, procurement officials may wish to require a statement or attestation by each bidder that the bid it has submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded. Consideration may be given to requiring the signature of an individual with the authority to represent the firm and adding separate penalties for statements that are fraudulently or inaccurately made.

219

Cost increases during the execution phase of a contract should be carefully monitored as they may be a front for corruption and bribery.

5. Carefully choose your criteria for evaluating and awarding the tender

All selection criteria affect the intensity and effectiveness of competition in the tender process. The decision on what selection criteria to use is also important as a form of maintaining a pool of potential credible bidders with a continuing interest in bidding on future projects. It is therefore important to ensure that qualitative selection and awarding criteria are chosen in such a way that credible bidders, including small and medium enterprises, are not deterred unnecessarily.

- When designing the tender offer, think of the impact that your choice of criteria will have on future competition.
- Whenever evaluating bidders on criteria other than price (e.g., product quality, post-sale services, etc.) such criteria need to be described and weighted adequately in advance in order to avoid post-award challenges. When properly used, such criteria can reward innovation and cost-cutting measures, along with promoting competitive pricing. The extent to which the weighting criteria are disclosed in advance of the tender closing can affect the ability of the bidders to co-ordinate their bid.
- Avoid any kind of preferential treatment for a certain class, or type, of suppliers.
- Do not favour incumbents.²²⁰ Tools that ensure as much anonymity as possible throughout the procurement process may counteract incumbent advantages.
- Do not over-emphasise the importance of performance records. Whenever possible, consider other relevant experience.
- Avoid splitting contracts between suppliers with identical bids. Investigate the reasons for the identical bids and, if necessary, consider re-issuing the invitation to tender or award the contract to one supplier only.
- Make inquiries if prices or bids do not make sense, however never discuss these issues with the bidders collectively.

²²⁰

The incumbent is the company currently supplying the goods or services to the public administration and whose contract is coming to an end.

- Whenever possible under the legal requirements governing the award notices, keep the terms and conditions of each firm's bid confidential. Educate those who are involved in the contract process (e.g., preparation, estimates, etc.) about strict confidentiality.
- Reserve the right not to award the contract if it is suspected that the bidding outcome is not competitive.

6. Raise awareness among your staff about the risks of bid rigging in procurement

Professional training is important to strengthen procurement officials' awareness of competition issues in public procurement. Efforts to fight bid rigging more effectively can be supported by collecting historical information on bidding behaviour, by constantly monitoring bidding activities, and by performing analyses on bid data. This helps procurement agencies (and competition authorities) to identify problematic situations. It should be noted that bid rigging may not be evident from the results of a single tender. Often a collusive scheme is only revealed when one examines the results from a number of tenders over a period of time.

- Implement a regular training Programme on bid rigging and cartel detection for your staff, with the help of the competition agency or external legal consultants.
- Store information about the characteristics of past tenders (e.g., store information such as the product purchased, each participant's bid, and the identity of the winner).
- Periodically review the history of tenders for particular products or services and try to discern suspicious patterns, especially in industries susceptible to collusion.²²¹
- Adopt a policy to review selected tenders periodically.
- Undertake comparison checks between lists of companies that have submitted an expression of interest and companies that have submitted bids to identify possible trends such as bid withdrawals and use of sub-contractors.

²²¹ See "Industry, product and service characteristics that help support collusion" above.

- Conduct interviews with vendors who no longer bid on tenders and unsuccessful vendors.
- Establish a complaint mechanism for firms to convey competition concerns. For example, clearly identify the person or the office to which complaints must be submitted (and provide their contact details) and ensure an appropriate level of confidentiality.
- Make use of mechanisms, such as a whistle-blower system, to collect information on bid rigging from companies and their employees. Consider launching requests in the media to invite companies to provide the authorities with information on potential collusion.
- Inform yourself about your country's leniency policy,²²² if applicable, and review your policy on suspension from qualification to bid, where there has been a finding of collusive activity, to determine whether it is harmonious with your country's leniency policy.
- Establish internal procedures that encourage or require officials to report suspicious statements or behaviour to the competition authorities in addition to the procurement agency's internal audit group and comptroller, and consider setting up incentives to encourage officials to do so.
- Establish co-operative relationships with the competition authority (e.g. set up a mechanism for communication, listing information to be provided when procurement officials contact competition agencies, etc.).

²²²

Such policies generally provide for immunity from antitrust legal proceedings to the first party to apply under the policy who admits its involvement in particular cartel activities, including bid rigging schemes, and agrees to co-operate with the competition authority's investigation.

CHECKLIST FOR DETECTING BID RIGGING IN PUBLIC PROCUREMENT

Bid-rigging agreements can be very difficult to detect as they are typically negotiated in secret. In industries where collusion is common, however, suppliers and purchasers may be aware of long-standing bid-rigging conspiracies. In most industries, it is necessary to look for clues such as unusual bidding or pricing patterns, or something that the vendor says or does. Be on guard throughout the entire procurement process, as well as during your preliminary market research.

1. Look for warning signs and patterns when businesses are submitting bids

Certain bidding patterns and practices seem at odds with a competitive market and suggest the possibility of bid rigging. Search for odd patterns in the ways that firms bid and the frequency with which they win or lose tender offers. Sub-contracting and undisclosed joint venture practices can also raise suspicions.

- The same supplier is often the lowest bidder.
- There is a geographic allocation of winning tenders. Some firms submit tenders that win in only certain geographic areas.
- Regular suppliers fail to bid on a tender they would normally be expected to bid for, but have continued to bid for other tenders.
- Some suppliers unexpectedly withdraw from bidding.
- Certain companies always submit bids but never win.
- Each company seems to take a turn being the winning bidder.
- Two or more businesses submit a joint bid even though at least one of them could have bid on its own.

- The winning bidder repeatedly subcontracts work to unsuccessful bidders.
- The winning bidder does not accept the contract and is later found to be a subcontractor.
- Competitors regularly socialise or hold meetings shortly before the tender deadline.

2. Look for warning signs in all documents submitted

Tell-tale signs of a bid-rigging conspiracy can be found in the various documents that companies submit. Although companies that are part of the bid-rigging agreement will try to keep it secret, carelessness, or boastfulness or guilt on the part of the conspirators, may result in clues that ultimately lead to its discovery. Carefully compare all documents for evidence that suggests that the bids were prepared by the same person or were prepared jointly.

- Identical mistakes in the bid documents or letters submitted by different companies, such as spelling errors.
- Bids from different companies contain similar handwriting or typeface or use identical forms or stationery.
- Bid documents from one company make express reference to competitors' bids or use another bidder's letterhead or fax number.
- Bids from different companies contain identical miscalculations.
- Bids from different companies contain a significant number of identical estimates of the cost of certain items.
- The packaging from different companies has similar postmarks or post metering machine marks.
- Bid documents from different companies indicate numerous last minute adjustments, such as the use of erasures or other physical alterations.
- Bid documents submitted by different companies contain less detail than would be necessary or expected, or give other indications of not being genuine.
- Competitors submit identical tenders or the prices submitted by bidders increase in regular increments.

3. Look for warning signs and patterns in pricing

Bid prices can be used to help uncover collusion. Look for patterns that suggest that companies may be co-ordinating their efforts such as price increases that cannot be explained by cost increases. When losing bids are much higher than the winner's bid, conspirators may be using a cover bidding scheme. A common practice in cover pricing schemes is for the provider of the cover price to add 10% or more to the lowest bid. Bid prices that are higher than the engineering cost estimates or higher than prior bids for similar tenders may also indicate collusion. The following may be suspicious:

- Sudden and identical increases in price or price ranges by bidders that cannot be explained by cost increases.
- Anticipated discounts or rebates disappear unexpectedly.
- Identical pricing can raise concerns especially when one of the following is true:
 - Suppliers' prices were the same for a long period of time,
 - Suppliers' prices were previously different from one another,
 - Suppliers increased price and it is not justified by increased costs, or
 - Suppliers eliminated discounts, especially in a market where discounts were historically given.
- A large difference between the price of a winning bid and other bids.
- A certain supplier's bid is much higher for a particular contract than that supplier's bid for another similar contract.
- There are significant reductions from past price levels after a bid from a new or infrequent supplier, e.g. the new supplier may have disrupted an existing bidding cartel.
- Local suppliers are bidding higher prices for local delivery than for delivery to destinations farther away.

- Similar transportation costs are specified by local and non-local companies.
- Only one bidder contacts wholesalers for pricing information prior to a bid submission.
- Unexpected features of public bids in an auction, electronic or otherwise -- such as offers including unusual numbers where one would expect a rounded number of hundreds or thousands -- may indicate that bidders are using the bids themselves as a vehicle to collude by communicating information or signalling preferences.

4. Look for suspicious statements at all times

When working with vendors watch carefully for suspicious statements that suggest that companies may have reached an agreement or co-ordinated their prices or selling practices.

- Spoken or written references to an agreement among bidders.
- Statements that bidders justify their prices by looking at “industry suggested prices”, “standard market prices” or “industry price schedules”.
- Statements indicating that certain firms do not sell in a particular area or to particular customers.
- Statements indicating that an area or customer “belongs to” another supplier.
- Statements indicating advance non-public knowledge of competitors’ pricing or bid details or foreknowledge of a firm’s success or failure in a competition for which the results have yet to be published.
- Statements indicating that a supplier submitted a courtesy, complementary, token, and symbolic or cover bid.
- Use of the same terminology by various suppliers when explaining price increases.

- Questions or concerns expressed about Certificates of Independent Bid Determination, or indications that, although signed (or even submitted unsigned), they are not taken seriously.
- Cover letters from bidders refusing to observe certain tender conditions or referring to discussions, perhaps within a trade association.

5. Look for suspicious behaviour at all times

Look for references to meetings or events at which suppliers may have an opportunity to discuss prices, or behaviour that suggests a company is taking certain actions that only benefit other firms. Forms of suspicious behaviour could include the following:

- Suppliers meet privately before submitting bids, sometimes in the vicinity of the location where bids are to be submitted.
- Suppliers regularly socialise together or appear to hold regular meetings.
- A company requests a bid package for itself and a competitor.
- A company submits both its own and a competitor's bid and bidding documents.
- A bid is submitted by a company that is incapable of successfully completing the contract.
- A company brings multiple bids to a bid opening and chooses which bid to submit after determining (or trying to determine) who else is bidding.
- Several bidders make similar enquiries to the procurement agency or submit similar requests or materials.

6. A caution about indicators of bid rigging

The indicators of possible bid rigging described above identify numerous suspicious bid and pricing patterns as well as suspicious statements and behaviours. They should not however be taken as proof that firms are engaging in bid rigging. For example, a firm may have not bid on a particular tender offer because it was too busy to handle the work. High bids may simply reflect a different assessment of the cost of a project. Nevertheless, when suspicious patterns in bids and pricing are detected or when procurement agents hear odd statements or observe peculiar behaviour, further investigation of bid rigging is required. A regular pattern of suspicious behaviour over a period of time is often a better indicator of possible bid rigging than evidence from a single bid. Carefully record all information so that a pattern of behaviour can be established over time.

7. Steps procurement officials should take if bid rigging is suspected

If you suspect that bid rigging is occurring, there are a number of steps you should take in order to help uncover it and stop it.

- Have a working understanding of the law on bid rigging in your jurisdiction.
- Do not discuss your concerns with suspected participants.
- Keep all documents, including bid documents, correspondence, envelopes, etc.
- Keep a detailed record of all suspicious behaviour and statements including dates, who was involved, and who else was present and what precisely occurred or was said. Notes should be made during the event or while they are fresh in the official's memory so as to provide an accurate description of what transpired.
- Contact the relevant competition authority in your jurisdiction.
- After consulting with your internal legal staff, consider whether it is appropriate to proceed with the tender offer.

**ANNEX 2:
CERTIFICATE OF INDEPENDENT BID DETERMINATION
(COFECE)**

_____ [Name of agent or common representative],
representing _____ [Name of person or entity] (hereinafter and
interchangeably, the "Offerer" or "Bidder"), submitted the attached bid or
proposal (hereinafter "Offer"): [The power to represent must also include
signing this statement on behalf of all who are represented]:

To _____

[Name and Password for the process involved]

Convened by: _____

[Name of Convenor] (hereinafter, the "Convening Authority")

I come to present for myself and on behalf of the Offerer, the following
statement of integrity (hereinafter the "Declaration of Integrity"):

1. I have read and I understand the contents of this Certificate;
2. I understand that the accompanying bid will be disqualified if this
Certificate is found not to be true and complete in every respect;
3. I understand that if the Declaration of Integrity is not true I'm
personally engaged and engage my client in wrongful civil, criminal
and administrative responsibilities, and in particular, the penalties
incurred for those who falsely declare to an authority other than the
judicial authority in terms of Article 247, Section I of the Federal
Criminal Code. The foregoing is without prejudice to the penalties in
terms of the laws applicable to this procedure;

4. I know the Federal Economic Competition Act, in particular the provisions of Articles 53 and 127 sections I, IV, IX, X, and XI, and Article 254 bis of the Federal Penal Code;
5. Each person whose signature appears on the accompanying bid has been authorized by the Bidder to define the terms and conditions of the Offer and to sign on their behalf;
6. For the purposes of this Declaration of Integrity and the accompanying bid, I understand that the word “competitor” shall include any individual or organization, other than the Bidder, whether or not affiliated with the Bidder who:
 - a. Has submitted or could submit a bid in response to this call for tender;
 - b. Could potentially submit a bid in response to this call for tender;
7. The Bidder discloses that (check one of the following, as applicable):
 - a. The Bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with, any competitor;
 - b. The Bidder has entered into consultations, communications, agreements or arrangements with one or more competitors regarding this call for bids, and the Bidder discloses, in the attached document(s), complete details thereof, including the names of the competitors and the nature of, and reasons for, such consultations, communications, agreements or arrangements; [The information is especially relevant when the offer joint proposals or schemes involving subcontracting. In this case, you must include the terms and conditions involving the people involved];
8. In particular, without limiting the generality of paragraphs (7)(a) or (7)(b) above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:
 - a. Prices;
 - b. Methods, factors or formulas used to calculate prices;
 - c. The intention or decision to submit, or not to submit, a bid; or

-
- d. The submission of a bid which does not meet the specifications of the call for bids; except as specifically disclosed pursuant to paragraph (7)(b) above;
 9. In addition, there has been no consultation, communication, agreement or arrangement with any competitor regarding the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates, except as specifically authorized by the Convening Authority or as specifically disclosed pursuant to paragraph (7)(b) above;
 10. The terms of the accompanying bid have not been, and will not be, knowingly disclosed by the Bidder, directly or indirectly, to any competitor, with the object or effect of handling, fixing, or setting prices; manipulating, establishing or arranging methods, factors or formulas used to determine prices; affecting or inducing the intention or decision to submit or not Offer; or submitting a bid which does not meet the specifications of this process.

Moreover, the terms of the accompanying bid have not been, and will not be, knowingly disclosed by the Bidder, directly or indirectly, to any competitor, with the object or effect handling, fixing, or arranging the quality, quantity, specifications or details of shipping of the products or services referenced in this process or as set out in paragraph (7)(b) above.

11. I also show that by myself or through another person, I will refrain from adopting behaviours that the public servants of the Convening Authority, induce or alter the evaluations of proposals, the result of the procedure or other aspects that give more advantageous conditions to other participants.

(Printed Name and Signature of Authorized Agent of Bidder)

(Date)

ANNEX 3
CERTIFICATE OF INDEPENDENT PRICE DETERMINATION
(UNITED STATES, APRIL 1985)

(a) The offeror certifies that:

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to:

- (i) Those prices;
- (ii) The intention to submit an offer; or
- (iii) The methods of factors used to calculate the prices offered.

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory:

(1) Is the person in the offeror's organization responsible for determining the prices being offered in this bid or proposal, and that the signatory has not participated and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; or

(2) (i) Has been authorized, in writing, to act as agent for the following principals in certifying that those principals have not participated, and will not participate in any action contrary to paragraphs (a) (1) through (a) (3) of this provision _____ [insert full name of person(s) in the offerors's proposal, and the title of his or her position in the offeror's organization];

(ii) As an authorized agent, does certify that the principals named in subdivision (b)(2)(i) of this provision have not participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; and

(iii) As agent, has not personally participated, and will not participate, in any action contrary to paragraphs (a) (1) through (a) (3) of this provision.

(c) If the offeror deletes or modifies paragraph (a) (2) of this provision, the offeror must furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure.

More on Fighting bid rigging in public procurement at:

www.oecd.org/daf/competition