FIGHTING BID RIGGING IN PUBLIC PROCUREMENT

A review of the procurement rules and practices of PEMEX in Mexico

OECD

Please cite this publication as:
OECD (2016), *Fighting Bid Rigging in Public Procurement: A review of the procurement rules and practices of PEMEX in Mexico.*

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

Foreword

Sound public procurement policies help public buyers to achieve value for money. Such policies should provide guidance to public procurement officials to design competitive tender procedures, give incentives for suppliers to truly compete on the price and quality that they offer, and enable the detection of conspiracies among tenderers to rig bids and, thereby, benefit illegally at the expense of taxpayers. The OECD has, for a long time now, helped countries, and public entities in them, to design public procurement processes that promote competition, and to set up methods to detect collusive agreements. The Recommendation of the Council on Fighting Bid Rigging in Public Procurement, and the Guidelines which this Recommendation includes, are pioneering instruments in the fight against bid rigging based on international good practices.

The OECD works closely with governments and public entities to encourage and facilitate the implementation of its Recommendation and Guidelines. Since 2011, Mexico has sought to improve its procurement practices and step up its fight against bid rigging in partnership with the OECD. As the result of this partnership, the OECD has conducted reviews of the procurement regulations and practices of the Mexican Social Security Institute (Instituto Mexicano del Seguro Social, IMSS), the Government of the State of Mexico (Gobierno del Estado de México), the State's Employees' Social Security and Social Services Institute (Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado, ISSSTE) and the Federal Electricity Commission (Comisión Federal de Electricidad, CFE), and provided recommendations to help them prevent and detect bid rigging. In 2015, PEMEX (Petróleos Mexicanos) also requested to work closely with the OECD to improve its procurement organisation and methods. This report is the outcome of this co-operation.

PEMEX is the largest public entity and state productive enterprise in Mexico and one of the largest oil companies in the world, with 150 000 employees and an annual budget in 2015 of about MXN 570 billion. Its role is particularly important considering that Mexico is one of the world's leading oil producing and exporting countries, and that oil revenues account for a big part of the country's GDP. PEMEX is also one of the largest purchasers of goods, services and works in the Mexican public sector.

As a consequence of the recent reforms in the energy sector in Mexico, PEMEX's public procurement rules and processes were reformed. This report contains recommendations to PEMEX on how to enhance its new procurement regulations and procedures, so as to promote competition among suppliers and to avoid collusion. The implementation of the OECD recommendations, together with the awareness among PEMEX procurement officials -built through several OECD led workshops during the drafting of this report- on the nature, risks and costs of collusion, should enable PEMEX to increase the effectiveness of its procurement strategy and generate savings.

Acknowledgements

The report was prepared by the Competition Division of the Directorate for Financial and Enterprise Affairs of the OECD.

This report was drafted by Iratxe Gurpegui and reviewed by Antonio Capobianco and Despina Pachnou. The report benefited from valuable comments by Sabine Zigelski, Ruben Maximiano, Mathieu Cahen, Rosana Aragón Plaza and Leonardo Noyola from the OECD Secretariat, as well as from the senior competition consultant Ian Nielsen-Jones. Jennifer Allain edited the manuscript. Erica Agostinho prepared the manuscript for publication. Rosana Aragón Plaza and José Antonio García Rosas translated the report into Spanish. Rosana Aragón Plaza reviewed the translation and English-Spanish alignment.

The Review also takes into consideration comments and contributions from the Mexican Competition Authority (COFECE). Special thanks go to COFECE's President Commissioner Alejandra Palacios Prieto, and COFECE's Deputy Director General of International Affairs Carolina Garayzar for their active contribution to this project. Ambassador Dionisio Pérez-Jácome Friscione and Maya Alejandra Camacho Dávalos, Second Secretary at the Permanent Delegation of Mexico to the OECD, were instrumental in supporting the OECD in this project.

The OECD expresses its gratitude to PEMEX for its fruitful co-operation and leadership, in particular Director General José Antonio González Anaya, Director of Corporate Administration and Services Carlos Alberto Treviño Medina, Operative Director of Procurement and Supply Miguel Angel Servín Diago, former Director General Emilio Lozoya Austin, former Director of Corporate Administration and Services Arturo Henriquez Autrey and all the team of procurement and the departments involved in this process.

This report incorporates information shared during six OECD workshops on fighting bid rigging in PEMEX, which took place between September 2015 and January 2016 in Mexico City, Villahermosa, Poza Rica, Ciudad del Carmen and Coatzacoalcos. Special thanks to PEMEX and its officers for the support in organising and carrying out the workshops.

The OECD is also grateful to the expert speakers who participated in the workshops: the General Director for Cartels at COFECE Francisco Rodrigo Téllez, Director of Research at the Directorate General for Cartels at COFECE Víctor Meyer, Deputy Director General at Directorate General for Cartels at COFECE Andrea Marván, Director of Legal and International Affairs at COFECE Patricio Cumming, senior competition consultants Carolyn Galbreath and Ian Nielsen-Jones, Chief of Staff of the General Superintendence at the Brazilian Competition Authority (CADE) Amanda Athayde and Co-ordinator of the Department of Economic Studies at the Colombian Competition Authority (SIC) Juan Pablo Herrera.

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Executive Summary

The 2013 Mexican energy reform opened the energy sector to competition while keeping the ownership of Mexico's hydrocarbons under state control. In 2014, following this reform, new procurement rules for PEMEX were adopted, with the goal of making its procurement processes more efficient and effective. In 2015, PEMEX and the OECD concluded an agreement to carry out a review of PEMEX's new procurement regime and procedures to promote competition and fight collusion, in accordance with international good practices.

This report assesses PEMEX's procurement regime against the OECD Recommendation and Guidelines on Fighting Bid Rigging in Public Procurement, and makes specific recommendations for reform.

The basic principles of PEMEX's public procurement regime are set by the PEMEX Act and its implementing Regulation; in addition, many rules governing public procurement in PEMEX are internal, adopted by PEMEX itself. The report shows that PEMEX can adapt its internal rules so as to enhance its procurement procedures.

Some of the most salient findings of the report are that PEMEX does not have a separate department to conduct market analysis, uses many exceptions to open tender procedures and the tools created for tracking procurement data do not identify red flags in relation to collusion. The OECD recommendations are aimed at addressing these and other limitations of PEMEX's public procurement regime.

Key recommendations

Staying informed about the market

- Create a specialised department dedicated to market analysis for all contracting procedures, in order to collect more comprehensive and reliable procurement information.
- Set up a step-by-step methodology for conducting market analysis, in order to identify market characteristics that facilitate collusion.

Maximising the potential participation of genuinely competing bidders

- Limit the use of exceptions to open tender procedures, which currently can be excessive and unjustified.
- Open the market to foreign bidders by abolishing the current restrictions on their participation, without infringing the relevant legal framework.
- Make electronic bidding the default bidding system, which will make the procedures more efficient and collusion more difficult.
- Modify internal rules regarding subcontracting and joint bids in order to limit them to cases in which they are justified by pro-competitive effects, specifying in the procurement document the scope of both modalities.

- Enhance the participation of SMEs, which are related to the industry and that add value to the business, in open public tenders so as to maximise the number of participants in competitive tenders.
- Keep the payment for tender documents exceptional, in order to reduce the costs of participation in a contracting procedure.

Defining requirements clearly and avoiding predictability

- Increase the use of functional requirements, which would specify what PEMEX would like to achieve in terms of results, rather than how to do so through a specific product or method, to promote innovation, competition and equality.

Reducing communication among bidders

- Manage the information flow towards third parties in a way that avoids sensitive information being disclosed unnecessarily, for instance by creating a public and an internal version of PEMEX's annual procurement programme and only publishing the public one, and not including sensitive information in the minutes of opening of proposals.
- Avoid creating the conditions for bidders to meet, such as physical clarification meetings or site visits, by limiting them to the minimum necessary.
- Abolish the practice of inviting external persons (for example, industry associations or "electronic witnesses") to the different events of the procurement procedure and of broadcasting these events on the internet.
- Require that bidders sign a Certificate of Independent Bid Determination and insert a clause in the calls for tender warning potential bidders of the sanctions for bid rigging.

Carefully choosing criteria for evaluating and awarding the tender

- Do not publish maximum and minimum reference prices, which may provide a basis for collusion.
- Set conditions under which a contract may be split, in order to avoid market sharing.

Raising awareness among public procurement officials

- Set up regular training on collusion for procurement officials; create a hotline and a predefined system to report suspicions of bid rigging, providing public procurement officials with incentives to fight bid rigging.
- Temporarily exclude from tenders companies convicted for having participated in bid rigging and insert a contractual penalty for suppliers found to be involved in bid rigging.
- Continue working on the development of a complete, comprehensive and easily accessible electronic record of the procurement documents.
- Adapt PEMEX's Comprehensive Information Tool on Suppliers to identify red flags in relation to the risks of bid rigging during the tender process.
- Establish closer co-operation with the Mexican competition authorities COFECE and IFT.

Chapter 1. Introduction

1.1 PEMEX and the energy reform

1.1.1 Energy reform of 2013

On 21 December 2013 the Mexican Constitution was modified[1] with the purpose of reforming the energy sector. As part of this reform, the Mexican Oil Act (*Ley de Petróleos Mexicanos*, hereinafter "PEMEX Act") of 11 August 2014 and its implementing regulation (*Reglamento de la Ley de Petróleos Mexicanos*) of 31 October 2014 were adopted.

Petróleos Mexicanos (Mexican Petroleums, PEMEX), Mexico's national oil and gas company, has been operating as a state-owned monopoly since 1938. Until the energy reform of 2013, the state had exclusive rights: to explore, exploit, refine and process crude oil and natural gas; produce basic petrochemicals and liquid petroleum gas; and carry out retail sales of such hydrocarbon products. For the first time in 77 years the energy reform allows competition with private sector operators in the energy sector while keeping the ownership of Mexico's hydrocarbons under state control. Private companies will be awarded licenses or contracts either directly by the government or in association with PEMEX to explore and exploit sites and to treat, distribute and sell hydrocarbon products. These licences and contracts will be awarded through bidding processes that will involve international companies.

The reform establishes that PEMEX will keep part of the exploitation and exploration activities ("grandfathered" activities). Before launching the international bidding processes, a so-called "round zero" process was organised. The aim of this process was to grant PEMEX exploitation and exploration rights without having to compete with private companies in a bidding process. As a result, PEMEX has kept the right to exploit 83% of the proven and probable reserves in Mexico and to explore 21% of the prospective resources of Mexico. PEMEX will, therefore, keep its lead position in the exploitation and exploration market. The exploitation and exploration of the remaining areas have been subject to a first international bidding process, the so-called "round one", which began in the summer of 2015. The government expects that succeeding open bids will attract USD 50 billion dollars of investment between 2015 and 2018 (see OECD, 2015a).

With regard to midstream and downstream activities (treatment and refining of oil, production of petrochemicals, transportation and retail of hydrocarbons), private companies will be able to enter the market through permits granted by the government.

On 1 January 2016, the government started granting permits for the retail sale of gasoline and fuel to any qualified person. The government planned to issue import permits for gasoline and diesel fuel in January 2017 but this took place earlier, in April 2016.[2]

1.1.2 New structure and organisation of PEMEX

Under the energy reform, PEMEX has been transformed into a state productive company (Snipeliski Nischli, 2014).[3] This new legal form is a company which is owned by the state and competes in the market like any other private company ruled by principles of private law (Snipeliski Nischli, 2014).[4] The

aim of a state productive company is to generate economic value and increase the state's revenue. PEMEX has its own legal personality and assets as well as management and operational autonomy based on corporate governance (Snipeliski Nischli, 2014). The government has only retained the power to approve the financial balance target and ceilings for the wage bill and debt. All other activities and operations are regulated by the Board of Directors.

Prior to the energy reform, the Board of PEMEX was composed of:

- six representatives of the state, appointed by the government
- five representatives from the Petroleum Workers' Union, who have to be active members and permanent employees of PEMEX
- four members appointed by the government and ratified by the Senate, who represented the state and, in this capacity, were considered as public officials.

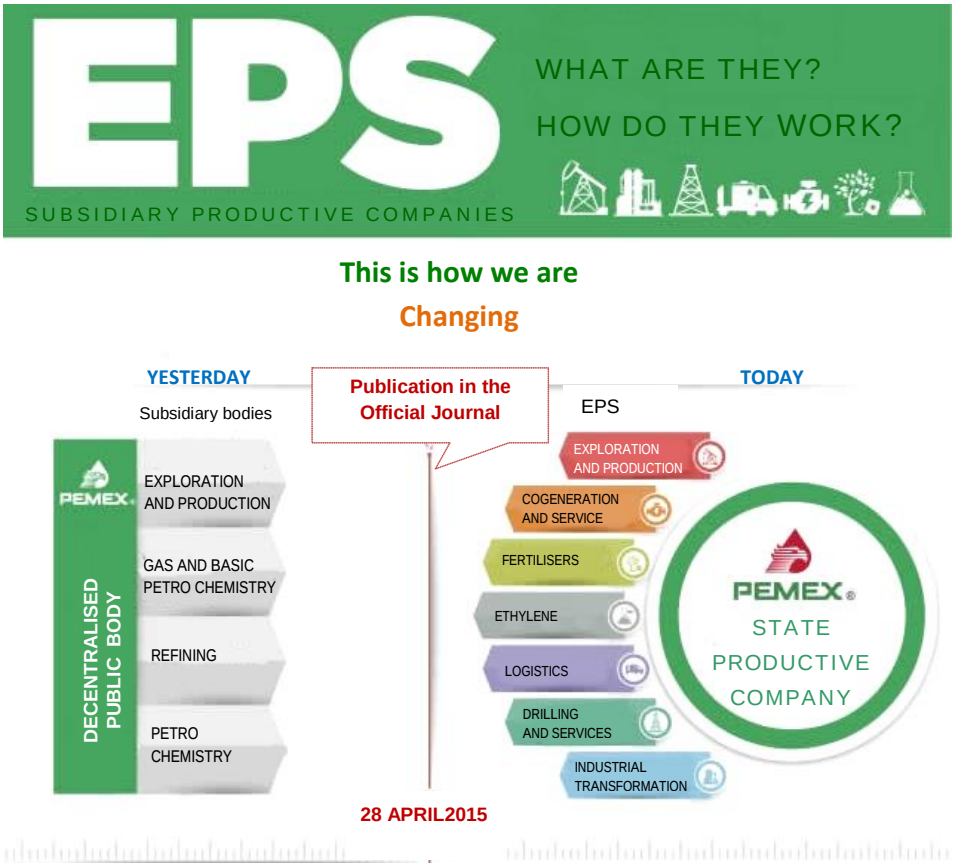
Following the reform, and in accordance with the PEMEX Act and the Articles of Organisation,[5] PEMEX is managed by the Board of Directors and a Director General. The Board of Directors is responsible for defining the strategic vision of PEMEX, and its various subsidiaries. The Director General is responsible for the operations and management of PEMEX in accordance with the strategies set by the Board of Directors.

The PEMEX Board of Directors is at present comprised of five government directors and four independent members. Overall, the reform of the Board of Directors is a positive step in relation to the OECD Guidelines on Corporate Governance of State-Owned Enterprises, as the inclusion of independent members is in accordance with internationally recommended good practices (OECD, 2015b).

As shown by Figure 1, the structure of PEMEX has also been modified. Before the reform, PEMEX was organised into four decentralised bodies (Exploration and Production, Gas and Basic Petro Chemistry, Refining and Petro Chemistry) and a corporate body. Since 28 April 2015, PEMEX is now divided into a corporate body and seven subsidiary productive companies: 1) PEMEX Exploration: 2) PEMEX Cogeneration and Services; 3) PEMEX Fertilisers; 4) PEMEX Ethylene; 5) PEMEX Logistics; 6) PEMEX Drilling and Services; and 7) PEMEX Industrial Transformation. The subsidiary productive companies have their own budgets and are independent entities but PEMEX centralises the strategic decisions, management and co-ordination of their activities.

PEMEX's public procurement activities have also been reorganised. As a state productive company, PEMEX will no longer apply the general public procurement laws.[6] A new set of rules on procurement was adopted for PEMEX in 2014 (see Chapter 2). Before the reform, there were five different procurement processes (one process per decentralised body plus one corporate procurement process). Following the reform, PEMEX has standardised and centralised all of its procurement activities into one process.[7]

Figure 1. Evolution of the structure of PEMEX



Source: PEMEX reply of 31 August 2015 to the OECD's questionnaire for this project.

1.2 Project background and scope

Since 2011, Mexico has sought to improve its procurement practices and step up its fight against bid rigging in partnership with the OECD. When the Mexican Social Security Institute (*Instituto Mexicano del Seguro Social*, 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 to formally commit itself to adopting and implementing the OECD Competition Committee's Guidelines for Fighting Bid Rigging in Public Procurement.[8] The IMSS report[9] was followed by three similar reports: one with the Government of the State of Mexico (*Gobierno del Estado de México*),[10] another with the State's Employees' Social Security and Social Services Institute (*Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado*, ISSSTE)[11] and another with the Federal Electricity Commission (*Comisión Federal de Electricidad*, CFE).[12]

The PEMEX Act and Regulation establish a new set of public procurement rules and restructure all of PEMEX's public procurement processes into a unique standardised and centralised process. This report consists of an analysis of the new normative framework and business rules applicable to PEMEX's procurement process and sourcing. The report aims to identify areas of opportunity for improving the fight against bid rigging.

In parallel with the preparation of the report, between September 2015 and January 2016, the OECD has organised workshops to train PEMEX procurement officials on: 1) how to design effective and competitive public procurement procedures with the aim of reducing the risks of bid rigging; and 2) how to detect collusive schemes during the course of procurement.

In order to prepare this report, the OECD met with officials from PEMEX from different departments involved in procurement. This report is also based on information provided to the OECD by PEMEX over the course of the project.

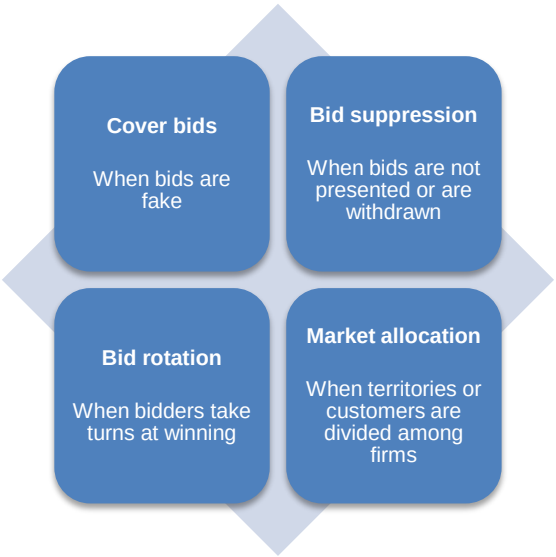
1.3 Public procurement and bid rigging

Procurement is the process of purchasing goods or services. Public procurement is a crucial pillar of strategic governance and services delivery for governments. Given the sheer volume of spending it represents, well-governed public procurement can and must play a major role in fostering public sector efficiency and establishing citizens' trust (OECD, 2015d). The primary objective of an effective procurement policy is the achievement of "value for money". Both public and private organisations often rely upon a competitive bidding process to achieve "value for money" in their procurement activities. The competitive process can only achieve lower prices, better quality and/or innovation when companies genuinely compete, that is, they set their terms and conditions honestly and independently (OECD, 2011). Competition is restricted if competing bidders agree amongst themselves on the terms and conditions of their offers, i.e. if they collude.

Collusion or cartel is the general term used to define agreements between companies which should be competing in the market but decide not to do so by fixing prices for goods and services, allocating markets or customers, and/or by restricting output. As a result of these agreements, which operate in secrecy and can be difficult to detect, consumers (including governments) pay higher prices and/or get lower quality goods or services than they would in a market where competition is not restricted. Collusion is considered an illegal practice in all OECD countries, and in many countries (including Mexico) it is also a criminal offence.

Bid rigging is the term used for collusion that occurs in tenders (OECD, 1998).[13] Bidders in a procurement process are meant to compete independently against each other to win the contract, and it is via this mechanism that "value for money" is achieved. Bid rigging is any agreement (written or oral) between bidders that limits or reduces competition in a tender process. Bid rigging can take many forms, which are illustrated in Figure 2. These practices are by no means mutually exclusive, and can occur simultaneously.

Figure 2. Different forms of bid rigging



Source: OECD (2009), "Guidelines for fighting bid rigging in public procurement", OECD, www.oecd.org/daf/competition/cartels/42851044.pdf

Schemes frequently include components that provide an appearance of competition. They may, for instance, include *cover bids*, where 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.

In a *market allocation* scenario, the cartel members may divide the market into geographic areas, and decide in advance which firms should be submitting the winning bid in each area. Cartel members could also divide the market by customers. In this case, the cartel members may decide which firm should be submitting the winning bid for each client. Other cartel members would decline to participate in the bidding process, or submit cover bids. Finally, in *bid rotation*, cartel members continue to bid for different contract opportunities although they take turns in winning the tenders.

As a result of bid rigging, companies obtain an (illegal) monopoly profit. Companies engaged in bid rigging use different mechanisms to allocate this profit. The 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 profit from its appointed customers without competition. 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 subcontracts from the winning bidder.

Finally, cartels often include monitoring mechanisms to ensure that the cartel members respect collusive arrangements. The aim of these monitoring mechanisms is to supervise that every member of the cartel is complying with the terms of the collusive agreement and to adopt retaliation measures, if this is not the case. Without supervision and retaliation mechanisms, it is more difficult for a cartel to operate. When firms in a cartel are found to deviate from the collusive agreement, retaliation or punishment is usually expected from the other members of the cartel.

Bid rigging can arise in any procurement procedure, whether in the public or private sector. However, the characteristics of public procurement tenders make them particularly vulnerable to bid

rigging. Unlike private purchasers, governments have limited strategic options. Whereas a private purchaser can choose his purchasing strategy flexibly, the public sector is subject to transparency requirements and generally constrained by legislation and detailed administrative regulations and procedures on public procurement. These rules are set to avoid any abuse of discretion by the public sector. However, full transparency of the procurement process and its outcome can promote collusion. Disclosing information such as the identity of the bidders and the terms and conditions of each bid allows competitors to detect deviations from a collusive agreement, punish those firms and better co-ordinate future tenders. Moreover, regulatory requirements dictating particular procurement procedures can render the process excessively predictable, creating further opportunity for collusion. In addition, public procurement frequently involves large, high-value projects, which present attractive opportunities for collusion. Certain sectors frequently subject to public procurement, including construction and medical goods and services, may be particularly prone to anti-competitive practices (OECD, 2011). Another element that makes public procurement more vulnerable to anti-competitive conduct is the fact that fighting collusion is not always a high priority for public procurement officials.

Distortion of the procurement process via collusion typically has a particularly detrimental effect in the public sector. The failure to achieve "value for money" has a negative impact on the range and depth of services and infrastructure that a state can provide to the detriment of the most disadvantaged in society who rely the most on public services. Moreover, collusion in public procurement can diminish public confidence in the government and the market, ultimately inhibiting a state's economic development (OECD, 2011).

Box 1. Collusion and corruption

Collusion sometimes occurs at the same time as corruption in public procurement tenders. Collusion and corruption are, however, two distinct issues. Collusion is a horizontal relationship between bidders which restricts competition and, in public procurement, it harms the public purchaser. Corruption involves a vertical relationship between one or more bidders and one or more procurement officials. A procurement official receives bribes or rewards at the expense of the public purchaser (or the public in general) in exchange of designing the procurement process or altering the outcome of the process in order to favour a particular firm (OECD, 2012c).

Despite the fact that they are distinct practices, collusion and corruption may have a mutually reinforcing effect. For example, economic rents derived from collusion may be used to corrupt the procurement official, while collusion is also facilitated by having an "insider" in the public agency that provides the bidders with the necessary information to manipulate bids in a plausible manner and may even operate as a cartel enforcement mechanism (OECD, 2011).

The example of the Marine Hose case

In the Marine Hose case, Bridgestone, a Tokyo-headquartered manufacturer of marine hose and other industrial products, participated in a conspiracy to fix prices and allocate market shares of marine hose in the United States and elsewhere. This company also conspired to make corrupt payments to government officials in various Latin American countries to obtain and retain business. The US Department of Justice said Bridgestone participated in conspiracies from as early as January 1999, and continuing until as late as May 2007.

According to the antitrust charge, Bridgestone and its co-conspirators agreed to allocate shares of the marine hose market and to use a price list for marine hose in order to implement the conspiracy. The US Department of Justice also maintained that, in order to secure sales of marine hose in Latin America, Bridgestone authorised and approved corrupt payments to foreign government officials employed at state-owned entities. Bridgestone's local sales agents agreed to pay employees of state-owned customers a percentage of the total value of proposed sales. When Bridgestone secured a sale, it would pay its local sales agent a "commission" consisting of not only the local sales agent's actual commission, but also the payments to be made to employees of the state-owned customer. The local sales agent was then responsible for passing the agreed-upon corrupt payment to the employees of the customer.

Bridgestone Corporation pleaded guilty on 15 September 2011. Pursuant to its plea agreement, it was sentenced to a criminal fine of USD 28 million.

Source: OECD (2013b), "Steps taken by parties to implement and enforce the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions", DAF/WGB(2013)13/REV2, OECD.

This report analyses PEMEX's new normative procurement framework and identifies, in the light of OECD best practices, areas of improvement to reduce the risk of bid rigging. Corruption-related issues are not analysed in this report.

1.4 Competition authorities dealing with bid rigging cases in Mexico

There are two competition authorities in Mexico dealing with, among other things, bid-rigging cases: the Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*, COFECE) and the Federal Telecommunications Institute (*Instituto Federal de Telecomunicaciones*, IFT).[14]

The new Federal Law on Economic Competition was enacted on 7 July 2014.[15] It establishes the operational features and concrete limits of the provisions of Mexico's 2013 constitutional reform, as applicable to competition, and grants to both authorities the powers to guarantee and defend free market access and competition in Mexico.

1.4.1 Federal Economic Competition Commission

The COFECE is an autonomous body of the Mexican State with its own legal personality and assets, created in accordance with the provisions of the constitutional reform of June 2013. This new institution is the successor of the Federal Competition Commission (hereafter "CFC") created in 1993.

The COFECE is responsible for enforcing the Federal Economic Competition Law in all sectors of the economy except telecommunications and broadcasting. It is committed to promote free market access and competition and to prevent, investigate and combat monopolies, monopolistic practices, anti-competitive mergers and other restrictions on the efficient functioning of markets.

Within the COFECE, the directorate dealing with bid-rigging cases is the "*Dirección General de Investigación de Practicas Monopólicas Absolutas*" ("Directorate General of Absolute Monopolistic Practices Investigations").

1.4.2 Federal Telecommunications Institute

The IFT was created to replace the Federal Telecommunications Commission (COFETEL) as the regulator for the broadcasting and telecommunications sector, but was provided with a much broader power than its predecessor. The COFETEL was an administrative agency with delegated powers within the executive branch and was financially dependent upon the Ministry of Communications and Transportation, although it had the technical and operational autonomy to regulate and promote the efficient development of telecommunications in Mexico.[16]

The IFT is an autonomous constitutional body with legal autonomy and its own budget, whose mandate is to promote the efficient development of the broadcasting and telecommunications sectors in Mexico in accordance with the terms of the Constitution and the implementing laws. The IFT is responsible for regulating, promoting and supervising the use and exploitation of the radio spectrum and networks and the provision of broadcasting and telecommunications services, as well as access to active and passive infrastructures and other essential facilities. It is also the competition authority with exclusive powers for promoting competition within the broadcasting and telecommunications sectors. In other words, the IFT is the telecommunications and broadcasting regulatory and competition authority.

The IFT has an investigative authority and an economic competition unit that deal with issues relating to the enforcement of the Federal Law for Economic Competition.[17]

1.5 The 2012 OECD Recommendation on Fighting Bid Rigging in Public Procurement and the 2009 Guidelines for Fighting Bid Rigging in Public Procurement

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

The earlier 2009 Guidelines for Fighting Bid Rigging in Public Procurement[18] (the "OECD Guidelines"), developed and approved by the OECD Competition Committee are particularly important in this endeavour. These Guidelines are based on 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.

The OECD Guidelines identify a number of market characteristics that can facilitate bid-rigging schemes. These characteristics include markets with a small number of competitors, high barriers to entry or where an industry is tightly organised and its members have opportunities to meet often. Other market conditions that favour bid rigging include stable market conditions, little or no technological change, few if any substitutes and repetitive bidding. Finally, identical or simple products or services can facilitate collusion because they make the arrangements easier.

The OECD Guidelines also include two checklists. The first 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 behaviour of bidders, suspicious statements or pricing patterns that should alert procurement officials to the fact that the procurement process may have been manipulated.

The Recommendation and the OECD Guidelines are widely disseminated and relied upon and are essential instruments to facilitate the work of governments in detecting and reducing anti-competitive practices in public procurement.

1.5.1 Checklist for designing the procurement process to reduce the risks of bid rigging

This section summarises the six broad sections of the design checklist.

1. Know the characteristics of 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 should also know whether the relevant industry exhibits some of the characteristics that make collusion more likely.

2. Maximise the number of genuinely competing bidders

Procurement officials should design the tender process to maximise the potential participation of genuine competitors. They should, for example, avoid introducing unnecessary restrictions on the size or nationality of firms that may submit bids. Similarly, they should seek to reduce the costs of bidding. This can be done in a number of ways. For instance, procurers can reduce participation costs for bidders by using the same application forms or contract models, so that bidders do not spend time reviewing them from one procedure to another, electronic bidding systems, which cut down on printing and submission

costs, and timely announcements of tenders, to allow interested suppliers adequate opportunities to study the tender and prepare their offer.

3. Use clear requirements and avoid predictability

Officials should define product and service requirements clearly, but avoid predictability. Drafting specifications and the formulation of terms of reference is a critical stage of the public procurement process. Emphasis should be on what needs to be done or delivered rather than on how it is executed, since excessive and unnecessarily specific requirements may discourage innovative solutions and reduce the number of potential bidders. Also, predictable procurement schedules and unchanging quantities bought can facilitate collusion. Aggregating or disaggregating contracts so as to vary the size and timing of tenders help avoid predictability and make it more difficult for suppliers to agree to a bid-rigging scheme in advance.

4. Reduce communication among bidders

The tender process should be designed in a way that reduces 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.

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 or 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, 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.

5. 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 – they must be described in full and weighted adequately in advance to avoid post-award challenges. However, the extent to which the weighting criteria are disclosed in advance can affect the ability of bidders to co-ordinate their bids. Preferential treatment for any class, size or type of supplier should be avoided, and performance records – or other indicators that unduly favour incumbents – should not be overemphasised.

6. 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. Entities that conduct public procurement should regularly train their staff in cartel and bid rigging detection, with the assistance of competition authorities.

Entities should store and periodically review information on past tenders. Procurement officials should exchange information between them to detect patterns across procurement procedures. Entities should establish adequate mechanisms for bidders and staff to convey competition concerns and suspicions about collusive practices they are aware of, as well as train procurement staff about these mechanisms.

1.5.2 Checklist for detecting bid rigging in public procurement

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

1. 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 win, this behaviour could be explained by collusion. Bid rigging could also be the explanation for the winning bidder repeatedly giving subcontracts to losing bidders, or if firms seem to take turns at winning tenders.

2. Look for warning signs in all documents submitted

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

3. Look for warning signs and patterns in pricing

Officials should look for warning signs in pricing and bidding strategies. Large unexplainable 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.

4. 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 concerns expressed about CIBDs, or indications that, although signed, these will not be taken seriously.

5. 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. A firm submitting bids on behalf of a competitor should also be considered a warning sign.

6. A note of caution about indicators of bid rigging

It is important that procurement officials be aware that signs of collusion do not in themselves constitute proof of collusion among bidders. If one, or several, 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. This is especially important since collusion often only becomes clear as specific patterns are established over time.

7. Steps procurement officials should take if bid rigging is suspected

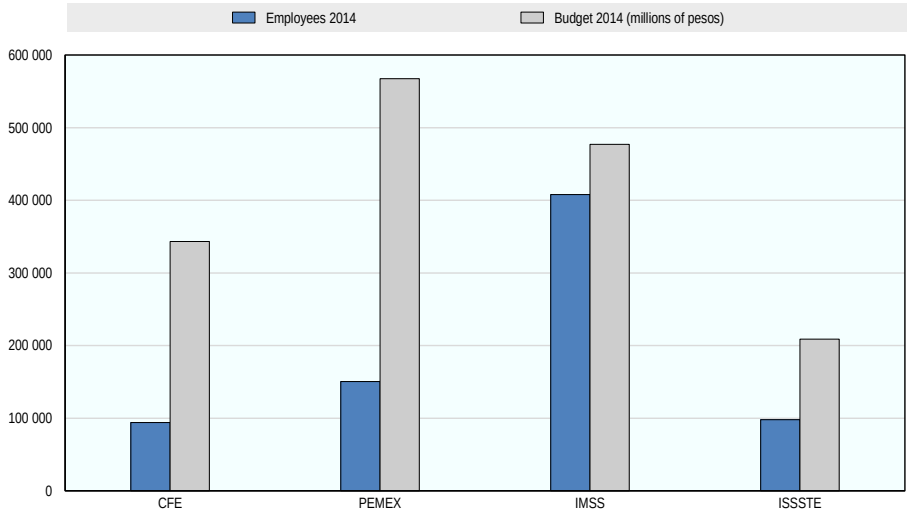
In addition to a working understanding of the relevant laws applicable to bid rigging in their jurisdiction, officials should discuss their suspicions with their own legal staff and with the competition authority, and together decide the best measures and steps to be taken. They should not discuss their concerns with bidders, as this will likely lead to destruction of evidence.

Chapter 2. Public procurement in PEMEX

In Mexico, public procurement represented 5.2% of the gross domestic product (GDP) in 2015[20] and 21.1% of the total government expenditure during the same year.[21]

With approximately 150 000 employees and an annual budget of about MXN 570 billion, PEMEX is the largest public entity in Mexico. It is Mexico's largest state productive enterprise – the Federal Electricity Commission is the second largest – and is comparable to the country's social security institutions – IMSS and ISSSTE.[22]

Figure 3. Number of employees and budget of Mexico's largest public entities, 2014



Sources: CFE (2014), "*Informe anual 2014*", *Comisión Federal de Electricidad*, *http://aplicaciones.cfe.gob.mx/Aplicaciones/OTROS/InformeAnualConFirmas2014.pdf;* PEMEX (2013), *PEMEX Anuario Estadístico* 2014, *www.pemex.com/ri/Publicaciones/Anuario%20Estadistico%20Archivos/2014_ae_00_vc_e.pdf;Centro de Estudios de las Finanzas Públicas, Recursos asignados* a PEMEX *en el Presupuesto del Ejercicio Fiscal* 2014, *www.cefp.gob.mx/publicaciones/nota/2014/febrero/notacefp0062014.pdf;*IMSS (2014), *Memoria estadística* 2014, *Instituto Mexicano del Seguro Social*, *www.imss.gob.mx/conoce-al-imss/memoria-estadistica-2014;* ISSSTE (2015), "*Presupuesto del ISSSTE 2014*", *http://portaltransparencia.gob.mx/pot/presupuesto/showPresupuesto.do?method=begin&_idDependencia=00637*; ISSSTE (2014), *Anuario estadístico* 2014,*www.issste.gob.mx/datosabiertos/anuarios/anuarios2014.html.*

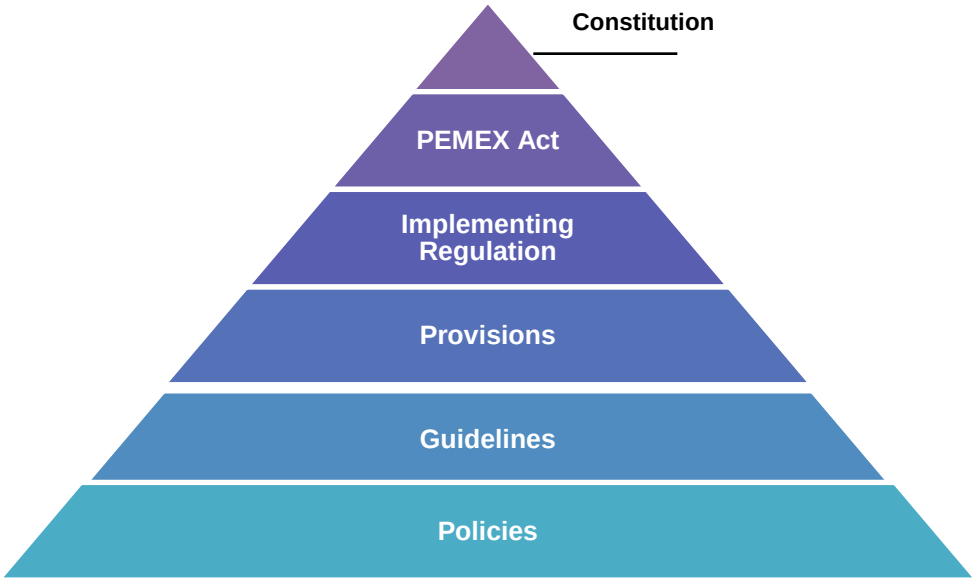
As explained above, the energy reform has changed the corporate structure of PEMEX. As a state productive company, PEMEX no longer applies the general public procurement regime but specific rules applicable to it only.

Based on Article 134 of the Mexican Constitution, which sets the legal basis for public procurement in Mexico,[23] the PEMEX Act and its implementing Regulation have defined the general principles for the new public procurement regime in PEMEX. Further to this act and regulation, PEMEX's Board of Directors and its Directorate for Procurement and Supply (*Dirección Corporativa de Procura y*

Abastecimiento, DCPA)[24] have defined and completed the new procurement regime by adopting the following provisions: the General Contracting Provisions for PEMEX and its subsidiary companies ("Provisions"),[25] the General Guidelines for Procurement and Supply ("Guidelines")[26] and the Policies and Guidelines for Procurement and Supply ("Policies").[27]

Figure 4 represents the order of priority of PEMEX's public procurement regime, going from highest (the Mexican Constitution) to the lowest (the Policies).

Figure 4. PEMEX's public procurement regime



Source: Based on information provided in PEMEX's reply of 31 August 2015 to the OECD's questionnaire for this project.

2.1 PEMEX's procurement structure

The new public procurement regime has centralised and standardised the process of acquiring goods, services and establishing leasing arrangements for PEMEX and its state subsidiary companies. The centralisation of the procurement process aims at better managing relations with suppliers, creating standard procedures for planning long-term acquisitions and increasing the knowledge and professionalism of procurement officials.

A new directorate, the DCPA, has been created to manage the new procurement process. The DCPA runs each specific procurement process together with a project manager. The project manager is a director of PEMEX or one of its subsidiary productive companies appointed by PEMEX's Director General. He/she is responsible for conducting the project in the most efficient way and helps the DCPA adapting the contracting process to the goals and objectives of the project.

In addition, different groups have been created to deal with specific procurement projects. For instance, the Group for Strategic Supply (*Grupo de Abastecimiento Estratégico*, GAE)[28] manages procurement related to the strategic supply and the management of categories (Article 10 of the Provisions; see also Section 0). The Group for the Authorisation of Exceptions to an Open Public Tender (*Grupo de Autorización de la Excepción al Concurso Abierto*)[29] approves the exceptions to an open tender, authorising the productive company to use other procedures, such as restricted invitations and direct award (Article 31 of the Provisions; see also Section 2.2.1.3).

PEMEX activities, including public procurement, are overseen by three bodies: the Audit Committee, the Internal Audit and an external auditor (Article 50 of the PEMEX Act).

The Audit Committee (Article 259 of the PEMEX Articles of Organisation) is one of the operating bodies of the Board of Directors (Article 40 of the PEMEX Act). This committee defines the policies, evaluates the performance and appoints the head of the Internal Audit.

PEMEX's Internal Audit is an independent body responsible for executing the policies defined by the Audit Committee. It reports to the Board of Directors through this committee.

The external auditor is appointed by the Board of Directors upon the recommendation of the Audit Committee (Article 57 of the PEMEX Act).

PEMEX also has an Internal Control Unit which reports to the Director General. This Unit is responsible for designing and co-ordinating the integrity and transparency policies of the company (Article 225 of PEMEX Articles of Organisation).

The Internal Control Unit and Internal Audit take part in the Group for Strategic Supply and the Group for the Authorisation of Exceptions to an Open Public Tender. The Audit Committee is notified of all of the exceptions to the open tender procedure which do not require the authorisation of the above-mentioned group.

The Responsibility Unit, an independent unit of the Ministry of Public Administration (*Secretaría de la Función Pública*), is in charge of receiving and investigating complaints, launching the relevant procedures and imposing the appropriate disciplinary sanctions (Articles 86 and 90 of the PEMEX Act).

2.2 PEMEX procurement procedure

Before assessing PEMEX's public procurement regime in light of the OECD Guidelines and Recommendation, this section will briefly summarise the three distinct phases of the procurement process: pre-tender, tender and post-award.

2.2.1 Pre-tender phase

The pre-tender phase in PEMEX may be divided into three stages: 1) forecasting and planning acquisitions; 2) defining the contracting strategies; and 3) defining the contracting procedures.

2.2.1.1 Forecasting and planning acquisitions

The first step of the procurement process consists of forecasting and planning the acquisitions.

Based on PEMEX's business plan and on the directions given by the Board of Directors, PEMEX officials draft the Annual Acquisition Programme (AAP). This programme contains a general description of the acquisitions, leases, works and services that PEMEX intends to contract during the fiscal year. It also contains the estimated amounts for each exercise and project taking into consideration the authorised budget ceilings (Article 4 of the Provisions). The AAP is a dynamic, flexible document which may be modified every three months.

2.2.1.2 Defining the contracting strategies

PEMEX has adopted a new methodology for defining its strategies for the acquisition of goods and services. This methodology is called "Strategic Supply and Management by Categories"

("*Abastecimiento estratégico y gestión por categorías*"). On the basis of an analysis of historical spending and of the needs of the company and the results of market analysis, PEMEX defines the contracting strategies that satisfy its supply needs while getting the best deal in terms of value and money.

As a first step of this methodology, PEMEX analyses the company's expenditures. Based on this analysis, PEMEX may define categories of products. A category of products is a group of products that can be acquired from similar suppliers, that have similar characteristics and for which a similar contracting strategy can be adopted. Categorising products allows the company to simplify its procurement processes and make them more efficient by defining a contracting strategy for the whole category of products instead of analysing the market and defining a contracting strategy for each individual product. To date (and based on an analysis of the expenditure for 2011-13), PEMEX has identified 7 families of categories of products and 37 categories of products. For instance, the family of categories of products called "vessels" includes the category "maritime transport" which includes the transport of staff, materials and lightweight equipment. Three-quarters of PEMEX's acquisitions today belong to these categories of products.

The next step of the strategic supply methodology consists of analysing the market. The objective of this step is to identify opportunities and possible strategies to negotiate and to establish a relationship with suppliers. Through the market analysis, PEMEX identifies, among other things, the existing and potential offer, prices, suppliers present in the market, different technologies available, substitutes and alternative products, availability of goods in the market, etc.

On the basis of this information, it then selects the different supply strategies. For example, for commodity-type products which are present in competitive markets with several suppliers competing and which represent high expenditure levels for PEMEX, an appropriate strategy can be to consolidate volume to leverage buying power and try to obtain the best price. For products which do not have true substitutes and are tailor-made to the specificities of the client, the most appropriate supply strategy may consist of improving the product specification by, for example, working together with the supplier to achieve better value and better adaptability of the products to the needs of the company.

These contracting strategies must then be unanimously authorised by the Group for Strategic Supply. Once they have been authorised by this group, the DCPA implements the strategies by adopting the defined contracting procedures.

2.2.1.3 Defining the contracting procedures

The contracting procedures may, in addition to usual procurement procedures, consist of the use of different mechanisms and legal instruments, such as preparatory contracts[30] and framework contracts[31] (Article 9 of the Provisions).

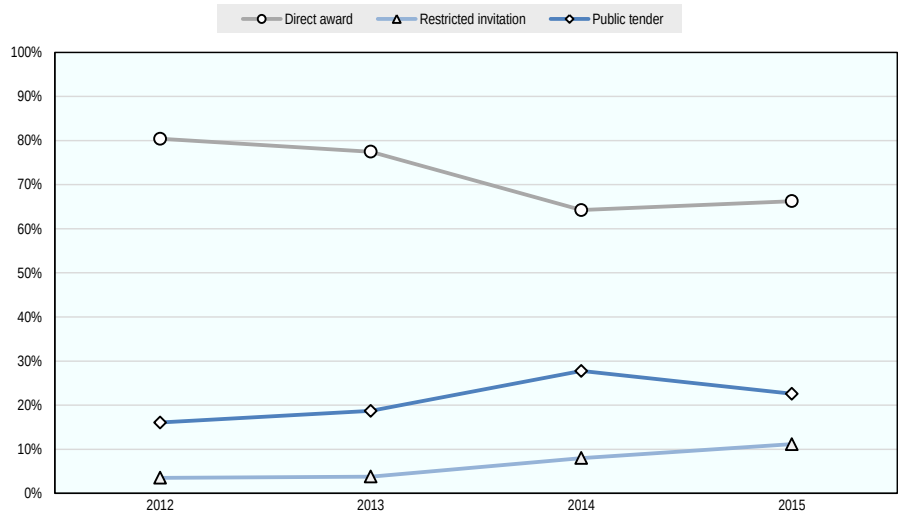
Preparatory contracts are concluded with suppliers with exclusive rights or commercial exclusivities. Framework contracts are concluded with several suppliers. The objective of these contracts is to set the terms, conditions and prices for the category of goods and services identified in the market analysis. These contracts create a unilateral obligation of the suppliers to sell goods or services to PEMEX, if requested. PEMEX does not have any obligation in terms of the volume or value of goods or services that it will acquire from these suppliers. Any department of PEMEX may acquire the goods and services foreseen by the agreement from the listed suppliers without having to conclude a specific contract.

For all other contracts, the usual procurement procedures include open public tenders, restricted invitations and direct award. According to the PEMEX Act, as a general rule the contracting procedure should be an open public tender. Under this procedure different bidders present their offers, which are

reviewed by the procurement entity. The contract is assigned to the bidder who has the best offer compatible with the call for tender. Also procurement methods other than open public tenders, like direct awards[32] or restricted invitations[33] are used, if authorised by the Group for the Authorisation of Exceptions to an Open Public Tender.

Figure 5 shows that open public tenders ranged between 16% and 23% of PEMEX's procurement in terms of volume over the period 2012-15.

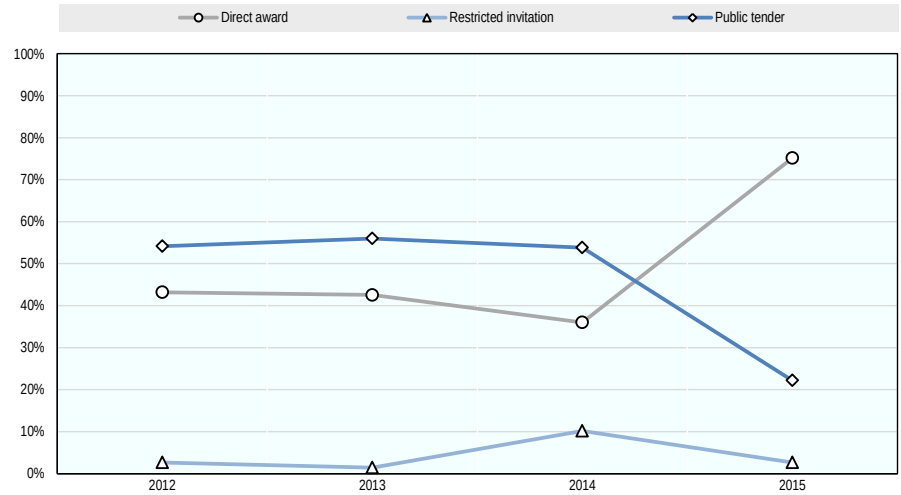
Figure 5. Use of different types of contracting procedures (by volume), 2012-15



Source: Based on data provided in PEMEX's reply of 28 March 2016 to the OECD's questionnaire for this project.

Figure 6 shows that, in terms of value, open public tenders decreased from 54% to 22% of all procurement value over the same period, 2012 to 2015. The percentages in the years 2012 to 2014 remained stable: the value of contracts awarded though public tender procedures were around 55% of total value. Between 2014 and 2015, the percentage of the total value of contracts awarded though public tender procedures decreased from 54% to 22%.[34]

Figure 6. Use of different types of contracting procedures (by value), 2012-15



Source: Based on data provided in PEMEX's reply of 28 March 2016 to the OECD's questionnaire for this project.

2.2.2 Tender stage

PEMEX's public procurement regime establishes the different phases of an open tender process.

Besides the call for tenders, the bid submission, the opening of proposals, the evaluation of the proposals and the award of the contract, the DCPA may (but does not have to) also include the following steps in a procurement process: 1) visits to the site; 2) clarification meetings; 3) prequalification of participants; and 4) negotiation (Point IV.2.5 of the Guidelines).

2.2.2.1 Call for tenders

The tender phase begins with the public tender announcement on the DCPA's website or in any other publication defined by the DCPA. The day of the publication of the call for tenders, the contractual terms are made available. Calls for international tenders covered by an international treaty are published in the Official Journal of the Federation (Point III.3.1 of the Policies).

2.2.2.2 Site visits

A site visit may be foreseen for procedures related to construction works, maintenance of infrastructure, acquisition of goods that require installation, tests, etc. Participation is optional. The DCPA chooses the site that is the most representative for the object of the contract (Point III.6.1 of the Policies).

The call for tender announces the place, date and time of the visit. The visit is to take place at the same time and with all the companies interested in participating. The visit is summarised in minutes which contain, among other things, the date, time and location of the visit. These minutes are published on PEMEX's website.[35]

2.2.2.3 Clarification meetings

The call for tender may define the mechanisms used to answer questions regarding the prequalification phase, if any, and the terms of the tender. Questions may be presented in writing or by electronic means (Point IV.2.7 of the Guidelines) and actual meetings are face-to-face.

If the call for tender provides for a prequalification phase, clarifications may only concern questions related to this step. Once the prequalification of participants has been completed, another round of clarification meetings may be organised in order to clarify points related to the terms of the tender. Only participants that have been prequalified may attend these meetings.

The minutes of the clarification meetings are published on PEMEX's website (*www.pemex.com/Paginas/default.aspx*). To date, minutes of clarification meetings include: the date, time and venue of the meeting; the names of the participants; their questions and the explanations; and any modification to the call for tender made by PEMEX.

2.2.2.4 Prequalification of participants

The DCPA may decide to conduct a prequalification of participants before the presentation and opening of proposals. This step can be added when the market analysis shows that there are several potential participants with inadequate profile and qualifications, so that only the ones that can perform the contract are short-listed.

During this step, the DCPA and the project administrator check whether the participants have the capacity and experience to meet the contract requirements[36] (Point II.9.1 of the Policies).

2.2.2.5 Bid submission and opening of proposals

Once a call for tender has been announced, bidders are invited to submit their proposals. The opening of individual proposals may take place electronically, during a face-to-face meeting with all bidders or a combination of these options. The minutes of the opening of bids contain a list and the amounts of the proposals that have been received (Point III.6.4 of the Policies). They are published on the PEMEX website.

If the procurement procedure includes a negotiation step, this must be announced in the call for tender before the opening of bids. In that case, the bids submitted are part of an independent document and are not published (Point III.6.5 of the Policies).

2.2.2.6 Negotiation

The purpose of the negotiation is to improve the terms and conditions of the offers submitted. The negotiation would, in principle, be conducted with all participants. The negotiations are conducted separately with each participant and are confidential. Internal Audit is present during the negotiations.

After having concluded the negotiations, participants benefit from an additional reasonable deadline to include the negotiated terms in their bids (Point IV.2.11 of the Guidelines and Point III.6.10 of the Policies).

2.2.2.7 Tender evaluation and contract award

PEMEX carries out technical and economic evaluation of bids. The economic evaluation is only conducted if the result of the technical evaluation is positive (Point V.5 of the Guidelines).

The contract is awarded to the best evaluated bid.[37] The call for tender may also specify awarding of the contract through auction mechanisms. These mechanisms apply to procurement of goods and services with standardised and equivalent characteristics and which may benefit from economies of scale (Point II.11 of the Policies). PEMEX's public procurement regime provides that auctions may have a maximum reference price and a minimum acceptable reference price. The contract will be awarded to the participant that offers the lowest price between the maximum reference price and the minimum acceptable price (Point II.11.2 of the Policies).

The DCPA issues a written decision on the award of the contract, which is notified to the participants.

Contracts may be assigned to a consortium of companies. The call for tender must allow two or more companies to bid together under the form of a consortium without having to create a legal entity for this purpose (Article 19 of the Provisions and Point II.15.b.ii of the Policies).

PEMEX may allow subcontracts. However, unlike joint bidding through consortia, subcontracting is not possible unless explicitly provided for in the call for tender (Point II.15.b.ii of the Policies).

PEMEX may also award the total volume of the contract to different participants (splitting contracts). This possibility must be mentioned in the call for tender. When splitting contracts, the same terms and prices apply to all awarded participants (Point VI of the Guidelines). The main criterion for considering splitting a contract is the operating capacity of the supplier. For example, if PEMEX has decided to aggregate the demand and the market analysis shows that the suppliers present in the market have a limited production capacity, the call for tender may allow for the splitting of the contract.[38]

2.2.3 Post-award stage

The last phase of the tender process begins after the contract has been awarded.

2.2.3.1 National content

The Mexican government, with the help of the Ministry of Energy (*Secretaría de Energía*, SENER) is responsible for establishing the policy regarding national content.[39]

The Board of Directors requires that minimum percentages of national content set by the Mexican government are met according to the nature of the contract and the international treaties that Mexico has signed (Section IX of Article 76 of the PEMEX Act).

The project administrator should verify that the contracts comply with the national content percentages. If this is not the case, the project administrator may impose a fine on the supplier.

2.2.3.2 Non acceptable bids

The PEMEX Act defines in which cases suppliers should not be allowed to participate in PEMEX's procurements. In addition to the cases in the PEMEX Act, article 12 of the Provisions excludes offers from suppliers: when they have been awarded a contract but do not sign it for reasons attributable to them (for a period of one year from the date when the contract should have been signed); when their shareholders, employees or business associates have committed theft, fraud, bribery or influence peddling to the detriment of PEMEX; in the case of a fatal work accident or a serious industrial accident on the participant's premises; or when a fine has been imposed on the bidder for corruption in public procurement, like bribery of public officials.

2.2.3.3 Monitoring suppliers' performance

The DCPA evaluates the performance of suppliers that have signed a contract with PEMEX (Point VII.7 of the Guidelines). The information resulting from this evaluation is included in a public information system which contains information on the suppliers and contractors that have concluded contracts with PEMEX in the last five years (Article 85 of the PEMEX Act).

Chapter 3. Key issues on preventing bid rigging in procurement

This chapter analyses PEMEX's public procurement regime in the light of the OECD checklist for preventing bid rigging in public procurement (see Section 1.5.1 above), analysing relevant policies, procedures and practices and identifying opportunities for improvement.

As explained above, the PEMEX Act and its implementing Regulation set the basic principles of PEMEX's public procurement regime, but the bulk of the rules governing public procurement in PEMEX are adopted by its Board of Directors and the DCPA (i.e. Provisions, Guidelines and Policies). This report acknowledges the limitations to modifying the PEMEX Act and Regulation, as they are adopted by the Mexican parliament and the Mexican government, respectively. However, PEMEX can improve its public procurement regime by adapting and modifying the internal rules adopted by its own Board of Directors and the DCPA, if this is necessary to shield its procurement procedures from bid rigging.

3.1 Be informed about the market

Collecting information about the products and/or services available in the market and information on potential suppliers is the best way to design a procurement process which achieves "value for money". This information is key for officials to promote effective competition in public procurement and reduce the risks of bid rigging through clever tender design.

PEMEX's public procurement regime includes some improvements in this respect compared to the general public procurement regime. It requires PEMEX to create two tools for registering its suppliers as well as to carry out a deeper market analysis.

3.1.1 Knowledge and monitoring of suppliers

PEMEX is authorised, under Article 85 of the PEMEX Act, to maintain a public information system of its suppliers and contractors. This system is updated on a regular basis and contains information on the suppliers,[40] the contracts that PEMEX has concluded with each of them in the last five years as well as their performance in relation to the execution of contracts.[41] This system also contains information about suppliers' compliance with the rules regarding environment, industry, operational security, labour responsibility and quality norms.

The public information system of suppliers is published on PEMEX's website at: *www.pemex.com/procura/relacion-con-proveedores/Paginas/info-proveedores-contratistas.aspx*.

Suppliers do not have to be registered in this system to participate in a contracting procedure. However, once a supplier decides to participate in a procurement procedure organised by PEMEX, it will be obliged to provide a minimum amount of required information and will be automatically registered in the system (Article 23 of the Provisions and Point III.4.1 of the Policies).

In addition to the public information system of suppliers and contractors, PEMEX is developing another tool which contains additional information on suppliers. This tool is called "Comprehensive Information Tool on Suppliers" ("*Herramienta integral de información de proveedores*", HIIP). The HIIP contains all the information available on the public information system of suppliers as well as additional information for evaluating risks and performance. The HIIP compiles information from different sources and cross-checks this information in order to evaluate the risk of concluding contracts with certain suppliers. The information contained in the HIIP includes information submitted by the supplier itself, information obtained from different public authorities (IMSS, SAT, INFONAVIT, STPS)[42] regarding compliance with labour and tax obligations, contract disqualifications and internal information on the termination of contracts, accidents, etc. The HIIP also contains the results of audits that have been conducted for a selected number of suppliers (this applies to 200-300 suppliers, representing 70-75% of PEMEX expenditure). By cross-checking all of this information, the HIIP shows red flags which help to better identify risks.

Unlike the public information system of suppliers, the HIIP is an internal tool and is not made publicly available. Suppliers may access, verify and modify information which is contained in the HIIP and relates to their individual situations (not their performance).[43]

Both of these tools allow PEMEX to better understand the market and the suppliers present therein. All the information contained in these tools is valuable for conducting market analysis more efficiently. These tools are also helpful in reducing risks in the procurement process.

The drawback of the public information system of suppliers is that it may make the market too transparent. Some of the information published may contain business secrets and sensitive information. Markets that are too transparent facilitate collusion. This issue is discussed in detail in Section 3.4.1.

The HIIP does not evaluate risks regarding bid rigging. This issue is discussed in more detail in Section 4.1.1.

3.1.2 Market analysis

According to PEMEX's public procurement regime, market analysis is the main source of information for taking decisions on the design of contracting procedures (Point II.5 of the Policies).

The market analysis foreseen by PEMEX's public procurement regime is more complete than the market analysis required by the general public procurement framework. Under the latter regime, the recommended sources of information for conducting market analysis are at least two of the following – although some procurers go further than this: CompraNet (the electronic procurement system), the private sector (industrial or commercial lobbies or associations, as well as individual producers, providers, distributors and retailers) and the internet or telephone sources, as long as reliable. The recommended list of sources of information to conduct the market analysis under PEMEX's public procurement regime is larger. PEMEX should also consider the information and evaluations available in the HIIP (see Section 3.1.1), previous contracts with the same contracting object, previous market analyses regarding the same contracting object, information obtained from suppliers, information publicly available on the Internet, and publications and contracts concluded by other institutions[44] (Point II.5.2 of the Policies).

The purpose of the market analysis is to identify, among other things, prices, suppliers present on the market, different technologies available, best practices and availability of the goods in the market (Point II.2.1 of the Guidelines). PEMEX's public procurement regime provides for the minimum content

of the market analysis: 1) the contracting object; 2) the volume, quantity and scope of the contract reflecting the availability of goods in the market; 3) the deadline for the delivery of goods; 4) the identified alternatives or substitutes to satisfy the demand; 5) information about the potential suppliers (general information, location, information about their activities); 6) estimated price taking into account the identified alternatives; 7) elements that could affect the estimated price; 8) conditions for delivery; and 9) national content (Point II.5.1 of the Policies).

Of the procurement stages, market analysis is the most important. This is because it allows officials to understand market conditions, identify the correct evaluation criteria, define the best contractual framework and make the best use of the procurement tools. For this reason, market information should be collected carefully and analysed rigorously.

The PEMEX public procurement regime provides for a good framework to conduct robust market analysis. The OECD recommends that market analysis should also focus on identifying the risks of bid rigging. When conducting market analysis, PEMEX procurement officials could consider identifying and paying attention to the characteristics of markets that could facilitate collusion, like: 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 and repetitive bidding. When analysing information about the potential suppliers, foreign supply should be taken into consideration. Point II.5.1 of the Policies, which lists the content of the market analysis, could specifically mention this issue. Procurement officials conducting market analysis would then pay attention to international supply on a routine basis and not only when national suppliers are not able to respond to the demand (see Section 3.2.2), and would thus be able to better assess their overall options. Procurement officials should also consider as a source of information how the private sector buys the same contracting object.

Under the general public procurement regime previously applicable to PEMEX, information about prices was often obtained from potential suppliers through requests for indicative, non-binding, price quotes (sometimes done by telephone). OECD fact-finding showed that similar practices remain in some cases and that their outcome is not helpful in giving a comprehensive and accurate overview of the market, since the sample of suppliers contacted can be small and not representative, while the indicative price quotes may be inaccurate or misleading.[45] It would be useful for PEMEX to adopt a new, clear, step-by-step methodology for conducting market analysis as soon as possible and not follow past practices, like asking for price quotes.

During the preparation of this report, it was noted that PEMEX does not have a sole unit dealing with market analysis. Market analysis is carried out by twelve different departments of the DCPA.[46] It is recommended that there be a specialised department dedicated to market analysis for all contracting procedures.[47] PEMEX could create a new department or assign the task of conducting market analysis for the whole organisation to the existing Department of Planning, Market Intelligence and Strategic Supply (*Gerencia de Planeación, Inteligencia de Mercado y Abastecimiento Estratégico*).[48] PEMEX should provide the market analysis department with the necessary IT, material and human resources, capacity building and budget. This would improve significantly PEMEX's ability to detect markets and industries at higher risk of collusion and to plan its procurement strategy accordingly. This department could work closely with the units of PEMEX which generate the procurement needs, as they have the necessary specialised knowledge on the products and services that they need.

3.2 Maximise the potential participation of genuinely competing bidders

Procurement officials should design the tender process to enhance effective competition by maximising the potential participation of genuinely competing bidders.

3.2.1 Reduce the excessive and unjustified use of exceptions to public open tenders

According to Article 77 of the PEMEX Act, as a general rule the contracting procedure consists of open public tenders. This kind of procedure allows for the participation of a large number of competing bidders, encouraging effective competition and allowing PEMEX to achieve "value for money".

However, the PEMEX Act provides for an extensive list of exceptions to open public tender procedures. For the most part, the PEMEX Act maintains the exceptions foreseen in Article 41 of the Public Procurement Act (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*), while also including further exceptions derived from the company's nature. This list of exceptions includes:

- 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 contracting with a particular company in order, for example, to keep the technical guarantee of equipment, if the procurement consists of the design and/or production of a prototype, or if the procurement concerns specialised equipment or substances and materials of chemical, biochemical, physic-chemical origin to be used in experimental activities, if the procurement consists of the acquisition of goods to be directly commercialised or used in the productive process, and if the purpose of the procurement is to develop technological innovations related to the objective of PEMEX (Sections I, VI, IX, XIII, XIV, XIX, XXII of Article 78 of the PEMEX Act).
- Special research: When a very specific study or research is required from a particular supplier, competitive tendering is not mandatory. This is the case, for example, for studies or research in a given area. Similarly, if the services are provided by an individual, public tenders are not mandatory (Sections VIII and XI of Article 78 of the PEMEX Act).
- Lack of providers: If a public tender were 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 (Section V of Article 78 of the PEMEX Act).
- National security, public security and security of the company, its premises and pipelines: public tendering may be exempted when national security, public safety, security of the company, its premises and pipelines are threatened (Section II of Article 78 of the PEMEX Act).
- Random and unpredictable situations: Procurement officials can decide to procure without a public tender when an unexpected and urgent situation (like an accident, sabotage, theft or act of God) requires them to speed up procurement to protect the employees, population, environment and premises of the company. The quantities and products cannot exceed the strict necessity (Sections III and XVI of Article 78 of the PEMEX Act).
- Other favourable purchasing conditions: When the opportunity costs of a public tender are higher than the opportunity costs of an exception. This is the case when the additional cost is directly related to the difference between the time to organise an open public tender and another contracting procedure, if the market analysis establishes that losses or additional costs can be avoided if the contract is awarded to a supplier without an open public tender, if the market analysis concludes that only one of the suppliers has a competitive advantage or if the market analysis establishes the convenience of a competitive tender in order to ensure the best conditions (Point II.1.7.1 of the Guidelines). Additionally, it is possible to authorise an exception if a supplier is selling at low prices because of bankruptcy or if the supplier is

providing the goods or services in payment of a debt to PEMEX (Sections X and XV of Article 78 of the PEMEX Act).

The PEMEX Act also allows *low-value exceptions* to open procurement: If the amount of the contract does not exceed MXN 650 000, it can be awarded directly to a supplier; if the amount of the contract does not exceed MXN 3 million, it can be awarded through a restricted invitation. These amounts are updated every year in accordance with the national consumer price index. Contracts may not be fractioned so as to fall under the low-value exceptions and the total amount of the contracts concluded under this exception may not exceed 30% of the total budget authorised for acquisitions, leases, works and services (Article 50 of the Regulation).

- When according to the provisions adopted by the Board of Directors, PEMEX rescinds contracts awarded through an open tender, a second contract may be awarded without a tender (Section IV of Article 78 of the PEMEX Act).
- Repaired and second-hand goods can be exempted from tenders. Under Section VII of Article 78, the PEMEX Act allows for these goods to be acquired without public tendering if the price is not higher than the price estimated by credit institutions.
- Goods that require the workforce of rural or marginalised populations can be exempted from tenders (Section XVII of Article 78 of the PEMEX Act).
- Specific services are also exempted from open tenders. This is the case of consultant services, engineering advice, investigations or training services. Services from a public notary, an expert, legal service and services of representation before courts may also be exempted from open tender. This category of exemption also applies to banking services, exchange brokerage services, custody of securities or the constitution of a trust (Sections VIII, XVIII and XXI of Article 78 of the PEMEX Act).
- Maintenance services may also be exempted from the open tender when the scope, quantities of work or the specificities of the maintenance services cannot be specified (Section XII of Article 78 of the PEMEX Act).
- Contracts with public authorities or PEMEX subsidiaries may be awarded without an open tender (Section XXIII of Article 78 of the PEMEX Act).

Strategic alliances in order to apply technological innovation to the national infrastructure may also be exempted from an open tender (Section XX of Article 78 of the PEMEX Act).

On the basis of figures 5 and 6 and assuming that all direct awards and restricted invitations are the result of the exceptions provided for in the PEMEX act and PEMEX's public procurement regime, it can be observed that the exceptions have been extensively used during the period 2012-15. In terms of the number of procedures, the exceptions have ranged between 84% (2012) and 77% (2015). In terms of value, the exceptions have ranged between 46% and 78% of the total value of contracts awarded over the same period. They remained basically stable between 2012 and 2014 and substantially increased from 46% to 78% between 2014 and 2015.

Deciding when an exception to an open public tender applies requires procurement officials to justify why a given situation falls under one of the provisions described above. This allows discretion in deciding whether PEMEX should or should not use a competitive procedure.

There is some control of the use of the exceptions. Most exceptions must be authorised by a higher internal body on the basis of the justification given by the procurement official. The authorising bodies are (Article 31 of the Provisions):

- The project administrator and a representative of the DCPA if it relates to Strategic Supply and management by categories.
- The Group for the Authorisation of Exceptions to an Open Public Tender whose decision must be unanimous.
- With regard to the exceptions set in Sections II, III, XVI, XVIII and XIX of Article 78 of the PEMEX Act, the Committee of Acquisitions, Leases, Works and Services (*Comité de Adquisiciones, Arrendamientos, Obras y Servicios*)[49] will decide on the basis of the information provided by the relevant administrative unit.[50]

Exceptions to an open public tender for low-value acquisitions must be justified on the basis of a market investigation (a less thorough analysis of the market than the market analysis explained above in Section 3.1.2)[51] conducted by the DCPA. This exception does not need to be authorised by another body. Nonetheless, every three months the DCPA sends a report of the contracts concluded under this exception to the Audit Committee via the Internal Audit (Article 30 of the Provisions). If the Audit Committee establishes that the acquisitions have been fraudulently fractioned so as to fall under the low-value exceptions and/or that the total amount of the contracts concluded under this exception exceeds 30% of the total authorised budget for acquisitions, the Internal Audit may launch a complaint before the Responsibility Unit. The complaint may lead to an investigation and eventually to disciplinary proceedings and sanctions.

PEMEX could consider limiting the use of exceptions to open public tender procedures, to give clear priority to open tendering and use direct awards as a last resort solution, in exceptional, few and fully justifiable cases. Fewer exceptions to the open tender procedures would also reduce the administrative burden of all the internal reporting and reviewing required for their authorisation by the different bodies.

Given the very technical nature of some of the situations that justify an exception, PEMEX could create a list of approved technical staff from different departments (external consultants could also be included in cases where additional expertise is needed) for consultation or assistance as advisors in the sessions of the authorising bodies.

3.2.2 Open the market to foreign participants

According to PEMEX's public procurement regime, the open public tender procedures may be (Point IV.1.5 of the Guidelines):

- International: when covered by an international free-trade treaty for goods and services included in such treaty and for procurements above the value threshold specified therein.[52] In this case, participants may be Mexicans and nationals of the countries which have signed an international free-trade treaty with Mexico.
- National: only participants with Mexican nationality may present bids. The tender will be national if the market analysis shows the existence of national providers who may satisfy the demand.

- International not covered by an international free-trade treaty (open international tender): the tender will be open to participants of all nationalities (even foreign participants from countries that have not signed an international free-trade agreement with Mexico) if the market analysis shows that there is no sufficient offer or competitive conditions in the national market. An international tender may also be used when no suitable bid has been obtained from a national tender or an international tender covered by an international treaty (Point II.8.1 of the Policies).

If two or more proposals are tied under an open international tender, the contract will be awarded to the bid proposing the higher percentage of national content (Point VI of the Guidelines).

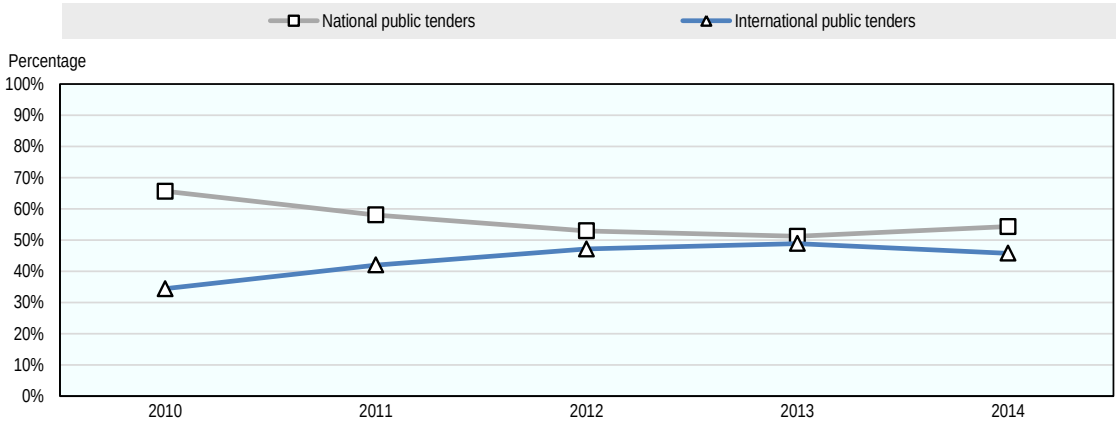
Therefore, PEMEX can only allow the participation of foreign bidders when it is obliged to by an international free-trade treaty or when resources are unavailable locally.

As a result of the energy reform and of PEMEX becoming a state productive company, it now has to compete with other companies and has to procure in a competitive manner, minimising cost and maximising quality independently of whether goods and services are provided by a national or international company.

Figures 7 and 8 show an increase of the number of international public tenders between 2010 and 2013 and a decrease of 3% since 2013. During the period of 2010-2014, the number of national public tenders has been higher than the number of international public tenders. The value represented by national public tenders during the same period has been lower than the value represented by international public tenders. The value of international public tenders has decreased by 11% since 2013.[53]

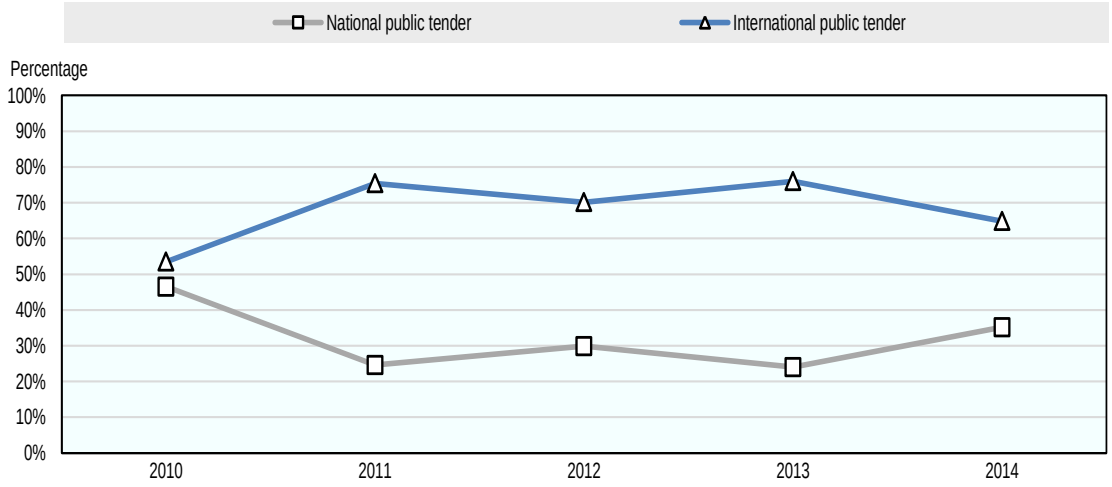
Participation of foreign suppliers should be further encouraged. Current restrictions on participation of foreign bidders should be abolished so that all qualified bidders may compete, irrespective of their nationality or the origin of the goods or services.

Figure 7. Percentage of national and international public tenders in relation to all PEMEX public tenders (in volume) 2010-2014



Source: Based on data provided in PEMEX's reply of 31 August 2015 to the OECD's questionnaire for this project.

Figure 8. Percentage of national and international public tender in relation to all PEMEX public tenders (in value) 2010-2014



Source: Based on data provided in PEMEX's reply of 31 August 2015 to the OECD's questionnaire for this project.

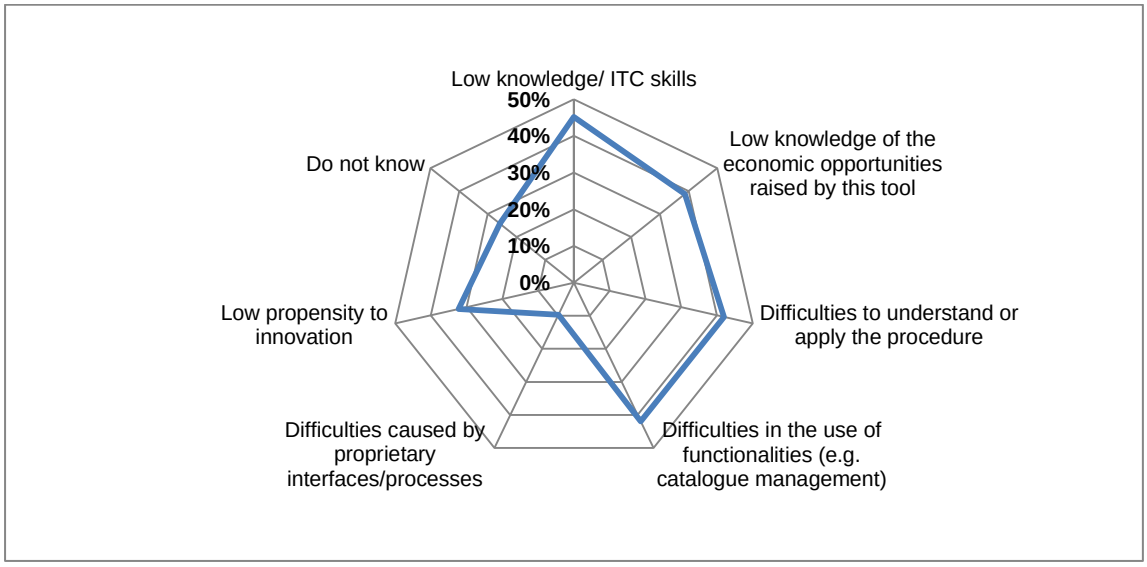
3.2.3 Encourage the use of electronic tenders

According to Section XI of Article 76 of the PEMEX Act, its Board of Directors should promote the use of electronic procurement. However, Article 17 of PEMEX's Provisions establishes that contracting procedures may be carried out by electronic or paper means or using a combination of both systems.

Electronic bidding should be the default bidding system. Other forms of bidding could be used if there are reasons to think that electronic bidding is not suitable for a particular contract (this can be the case in certain design contests, which need to have paper mock-ups of buildings, for example). Adopting electronic bidding procedures will help reduce communications among bidders, and at the same time lower tender costs for bidders and PEMEX.

When designing and implementing electronic bidding systems, PEMEX should take into account the main challenges that potential bidders face in using this type of contracting system (see Figure 9).[54]

Figure 9. Main challenges to the use of e-Procurement systems faced by potential bidders/suppliers



Source: 2014 OECD Survey on Public Procurement, based on replies by 31 Members. Czech Republic, Iceland and Israel did not respond. See also, Report to the Council on the Implementation of the Recommendation of the Council on Fighting Bid Rigging in Public Procurement, C(2016)10, OECD.

3.2.4 Joint bidding

Joint bids refer to the situation where two or more independent bidders submit a single bid. The pro-competitive purpose of a joint bid is to allow new or small suppliers to participate in a tender that they may be unable to win on their own, for example because it requires a complex combination of skills or large volumes of goods and services. In instances where firms would have the ability and incentive to present separate bids, the possibility of joint bidding reduces the number of bidders and may facilitate bid rigging.

PEMEX procurement officials always authorise joint bids (Article 19 of the Provisions).

PEMEX should introduce stricter internal rules to ensure that joint bids do not reduce the number of competitors. PEMEX's public procurement regime could be amended to the effect that joint bids are permitted only 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; or
- two or more suppliers active in different product 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 includes areas that no single supplier can accommodate on its own.

To help procurement officials in their assessment of whether a specific tender is genuinely competitive or not, bidders could be required to specify the purpose and merits of submitting a joint bid (Box 2). PEMEX is already considering that.

Box 2. Guidance on consortium bidding in other countries

In some countries, competition authorities have undertaken advocacy efforts in order to guide companies and procurement bodies to understand when joint bids are compatible with competition law.

Ireland

In 2014, the Irish Competition and Consumer Protection Commission issued a Guide for Small and Medium Enterprises (SMEs) on joint bidding. Although this guide is addressed to SMEs, the basic principles described in it may also apply to other types of companies participating in a bid under the form of a consortium. The guide explains when a joint bid is likely to be allowed under competition law. This is the case when the members are not actual or potential competitors. Among actual or potential competitors, consortia do not breach competition law if: 1) none of the consortium members could fulfil the requirements of the contract alone; 2) no subset of the consortium members could fulfil the contract; 3) the information shared under the consortium should be strictly limited to what is necessary to formulate the bid on a "need to know" basis; and 4) consortium members must compete vigorously in other contexts.

If the consortium does not comply with the above-mentioned requirements, it may still be compatible with competition law if the following four criteria are met: 1) the consortium must produce real efficiency gains; 2) consumers must benefit from efficiencies; 3) any restrictions of competition involving the consortium bid must be indispensable; and 4) consortium bidding must not substantially eliminate competition either in the specific public procurement involving the consortium or in other markets.

The guide is available at *www.ccpc.ie/sites/default/files/Consortium%20Bidding%20Guide_0.pdf*.

Norway

In 2008, the Norwegian Competition Authority published a Guidance on Tendering and Project Agreements. This guide deals with, among other things, the assessment of joint bids under competition law.

Like the Irish guide, the Norwegian Competition Authority considers that a joint bid is not likely to restrict competition if the co-operating parties are not actual or potential competitors.

If the parties are actual or potential competitors and they are able to perform the project independently, a joint bid will be considered restrictive of competition.

The joint bid might, however, be considered lawful if it generates efficiency gains which outweigh the restrictive effects on competition. For this to happen, four cumulative conditions have to be fulfilled. First, the agreement must contribute to the improvement of the production or distribution of goods or promote technical or economic progress. Second, the agreement must ensure that a fair share of the benefits achieved is passed on to consumers. Third, the undertakings must not impose restrictions that are not necessary for achieving these benefits. Finally, the agreement should not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. Joint bids that aim at fixing prices or sharing the market will not benefit from this exception. The Norwegian guide is available at *www.konkurransetilsynet.no/en/legislation/fact-sheet-guidance-on-tendering-and-project-agreements/*

Spain

Spain has also published a guide on public procurement and competition which deals with the issue of joint bids. This guide is addressed to entities in the public sector that operate in the market as buyers of goods and services through public procurement procedures.

According to the Spanish guide, a joint bid may involve an anti-competitive agreement if: 1) some of the jointly bidding members have the capacity to participate in the tender separately; 2) companies from the same group participate simultaneously in a tender, but one of them participates individually and the others do so through a joint bid; 3) the companies participating in a joint bid account for a large part of the business in the public or private sector; 4) the members of a joint bid with a large aggregate market share reject the participation in the group of other companies that do not have the capacity to propose an independent joint bid; 5) the companies that previously tried to participate jointly in the tender but were not allowed to do so eventually take part individually – in this case, they may maintain the intention of co-ordinating their efforts; and 6) the companies participate separately in the tender and then subcontract the performance of the contract to a group of companies to which they all belong. This arrangement could reflect the existence of a market-sharing agreement to ensure that they perform the contract jointly regardless of who wins the bid. The Spanish guide is available at *www.cnmc.es/Portals/0/Ficheros/Promocion/Guias_y_recomendaciones/GUIA_CONTRATACION_v4.pdf*

The example of the travel case in Spain

Four companies set up a group that took part in a tender for senior citizen travel services in 1995. When the procurement board did not allow the group to participate, the companies chose to submit individual bids but fixed prices and certain conditions of their offers. In addition, they agreed that the winning bidder would subcontract the work to the members of the group, who presented identical bids. The Spanish Competition Defence Tribunal (*Tribunal de Defensa de la Competencia*, TDC) fined the companies involved (Decision of the TDC of 25 November 2000 in Case 476/99 Travel Agencies, TDC, Spain, *www.cnmc.es/desktopmodules/buscadorexpedientes/mostrarfichero.aspx?dueno=1&codigoMetadato=36925)*.

3.2.5 Subcontracting

Subcontracting refers to the situation where the winning bidder engages one or more companies to supply some of the components of the contract.

PEMEX's public procurement regime allows participating in a contracting procedure using subcontractors when it is explicitly allowed by the terms of the tender (Point II.15.b.ii of the Policies). PEMEX's public procurement regime is, however, silent on the conditions to accept subcontracting.

Subcontracting may be used to implement a collusive agreement. Specifically, the winner of a tender can use subcontracting to unsuccessful rival bidders as a way of remunerating them for their participation in a bid-rigging scheme.

In order to deter the use of subcontracting as a means to implement collusion, PEMEX could require bidders before the bidding process to: 1) provide details about the identities of the subcontracting companies; and 2) explain why subcontracting is necessary for the performance of the contract.

The objective is to avoid subcontracting to rivals. PEMEX could consider rejecting subcontracting between competitors when it is not justified by pro-competitive effects (Box 3).

Box 3. Guidance on subcontracting

Norway

The Norwegian Competition Authority's Guidance on Tendering and Project Agreements deals with the assessment of subcontracts under competition law.

According to the Norwegian Competition Authority, subcontracting agreements between competitors are not contrary to competition law if they are limited to individual assignments and do not form part of a wider co-operation between the parties.

Where the undertakings have agreed to co-operate, the potential restrictive effects on competition are the same as with joint tendering, meaning that one or more competitors disappear. The Norwegian guide is available at *www.konkurransetilsynet.no/en/legislation/fact-sheet-guidance-on-tendering-and-project-agreements/*.

Spain

According to the Spanish Competition Authority's guide on public procurement and competition, subcontracting may favour the participation of companies in public tender procedures, in particular SMEs. However, subcontracting may reduce effective competition during the tender procedure. This is the case when companies which could compete for a contract prefer to be subcontractors and decide not to submit bids or to submit bids which are not competitive.

The contracting authority should therefore evaluate the market conditions and allow subcontracting with the aim of making public contracts accessible to SMEs without reducing effective competition.

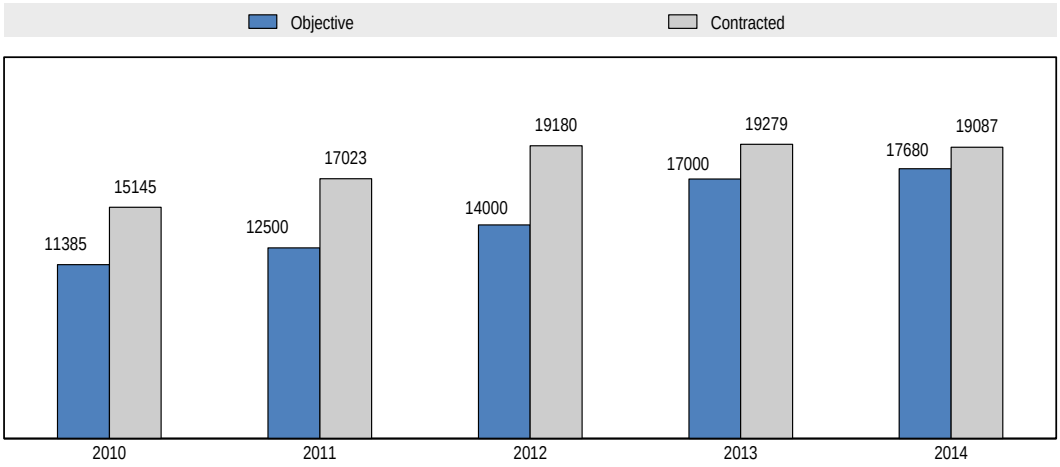
The Spanish guide is available at *www.cnmc.es/Portals/0/Ficheros/Promocion/Guias_y_recomendaciones/GUIA_CONTRATACION_v4.pdf*

3.2.6 Participation of small and medium-sized enterprises

PEMEX's public procurement regime does not contain any provision regarding the participation of small and medium-sized enterprises (SMEs) in contracting procedures apart from the possibility to award a contract to a SME, if two or more proposals are tied (Point VI of the Guidelines).

Each year the Ministry of Economy defines indicative procurement targets for awards to SMEs that public entities have to try to meet. Figure 10 shows that PEMEX has exceeded these objectives from 2010 to 2014.

Figure 10. Participation of SMEs in PEMEX's procurement

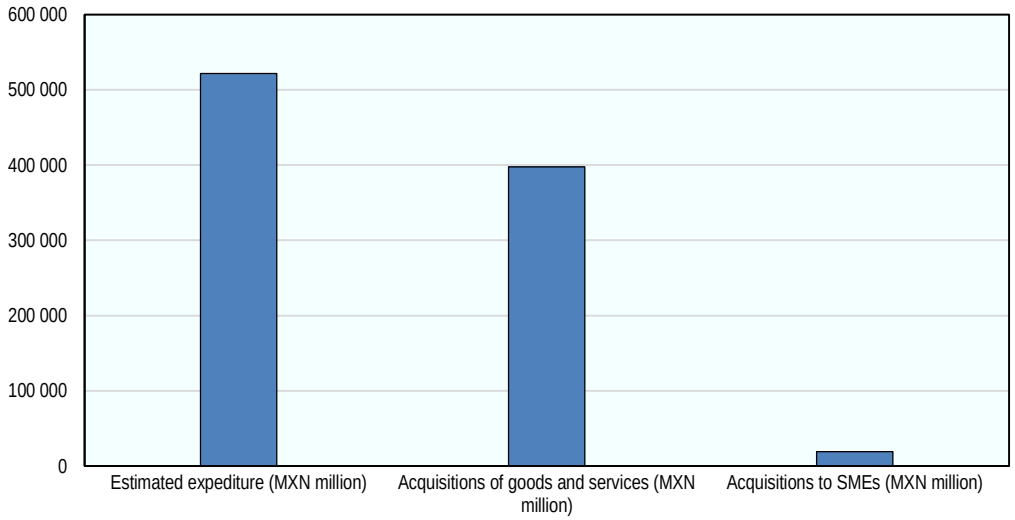


Source: Based on data provided in PEMEX's reply of 31 August 2015 to the OECD's questionnaire for this project.

The target for awards to SMEs in terms of value established by the Ministry of Economy for PEMEX in 2015 was MXN 17 680 million. During this year, PEMEX awarded contracts to SMEs for a value of MXN 15,469.7 million (so less than the targeted amount), and 43% of the value of the contracts awarded to SMEs were under direct award and restricted invitation procedures.[55]

As shown in Figure 11, PEMEX spent 5% of its 2014 budget on goods and services provided by SMEs.[56]

Figure 11. PEMEX's budget, 2014



Source: Based on data provided in PEMEX's reply of 31 August 2015 to the OECD's questionnaire for this project.

PEMEX could explore alternatives to further enhance the participation of SMEs in open public tenders so as to maximise the number of participants in competitive tenders. Although the degree of specialization of many products and services required by PEMEX does not allow for their supply by SMEs, PEMEX could still consider dividing contracts into smaller lots when market analysis shows that SMEs could provide part of the demand but do not have the production capacity necessary to respond to the total demand, which only a few big firms could. Similar initiatives have been undertaken by the European Union, United States and Chile as shown in Box 4.

Box 4. Encouraging the participation of SMEs in public procurement

European Union

The European Union Public Procurement Directive 2014/24/EU adopted on 26 February 2014 sets forth principles and procedures which should be followed by suppliers and public authorities in the EU member states for the procurement of works, goods or services. The Directive is part of a wider EU legislative package on public procurement and concessions which seeks to improve the efficiency and value for money of public procurement, simplify the rules and make them more flexible, reduce the administrative burdens on public authorities and contractors, and stimulate greater competition across the European single market. The OECD Recommendation on Fighting Bid Rigging in Public Procurement was taken into account in developing the EU public procurement package, and the Directive makes numerous references to the need to ensure competition and prevent distortions in the market.

In 2012, the European Commission ran a "TOP10 public consultation" to find out "the top 10 most burdensome legislative acts for SMEs". Of the 20 most burdensome pieces of legislation, procedures for the award of public contracts (public works, supply and service contracts) ranked sixth. Since there are more than 20 million SMEs in the European Union representing 99% of all businesses, they are drivers of economic growth, innovation, employment and social integration. The European Commission took action to ensure that policies and programmes foster the viability of SMEs by easing administrative burdens and adapting rules to their needs. Against this background, the Directive seeks to make it easier for SMEs to participate in procurement procedures by allowing bidding through a European Single Procurement Document based on self-declarations as regards the personal situation and legal standing of the bidder.

The Directive also encourages public procurement authorities to divide contracts into smaller or more specialised lots to make it easier for smaller firms to bid. Such division can be done on a quantitative basis – adapting the size of the individual contracts to the capacity of SMEs – or on a qualitative basis between different trades or project phases to adapt the content of the individual contracts to the specialised sectors of SMEs. When a contract can be split into lots but a contracting authority decides not to, it must justify its decision. Finally, the Directive addresses overly demanding requirements for economic and financial capacity, which frequently rule SMEs out of bidding. It states that contracting authorities should not be allowed to require tenderers to have a minimum turnover disproportionate to the subject matter of the contract; the minimum turnover requirement should not exceed twice the estimated contract value.

United States

Regulation 19.202-1 of the US Federal Acquisition Regulations1 provides for actions aimed at encouraging small business participation in acquisitions. According to this regulation, small business concerns shall be afforded an equitable opportunity to compete for all contracts that they can perform to the extent consistent with the government's interest. When applicable, the contracting officer shall take the following actions:

- Divide proposed acquisitions of supplies and services (except construction) into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement.
- Plan acquisitions such that, if practicable, more than one small business concern may perform the work, if the work exceeds the amount for which a surety may be guaranteed by the Small Business Administration against loss.
- Ensure that delivery schedules are established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the government.
- Encourage prime contractors to subcontract with small business concerns (see Subpart 19.7).

If the proposed acquisition cannot be divided into reasonably small lots, the delivery schedules cannot be established on a realistic basis that will encourage small business participation or bundling is necessary and justified, the contracting officer must explain why this is the case.

Regulation 19.202-3 provides that in the event of equal low bids (regulation 14.408-6), awards shall be made first to small business concerns.

Chile

ChileCompra establishes framework agreements for common products and services needed by the Chilean public sector. Agreements are divided into smaller regional lots so as to ensure delivery in all regions through suppliers who have the capacity to deliver regionally and to support SMEs that may only be able to supply small quantities. ChileCompra is able to divide contracts into smaller lots because its market research has yielded the knowledge it needs to do so.

Sources: European Union (2014), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Official Journal of the European Union, L 94/65, *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN*; European Commission (2013), "Results of the public consultation on the TOP10 most burdensome legislative acts for SMEs*", http://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52013DC0446&from=ES;* US Federal Acquisition Regulations: *www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf;* OECD (2016), "Improving ISSSTE's Public Procurement for Better Results", OECD Public Governance Reviews, OECD Publishing, Paris, *http://dx.doi.org/10.1787/9789264249899-en*..

Splitting a contract into lots may, however, help cartel members to better allocate the market especially if lots are split in a predictable way[57] (Box 5).

Box 5. Division of public procurement contracts into lots

In 2015 the OECD conducted a survey on the division of public procurement contracts into lots. Respondents to the survey concurred that optimal division of a contract into lots is particularly challenging from a technical point of view. Solutions can only be designed on a case-by-case basis as they depend, to a large extent, on the specific characteristics of the market concerned and the object of the contract. The survey responses also illustrate the importance of understanding how the market works. Dividing a contract into lots requires collecting, processing and synchronising a variety of clusters of market data.

The economic theory literature on the subject is limited, but nonetheless provides several important insights.

The trade-off between potential competition gains and efficiency losses

Efficiency losses can emerge if there are complementarities (e.g. economies of scale and scope) between different parts (lots) of the contract. If these complementarities are strong, firms will face uncertainty driven by the fact that they do not know which other lots they will win when placing their bid on a given lot. The internalisation of the risk of failing to win complementary objects and being unable to benefit from the resulting cost synergies will translate into lower valuations when placing the bids (the "exposure problem"). Allowing bidders to place offers on bundles of lots, i.e. the possibility of package bidding, addresses this issue.

The relevance of the number of firms in the market for choosing the number of lots

The ratio between the number of potential bidders and the number of lots has been shown to be another crucial consideration when deciding on the configuration of contract division. One of the key results of the literature states that having more lots than expected tender participants may deliver more competition for the lots and reduce the risk of collusive agreements (Klemperer, 2002).

The role of new entrants for the tender outcome

Promoting tender participation by new entrants is one of the keys in procurement design (Klemperer, 2002; Milgrom, 2004). New entrants to the tender can introduce competition for the lots and weaken the conditions for collusion. Thus, when dividing contracts into lots, the relevance of new entrants is another important consideration. Whenever adequate, this may be addressed by reserving lots for entrants and/or imposing caps on the number of lots that can be awarded to incumbents.

The relative size of lots and the risk of collusion

Heterogeneity on the size of lots may play a role in reducing the scope for market-sharing arrangements. One should consider to what extent lot values are similar (homogenous lots) rather than different from each other (heterogeneous lots). The reason is that collusive profit shares are typically allocated according to cartel members' bargaining power. Thus when bargaining power is asymmetrically distributed among cartel members then heterogeneous lots may facilitate the task of sharing collusive profits (OECD 2015h).

Source: OECD (2015h), "Hearing on auctions and tenders: further issues", DAF/COMP/WP2(2015)1, OECD. For further information, see *www.oecd.org/daf/competition/tenders-and-auctions.htm*.

PEMEX could also consider helping SMEs through dedicated training so that SMEs that are interested in bidding have the required skills and knowledge to bid. Another positive step could be to reduce paperwork – within the limits of the applicable rules – for SMEs wishing to bid. An increase of the use of e-procurement could also reduce the cost of participation for all companies and, in particular, for SMEs.

Similar initiatives have been undertaken by other OECD countries. One example is Italy, which provides training to SMEs across the country to help them participate in procurement procedures (Box6).

Box 6. Supplier training desks in Italy

The Italian central purchasing body, Consip SpA, carries out procurement procedures and awards contracts for commonly purchased goods and services across the Italian public sector.

Consip has taken action to help suppliers bid for contracts by setting up supplier training desks ("Sportelli in Rete" in Italian) within the offices of suppliers' regional associations across the country. Supplier training desks provide training and assistance to local enterprises and, in particular, to micro-, small and medium-sized enterprises (MSMEs) on the use of electronic procurement tools. Through supplier training desks, Consip experts train persons from the suppliers' associations who will subsequently train local MSMEs on the use of electronic procurement tools. In Italy, MSMEs take part in lower value public procurement tenders. They account for 65% of bidders in tenders with a value of EUR 100 000-300 000, 51% in contracts worth EUR 1-5 million, and 30% in tenders with a value in excess of EUR 5 million.

Supplier training desks are quoted as a good practice in the "European Code of Best Practices facilitating access by SMEs to public procurement contracts" and won the European eGovernment Awards in the category "empowering business".

This project has been well received by SMEs. Since the beginning of the project, supplier training desks have supported more than 2 250 SMEs and helped nearly half as many qualify for Italy's public e-marketplace implemented by Consip for low-value purchases through e-catalogues. Around 1 000 SMEs qualified in 2013 – 44% of the total number of firms in the e-marketplace. Tables 1 and 2 show companies' percentage of the procurement activity in the public e-marketplace in 2013.

Table 1. Online enterprises active in 2013

Size of enterprise	Online	Active
Medium	5%	6%
Micro	68%	66%
Big	2%	2%
Small	25%	26%
Total	100%	100%

Table 2. Volume and value of transactions in 2013

Size of enterprise	Volume of transactions	Value of transactions
Medium	12%	16%
Micro	54%	42%
Big	3%	7%
Small	31%	35%
Total	100%	100%

Consip's active role in setting up an efficient e-procurement platform and commitment in forming a collaborative partnership with suppliers has contributed to the establishment of a transparent, competitive procurement environment in Italy.

Source: OECD (2015h), "Compendium of good practices for integrity in public procurement", GOV/PGC/ETH(2014)2/REV1, OECD, *www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH(2014)2/REV1&docLanguage=En.*

3.2.7 Reduce the costs of participating in a contracting procedure

PEMEX may ask potential bidders to pay for the tender documents (mentioned in Point III.4.1 of the Policies). Depending on the cost, this can deter companies from participating in a contracting procedure. Preparing a proposal for a tender procedure is already costly for participants. Increasing the burden of participation by asking for payment for the tender documents may discourage potential participants.

According to PEMEX, this practice is exceptional and the amount charged for the tender terms has, in general, reflected the costs of publication in the Official Journal of the Federation or the costs incurred by PEMEX in organising a data room to provide potential participants with the information necessary to participate in tenders relating to big projects.[58]

In order to limit barriers to entry, payment for tender documents should be kept exceptional and proportional to the costs of providing information to potential participants. Procurement officials should also justify this on a case-by-case basis. The Internal Audit, the Audit Committee or any other body of control should monitor this.

3.3 Define requirements clearly and avoid predictability

Article 14 of the Provisions provides that the terms of reference of a contracting procedure must be objective and avoid unnecessary complexity. Furthermore, the Provisions establish that the requirements should be clear and specific so as to promote competition and equality (Article 57 e) of the Provisions).

PEMEX could consider increasing the use of functional requirements in its tenders, which would specify what PEMEX would like to achieve in terms of outcomes, rather than providing for the description of a specific product. (see Box 7)

Box 7. Example of use of functional requirements in Italy

In November 2011 Consip SpA, the Italian central purchasing body, set the terms for a Framework Agreement on Desktop Outsourcing for 70 000 workstations. This was a public contract for the management of IT platforms, leasing of hardware (desktop and notebook PCs, printers, multifunction devices), software licenses and virtualisation services.

The main feature of this framework agreement was the focus on results such as energy efficiency and the rationalisation of IT infrastructure, a reduction of staffing costs and routine maintenance (upgrades and repairs of PC systems and servers). These requirements were met by purchasing an integrated service rather than by purchasing a specific product.

The integrated services had to include:

- a system for the digital management of documents (avoiding the use of paper, printers and related consumables, cost of renting archives);
- management of electronic waste; and
- customer service to evaluate the quality of services.

The provision of IT services rather than a specific product allowed for greater flexibility, financial and environmental efficiency and meeting the real needs of the public buyer. The service included technical support, maintenance and replacement of spare parts for the equipment and a certain service performance level. This provided suppliers with a strong incentive to supply top products in terms of energy performance, durability and quality, with less CO2 emissions, less material use, no waste of electronic equipment (since the products are not owned by public authorities but only leased) and increasing the level of efficiency for end users.

Source: OECD (2014) Going green: best practices for green procurement - ITALY - Framework Agreement on Desktop Outsourcing. *www.oecd.org/gov/ethics/gpp-procurement-Italy-Desktop.pdf*.

Some OECD countries already envisage this strategy. For example, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement recommends that technical specifications that express, as far as possible, functional and performance-related requirements should be used to promote innovation. The requirements should be sufficiently precise to allow suppliers to determine what the contract is for and for contracting authorities to compare bids and award the contract. Also, to promote suppliers' creativity and make procurement more flexible, the Directive states that public authorities should, as often as possible, encourage variant bids, spelling out, however, in their procurement documents the minimum requirements that bids should meet.

3.4 Reduce communication among bidders

3.4.1 Publication of information about bids

Excessive transparency in public procurement and in particular the dissemination of commercial information may facilitate collusive agreements. Disclosure of information about potential or actual bidders to a tendering process may facilitate contact among bidders. In cases of cartels that have been formed, information on the results of procurements and prices allows monitoring and retaliation against firms that deviate from the collusive arrangement. The OECD, in projects concerning the fight against bid rigging, has recommended that transparency before, during and after the procurement process must be handled in such a way that it does not facilitate bid rigging (OECD (2015c), OECD (2013a), OECD (2012a) and OECD (2012b)).

As stated in the OECD Recommendation on Public Procurement (OECD, 2015d), PEMEX should "*promote fair and equitable treatment for potential suppliers by providing an adequate and timely degree of transparency in each phase of the public procurement cycle, while taking into account the legitimate needs for protection of trade secrets and proprietary information and other privacy concerns, as well as the need to avoid information that can be used by interested suppliers to distort competition in the procurement process*."

PEMEX's transparency obligations include the publication of several documents. The Annual Acquisition Programme and its updates are published on PEMEX's website (Article 51 of the Provisions). This document includes a general description of the acquisitions, leases, works and services that PEMEX intends to contract during the fiscal year. It also contains the estimated costs for each fiscal year and project. The publication of this document keeps suppliers informed of procurement opportunities and allows them to study the terms, build a business case and eventually submit an offer; thus, it has in many ways a pro-competitive effect.

PEMEX should, nevertheless, be careful not to publish too detailed information, in particular on volumes, costs, delivery locations and schedules, as this can form the basis of a collusive scheme. PEMEX could, for example, create two versions of the Annual Acquisition Programme: a public one with a general description of its purchasing strategy (for example, aggregating the estimated amounts of the projects), and a more detailed version for internal use that is not made public but serves to guide the procurement staff. This would ensure a level of transparency (which could be adjusted depending on the subject matter of the procurement) and at the same time avoid disclosing information that could form the backbone of anti-competitive schemes. For example, PEMEX's business plan is issued in two versions, a simpler public one and a more detailed internal one. The PEMEX Act, which provides for the publication of the public version of the business plan, specifies that this version may not contain information which could jeopardise PEMEX's commercial strategies (Article 14).

According to the Mexican General Law on Transparency and Access to Public Information (*Ley General de Transparencia y Acceso a la Información Pública*) of 4 May 2015, PEMEX should also publish the information regarding the outcome of tendering procedures. This information must include the name of the participants to the tender, the name of the winning bidder and the award decision.

As explained in 3.1.1, PEMEX is also required to keep a public registry of PEMEX's suppliers and contractors. This system is updated on a regular basis and contains information on the contracts concluded for the last five years as well as the records on the execution of the contracts[59] (Article 85 of the PEMEX Act).

PEMEX discloses additional information concerning the (winning and losing) bids despite the fact that none of the provisions of the PEMEX Act, the Regulation or its public procurement regime require doing so. The procuring and contracting departments publish the minutes of all the clarification meetings,[60] site visits,[61] opening of proposals and public announcement of the winner. These minutes, in particular those regarding the opening of proposals, contain the identity of the bidders, their proposals and the proposed prices.

Transparency is important for losing bidders to be able to assess whether they were treated fairly, and, if not, decide whether they would like to exercise their rights to request the review of a contracting procedure. However, access to information should be limited to what is strictly necessary to guarantee those rights of due process and access to review. In deciding which information should be disclosed, PEMEX should take into consideration, in addition to transparency, the potential impact on competition of such disclosure. For instance, the publication of the name of the participants and the proposed prices during the tender process facilitates communication and thus collusion among bidders about ongoing contracting procedures. Publication of that information after the contract has been awarded facilitates communication and collusion for future contracting procedures as well as the monitoring of a collusive agreement.

As shown in Box 8, EU member states have adopted transparency rules which recognise that sensitive information from a competition perspective can be withheld from disclosure.

Box 8. Disclosure of information under the EU Directive

European Union

Under EU Directive 2014/24, contracting authorities may decide not to disclose information which might prejudice fair competition between economic operators. The Directive leaves a margin of discretion for procurement officials to decide whether certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators (Article 50.4 of the Directive).

United Kingdom

In the United Kingdom, Regulation 79 of the UK Public Contracts Regulation provides that "notice of the results of the contest shall include the information set out in part F of Annex V to the Public Contracts Directive. But where the release of information on the outcome of the contest might prejudice fair competition between service providers, such information may be withheld from publication."

Sources: European Union (2014) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Official Journal of the European Union, L 94/65, *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN*. UK Public Contracts Regulation 2015, *www.legislation.gov.uk/uksi/2015/102/contents/made*.

Similarly, in the United States information relating to classified information, trade secrets and confidential commercial or financial information is exempted from public disclosure.[62]

PEMEX's public procurement regime does not contain any provision on disclosure of information which may distort competition. PEMEX may protect information which is sensitive under Article 116 of the General Law on Transparency and Access to Public Information, which considers confidential all information regarding commercial secrets. PEMEX may also protect this information under Article 111 of the PEMEX Act and PEMEX Policies regarding the disclosure, filing and protection of information ("*Políticas para la revelación, resguardo y protección de la información*"), which provide that all information received by PEMEX or its productive subsidiary companies is public except for information which contains commercial secrets.[63] It is recommended that the only information that need be made public should be the identity of the winner (and not those of all other bidders) and the price of the contract, without specification of contract terms (like delivery times, volumes) and, naturally, omitting all commercially sensitive information which belongs to each competing bidder.

3.4.2 Clarification meetings

Bidders may ask the contracting officials for technical explanations and propose amendments to the call for tender through clarification meetings when this has been specified by the tender terms. Questions may be presented in writing or by electronic means (Point IV.2.7 of the Guidelines). The minutes of the clarification meetings are published on PEMEX's website (*www.pemex.com*). To date, minutes include the date, time and venue of the meeting; the names of participants; their questions; and the clarifications provided by PEMEX.

Face-to-face clarification meetings can be a facilitating factor for bid rigging. During this stage of the tender phase, the risk of bid rigging is at the highest level because these meetings enable potential bidders to identify their competitors and provide the opportunity to collude before presenting their offers.

Unlike the general public procurement regime which obliges contracting authorities to hold clarification meetings, PEMEX has a margin of discretion in relation to this matter. PEMEX may decide whether to carry out clarification meetings.

PEMEX procurement officials should consider organising clarification meetings only when this is necessary, for example when the object of the contract includes complex technical requirements. Such meetings could be held with each bidder separately, with at least two procurement officials present to minimise risks of corruption, and recordings of such meetings kept on record for PEMEX's internal and external audit.

Electronic communications also decrease communication among bidders. If clarification meetings cannot be held separately because, for example, the large number of participants makes this time consuming, costly and inefficient, it would be best if hearings were conducted on-line (with bidders submitting comments and receiving answers electronically). This would avoid bidders meeting each other and offering them opportunities to collude.[64] PEMEX already allows for questions or clarification requests to be sent by e-mail. To ensure equal treatment and competition, the clarifications and/or modifications to the tender resulting from these exchanges should be made public. A document compiling this information, including the questions (anonymously, without identification of the bidder asking them) and the answers provided by PEMEX could be published on PEMEX's website.

3.4.3 Site visits

Site visits organised with all potential bidders may also facilitate bid rigging for the same reasons as the clarification meetings do. The PEMEX public procurement regime provides that site visits may be scheduled for procedures related to construction works, maintenance of an infrastructure, acquisition of goods that require installation, tests, etc. (Point III.6.1 of the Policies). The tender terms will specify the place, date and time of the visit. The visit will be at the same time for all the companies interested. Minutes of the visit are published on the PEMEX website. The minutes already published on PEMEX's website, contain: the date, time and venue of the meeting; the names of the participants; and sometimes their telephone numbers.

Site visits should not become a generalised practice applicable to all procurement procedures. They should only be organised when strictly necessary and for the procedures mentioned above (Point III.6.1 of the Policies). Alternatively, if possible, PEMEX could publish videos of the premises on its internet site so all interested bidders can watch them. The minutes describing the issues discussed during the site visit should be published but they should not allow in any way the identification of the participants nor contain their contact details.

3.4.4 Invited and electronic witnesses

The OECD's fact-finding in this project showed that PEMEX invites external parties (for example an industrial association) to the different events of the procurement procedure. These events may also be broadcasted on the internet in order to be followed by "electronic witnesses".

Events that may be open to invited witnesses and electronic witnesses are the prequalification, opening of bids, clarification meetings, opening of proposals and notification of award decisions.[65]

As this practice allows the identity of bidders and to an extent the content of bids to become known, it can be a facilitating factor for bid rigging.

3.4.5 Certificate of independent bid determination

Under PEMEX's public procurement regime participants are obliged to declare under oath that they have established a plan to prevent and detect acts and practices of corruption (Article 53 of the Provisions). Bidders can be required to make a similar declaration with regard to collusion.

This could be done by requiring bidders to sign a certificate of independent bid determination (CIBD). A CIBD is a statement or attestation by each bidder that the bid they have submitted is genuine, non-collusive and made with the intention to accept the contract, if awarded. This certificate should be signed by an individual with the authority to represent the firm.

This instrument is a good practice and is recommended by the OECD Guidelines because it makes the legal representatives of firms aware of and accountable for unlawful behaviour. As such, it becomes an important deterrent to bid rigging. It makes firms aware of the unlawful nature of collusive agreements, demonstrates that the contracting authority is aware of, and on alert for, bid rigging and shows the contracting authority's zero tolerance for bid-rigging practices. The OECD recommends that PEMEX makes this requirement mandatory in its procurement regime, which should ideally include a template of such a CIBD. The template of CIBD used in the United States is annexed to this report (see Annex).

3.5 Carefully choose criteria for evaluating and awarding the tender

PEMEX often uses, and publishes in the tender notice, maximum reference prices for contracts, which are calculated on the basis of the market analysis. In cases where maximum reference prices are used, winning bids are those that offer the greatest discount in relation to that maximum reference price (Point VI of the Guidelines). PEMEX also uses maximum reference prices in auctions (see Section 2.2.2.7).

When PEMEX publishes reference prices, it informs bidders of the price it is willing to pay for a certain contract and makes it easier for bidders to agree on prices and rig bids.

As noticed below in Box 9, Brazil has modified the public procurement legislation so as to eliminate the requirement to publish maximum reference prices. The legislation has also been modified to make auctions less predictable.

Box 9. Evolution of public procurement legislation in Brazil

Under the 1993 General Public Procurement Act (Law 8666), the Brazilian contracting authority was obliged to publish a reference price (Article 40, §2o, II) and bidders could only make one proposal with a single price in a sealed envelope (Article 43, III).

In 2002, the Brazilian legislator adopted a new approach to public procurement, through the Reverse Auction Act (Law 10.520). Under this act, bidders had to present a first proposal with a single price in a sealed envelope and at a second stage of the auction could present proposals openly (Article 4).

In 2005, the Reverse Auction Act (Law 10.520) was amended (Decree 5450). Bidders had to present a first proposal with a single price through an electronic system (Article 22). All bidders have to participate in a second phase presenting decreasing prices (Articles 23 and 24). The Act introduced a new last phase to the auction (Article 24, §7o). The duration of this phase is randomly decided by the electronic system. Bidders or contracting authorities do not know how long this phase will last, thus increasing uncertainty of whether their proposal will be submitted in time and taken into account. Bidders, therefore, have greater incentives to be reactive and dynamic in the presentation of their proposals. Moreover, bidders' identities are kept confidential and bids are anonymous (Article 24, §5o).

Finally, in 2011 the so-called "Differentiated Regime of Public Procurement" (Law 12.462) was adopted. This law is applicable to specific situations such as those conducted for the World Cup, Olympic Games, infrastructure of airports and engineering services for the public health system. Under this legislation, the reference price is made public only after the end of the public procurement.

Source: Presentation made at the OECD workshop, Poza Rica, Mexico on 23 and 24 November 2015, by Amanda Athayde Martins, Responsible of the Leniency Unit at the General Superintendence of the Brazilian antitrust authority – the Administrative Council for Economic Defence (SG/CADE).

PEMEX favours a mechanism including technical evaluation (called points and percentages) for projects where technical aspects, quality aspects, experience and performance are important. This mechanism must be used with care, so as not to benefit certain companies. For example, if experience counts for many points, incumbents will be privileged over new entrants.

As explained above, PEMEX may split the award of the total volume of a contract among different participants. This possibility must be specified in the tender terms (Point VI of the Guidelines). This mechanism aims to avoid the risk of a lack of supply. However, splitting a contract among multiple

suppliers may facilitate market sharing, if the bidders know in advance that PEMEX will use this mechanism.

For this reason, PEMEX could consider splitting a single contract between multiple suppliers only in exceptional circumstances where there is a real concern about the security of supply and this concern has been balanced against the potential anti-competitive effects of splitting the contract. When contract splitting is used, it should not be announced in the tender terms. It could be announced at a later stage, i.e. during the opening of bids or at the contract award stage. In this way, PEMEX would reduce predictability and bidders would not have the opportunity to allocate the contract at an early stage.

3.6 Raise awareness among public procurement officials

3.6.1 Capacity building of staff involved in procurement activities

The awareness of procurement officials about the costs and risks of collusion is important to fight bid rigging. The OECD Guidelines recommends agencies to regularly train their staff in cartel and bid rigging prevention and detection. PEMEX has already undertaken the initial steps to implement this recommendation by concluding the agreement with the OECD for this project. The OECD organised six workshops of two days each to train PEMEX procurement officials on preventing and detecting bid rigging together with COFECE and international experts and peers from other competition authorities. PEMEX could continue its efforts by setting up regular trainings for procurement officials as well as officials in the Internal Audit, Internal control Unit and Responsibility Unit, on collusion, eventually with support from the COFECE. Moreover, these trainings should be part of a certification process for PEMEX procurement agents.

PEMEX sometimes invites observers ("social witnesses") to the different phases of the procurement procedure. These observers issue opinions and recommendations about the procurement procedure and may inform the Internal Audit and the Responsibility Unit of any observed irregularities (Section III of Article 76 of the PEMEX Act). Social witnesses must prove, among others, moral integrity, professional prestige and specialised professional experience related to procurement and supply activities. PEMEX could also require that social witnesses to attend the trainings on collusion mentioned above.

3.6.2 Blacklisting companies involved in bid rigging (temporary exclusion from tenders)

PEMEX should consider the possibility of excluding for a limited period of time bids from companies that have been convicted of participating in bid-rigging schemes. This faculty should be discretionary and take into consideration the relevant market characteristics. Blacklisting companies in a market with very few players and high barriers to entry could be counterproductive as it could result in a lack of supply or considerably reduce the number of participants for future contracting procedures.

As shown in Box 10, the EU Directives and the US Federal Acquisition Regulation contain provisions which allow excluding companies from procurement procedures when they have been involved in bid rigging or when there are indications that they may be involved in this kind of conduct.

Box 10. Exclusion of companies for involvement in bid-rigging activities

European Union

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

United States

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

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

3.6.3 Communicate to bidders in advance the possible sanctions for involvement in bid rigging

Calls for tender could include an anti-collusion clause making bidders aware of what constitutes bid rigging and warning them of the sanctions.[66] The introduction of this clause could not only have a deterrent effect on bidders but also would also raise the awareness of procurement officials.

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

PEMEX could also include in contracts a contractual penalty for suppliers found to be involved in bid rigging. This penalty could consist of a certain percentage of the amount of the contract.

For example, in Japan, contractors are requested to sign a statement under oath that they will pay a certain percentage of the amount of the contract as compensation for damages if they are found to be involved in bid rigging. Likewise, in Korea the amount of damages for bid rigging is predetermined and included as a clause in public contracts. Thus, bidders are aware of the large sums that they risk paying if they collude. Almost all Korean public corporations follow this system, which aims at preventing as well as punishing collusion. In Australia, the use of anti-collusion tender clauses specifying sanctions for breaches of competition rules caused one tenderer to become an immunity applicant (OECD, 2015f).

3.6.4 Keep information about tenders

In order to design tenders that limit bid rigging, besides understanding how bid rigging occurs, procurement officials should be able to check what happened during past tenders, talk with other contracting authorities that are buying similar products, and talk with potential and former bidders. This could be facilitated by keeping a centralised record of past tenders including all of the documents submitted during the tenders. This will also help detect bid-rigging patterns over time.

PEMEX already requires that all original documents be kept in a safe place and that an Electronic Institutional System for Procurement (*Sistema Institucional para el Expediente Electrónico de Procura*) be created (Point VI.6 of the Policies). This system will contain all of the electronic documents related to procurement. This is a good initiative and PEMEX should work on designing a complete, comprehensive and easily accessible electronic record of procurement information. This system should be for internal use only and bidders should not have access to it.

Chapter 4. Key issues on detecting bid rigging in procurement

As explained above, the checklist on how to detect bid rigging during the tender process includes five general recommendations. The underlying principle of these recommendations is that procurement officials should always stay alert and look for indications of suspicious patterns and/or behaviour indicating that bidders are communicating and exchanging sensitive information and are engaged in collusive activity.

Section 4.1 identifies the existing provisions and suggests improvements and/or new mechanisms that could help procurement officials detect bid rigging. Section 4.2 presents some recommendations in relation to the steps and procedures that procurement officials should follow when they suspect bid rigging.

4.1 Detecting bid rigging in PEMEX

4.1.1 The Comprehensive Information Tool on Suppliers should take into consideration the risks of bid rigging

Risk matrices using red flags when a risk of collusion has been identified are useful for helping procurement officials detect bid rigging.

As described in Section 3.1.1, PEMEX has already developed a tool (the Comprehensive Information Tool on Suppliers, HIIP) which contains information about suppliers' compliance of labour and tax obligations, on disqualifications, internal information on the termination of contracts, on accidents, etc. The HIIP also contains the results of audits that have been conducted for a selected number of suppliers. By cross-checking all this information PEMEX is able to identify red flags.

The HIIP could also take into consideration information about suppliers' compliance with competition law, for instance, if a supplier has been fined for anti-competitive practices in Mexico, or in some cases, abroad.

PEMEX could include this information in the HIIP and adapt the tool to make it more suitable to identify red flags in relation to the risks of bid rigging.

4.1.2 Identify suspicious patterns over time

To determine if unusual bid patterns exist over time, the information regarding tenders must be in a readily accessible form and centralised. Further, although the analysis can be done manually, the use of electronic data to monitor bidding activity could be useful. PEMEX's Electronic Institutional System for Procurement (see Section 3.6.4) could be a suitable information system to analyse bid patterns over time.

This system could also be made available to COFECE and IFT. These authorities could consider using this information to develop screens to assess markets and to identify suspicious behaviour. Some competition authorities use such screens (OECD, 2013c). Screens involve analysing the structural

characteristics of a specific market or industry to check whether they make collusive strategies more likely and/or examining bidders' behaviour and tender outcomes to assess whether the observed behaviour is more or less probable to be consistent with collusion or genuine competition (OECD, 2015f).

Some countries have developed electronic screening programmes to detect bid rigging through monitoring bids and bidding patterns on a systematic basis. Such programmes are designed to quantify the probability of bid rigging using specific markers, such as the rate of successful bids, bid price, number of failed bids, price increases, etc. For example, the Korean Fair Trade Commission has developed the Bid-Rigging Indicator Analysis System (BRIAS) as part of its anti-cartel enforcement programme (Box 11; OECD, 2015f).

Box 11. Korea's Bid-Rigging Indicator Analysis System (BRIAS)

In 2006, the Korean Fair Trade Commission developed the Bid-Rigging Indicator Analysis System (BRIAS) to help detect bid rigging. BRIAS is an automated quantitative analysis IT system which analyses large amounts of online public procurement data and, based on indicators incorporated in it, quantifies the possibility of bid rigging.

BRIAS collects online public procurement data concerning large-scale contracts awarded by central and local administrations within 30 days of the contract award. The system then analyses the data and generates scores on the likelihood of bid rigging by assessing factors like tender method, number of bidders, number of successful bids, number of failed bids, bid prices above the estimated price, or the price of the winning bidder. Each of these factors is assigned a weighted value and all values are then added up. For instance, higher rates of successful bids and a lower number of participating companies are indicative of a possibility of collusion. All bids are also screened according to search criteria, like the name of the winning candidate or bids with similar scores.

Source: OECD (2016a), Report to the Council on the implementation of the recommendation of the council on fighting bid rigging in public procurement, C(2016)10, OECD.

The Economic Studies Department of the Peruvian competition authority (Instituto Nacional de *Defensa de la Competencia y de la Protección de la Propiedad Intelectual*) is also developing indicators for the detection of bid rigging in the procurement of liquid fuel between 2007 and 2013, based on economic criteria and data provided by the Peruvian Public Procurement Supervisory Body (*Organismo Supervisor de las Contrataciones del Estado*). Chile's Competition Authority, the Fiscalía Nacional Económica (FNE), also uses procurement data to perform screening exercises. The FNE and the central purchasing body, ChileCompra, have a co-operation agreement that allows the FNE to monitor tenders through ChileCompra's database (OECD, 2015f).

Box 12. Colombia's computer programme ALCO to detect Bid-Rigging

The Economic Studies Group of the Colombian competition authority (Superintendencia de Industria y Comercio, SIC) is developing a computer programme called ALCO to help public procurement officials detect behaviour that could give rise to bid-rigging investigations and flag it to the SIC. The creation of this application was inspired by OECD recommendations in terms of public procurement and comes from the need of the 1 122 municipalities that make public procurement in the country to identify bid-rigging as a priority when evaluating offers. The effectiveness of this kind of tools is that some offers show simple formal similarities that make the identification of bid-rigging an easy task. The key of the success is the co-ordination between those public entities and the competition authority. The evidence gathered by the public officers using ALCO could be the start of an administrative investigation under the unique responsibility of the Competition Authority.

Source: Presentation made at the OECD workshop, Ciudad del Carmen, Mexico on 21 and 22 January 2016, by Juan Pablo Herrera, Co-ordinator of the Department of Economic Studies at Superintendencia de Industria y Comercio (SIC).

4.2 Steps to take when bid rigging is suspected

4.2.1 Formal procedure to report suspicions

PEMEX has no reporting mechanism in place for suspected bid rigging. If officials have suspicions that bid rigging may be occurring or has occurred, they should be able to discuss this with a competent body within PEMEX, or report anonymously. In order to facilitate the reporting of suspicions of bid rigging, PEMEX should establish clear, predefined and secure reporting mechanisms and let procurement officials know about them.

Procurement officials lack incentives to report possible bid rigging and gather evidence. They may be reluctant, either because they do not wish to disrupt the procurement or because they are afraid of retaliation. If however they so wish, procurement officials should be able to report suspicions, anonymously or eponymously. PEMEX should take the necessary measures to protect their identity (if they wish to remain anonymous) and their careers.[67]

PEMEX could, first of all, appoint an official or a group of officials from the legal department to deal with suspicions of bid rigging reported by procurement officials. This specialised unit would analyse the seriousness of the suspicions and contact the COFECE or the IFT (for bid rigging in procurement procedures for telecommunications and broadcasting services) if it considers that the indications of bid rigging are sufficiently serious. Contacting the legal department first would have the benefit of screening suspicions but does not guarantee anonymity. Procurement officials may also contact COFECE and IFT directly and anonymously.

In parallel, and as it occurs with complaints in relation to the Code of Ethics, PEMEX could create a hotline in relation to suspicions of bid rigging. [68] This hotline could be used by procurement officials to ask questions in relation to bid rigging and discuss patterns or behaviours that could indicate collusion. It should also allow anonymous reporting of suspicions.

4.2.2 Create incentives for procurement officials to raise concerns on bid rigging

Section VI of Article 104 of the PEMEX Act provides for the possibility to reward PEMEX officials. PEMEX could use this power to reward procurement officials for complying with best practices in purchasing activities, including those related to fighting bid rigging. The award could vary, for example, from career recognition to financial rewards.

4.2.3 Co-operation with competition authorities

Co-operation between COFECE and the contracting authorities in Mexico has so far been successful but limited to specific cases. PEMEX could consider making a formal agreement of collaboration with the competition authorities (COFECE and IFT). This would facilitate dialogue and communication channels for issues regarding competition in procurement procedures.

As part of this agreement, PEMEX should be able to consult the competition authorities in matters regarding tenders, agreements or any other procurement-related activities. PEMEX could also ask for advice about markets which present a high risk of collusive conduct.

Competition authorities could also advise PEMEX regarding the amount and type of information on tender procedures that should be disclosed to the public.

Many member and partner countries of the OECD follow this recommendation, as examples in Box 13 show.

Box 13. Examples of agreements between competition and public procurement authorities

In Mexico, COFECE and the Mexican Social Security Institute (Instituto Mexicano del Seguro Social, IMSS) signed a co-operation agreement in 2014 which establishes the mechanisms and principles for exchanging information between the two institutions to promote capacity building in competition for procurement officials.

Canada's Competition Bureau (the Bureau) has set as a priority reaching out to public procurement organisations at all levels of government. The Bureau provides training on fighting bid rigging to employees of Public Works and Government Services Canada (PWGSC), the principal procurement agency of the national government. These presentations aim to provide PWGSC's procurement officials with the knowledge necessary to detect, deter and report bid rigging to the Bureau, and include information on, among other things, the bid-rigging provisions in the law, the common forms of bid rigging, the characteristics that make an industry more susceptible to bid rigging, the warning signs for possible bid rigging, and the techniques that can be used to prevent bid rigging. Over the years, the Bureau and PWGSC have worked together to address the challenges posed by bid rigging. Pursuant to this relationship, PWGSC refers bid-rigging complaints and cases to the Bureau for investigation, and the Bureau provides annual training to PWGSC staff on bid-rigging prevention. The two authorities have also entered into a Memorandum of Understanding aiming to strengthen the prevention, detection, reporting and investigation of possible cartel activity, including bid rigging, for procurement processes and real property transactions that fall under the responsibility of PWGSC. This agreement is the first of its kind for the Bureau. In it, the two authorities agree to share information and collaborate in the areas of enforcement, education and awareness. Both organisations benefit from sharing in each other's expertise and knowledge. They also collaborate in training and awareness programmes to educate other relevant stakeholders on how to detect and prevent cartel activity.

The Colombian Competition Authority (Superintendencia de Industria y Comercio – SIC) and the Colombian national procurement agency Colombia, Compra Eficiente, have established a strong working relationship involving exchanges of information and consultations to facilitate early detection of collusion, on the basis of recommendations made by the OECD in its assessment of public procurement in Colombia. The two agencies are in the process of concluding a co-operation agreement to formalise their partnership.

The Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) and the Hungarian Public Procurement Authority put in place a co-operation agreement in December 2012 to enhance the efficiency of the fight against bid rigging. The agreement covers expert meetings, transparency of procurement data and awareness-raising tools on collusive schemes. Also, since 2012, the GVH has a webpage dedicated to collusion in public procurement with concrete examples and dos and don'ts for suppliers.

The Antimonopoly Office of the Slovak Republic has concluded memoranda of co-operation with the Office of Public Procurement and the Supreme Audit Office to enhance co-operation and the exchange of information. It also increased advocacy towards municipalities.

Sources: IMSS press release of 2014, *www.imss.gob.mx/prensa/archivo/201407/040* (accessed on 18 January 2016). OECD Competition Committee (2014), Fighting Bid Rigging in Public Procurement in Colombia, A Secretariat Report on Colombian Procurement Laws and Practices, at *www.oecd.org/daf/competition/Booklet_SIC%20Procurement%20Report_16X23_REV_web.pdf*;. OECD (2016a), Report to the Council on the implementation of the recommendation of the council on fighting bid rigging in public procurement, C(2016)10, OECD, *www.oecd.org/daf/competition/Fighting-Bid-Rigging-in-Public-Procurement-%202016-report.pdf*.

Chapter 5. Summary of recommendations

This chapter summarises the recommendations proposed by the present report and it suggests some actions to implement them. Where appropriate, the relevant legal basis for implementing the recommendations is also identified.

Recommendation 1. Market analysis helps identify the risks of bid rigging

This recommendation could be implemented by modifying point II.5.1 of the Policies accordingly. For example, the required minimum content of market analysis could be enlarged to include the identification of market characteristics that facilitate collusion (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) and consider potential foreign supply.

Recommendation	Action	Legal basis
The market analysis should focus on identifying the risks of bid rigging.	Modify point II.5.1 of the Policies	Article 75 of the PEMEX Act and the Guidelines.

Recommendation 2. Set up a step-by-step methodology for conducting market analysis

PEMEX should adopt a new, clear, step-by-step methodology for conducting market analysis and avoid relying on requests of price quotes from potential suppliers. This could be done by adopting an internal document in the form of policies or guidelines.

Procurement officials should also consider as a source of information how the private sector buys the same contracting object.

Recommendation	Action	Legal basis
Adopt a new, clear, step-by-step methodology for conducting market analysis.	Internal document in the form of policies or guidelines.	Not required.
Consider how private sector buys as a source of information.	Modify point II.5.2 of the Policies	Article 75 of the PEMEX Act and the Guidelines.

Recommendation 3. Specialised department dedicated to market analysis

PEMEX should create a specialised department dedicated to market analysis for all contracting procedures.

This recommendation could be implemented by modifying PEMEX's Articles of Organisation and either creating a new department or entrusting to the existing Department of Planning, Market

Intelligence and Strategic Supply (Gerencia de Planeación, Inteligencia de Mercado y Abastecimiento Estratégico) the task of conducting market analysis.

This department should have the necessary IT material, human resources, capacity building and budget to conduct high quality market studies. It should also work closely with the requiring units of PEMEX (i.e. the units which generate the procurement needs).

Recommendation	Action	Legal basis
Create a specialised department dedicated to market analysis.	Change the Articles of Organisation of PEMEX: • Create a new department; or • Entrust the existing Department of Planning, Market Intelligence and Strategic Supply (Gerencia de Planeación, Inteligencia de Mercado y Abastecimiento Estratégico) with the task of conducting market analysis.	Section XVI of Article 13 of the PEMEX Act.

Recommendation 4. Limit the use of exceptions to open tender procedures

The use of exceptions to open tender procedures should be limited. PEMEX should give clear priority to open tendering and use restricted and direct awards as a last resort solution, in exceptional, few and fully justifiable cases.

Given the very technical nature of some of the situations that justify an exception, PEMEX could create a list of approved technical staff from different departments (external consultants could also be included in cases where additional expertise is needed) for consultation or assistance as guests in the sessions of the authorising bodies.

In addition, PEMEX could adopt internal guidelines and/or capacity building addressed to members of authorising bodies about how and when an exception to an open tender procedure could be justified.

Recommendation	Action	Legal basis
Limit the use of exceptions to open tender procedures	• Internal guidelines and/or capacity building for authorising bodies. • Creation of a list of technical experts assisting authorising bodies.	Not required.

Recommendation 5. Abolish current restrictions on participation of foreign bidders

PEMEX should abolish all restrictions on participation of foreign bidders.

Point IV.1.5 of the guidelines only allows the participation of foreign bidders when it is compulsory under an international free-trade treaty or when resources are unavailable locally.

Recommendation	Action	Legal basis
Abolish current restrictions on participation of foreign bidders.	Abolish point IV.1.5 of the Guidelines.	Article 75 of the PEMEX Act.

Recommendation 6. Make electronic bidding the default bidding system

PEMEX should set a clear priority for electronic bidding systems.

According to Section XI of Article 76 of the PEMEX Act, PEMEX Board of Directors should promote the use of electronic procurement. However, Article 17 of the Provisions establishes that contracting procedures may be carried out indistinctively by electronic or paper means or using a combination of both systems.

In order to implement this recommendation, PEMEX should modify Article 17 of the Provisions accordingly.

This action should be accompanied by the development of the necessary technical means to allow electronic bidding.

Recommendation	Action	Legal basis
Consider electronic bidding as the default bidding system	Modify Article 17 of the provisions by setting a clear priority for electronic bidding systems. Develop the necessary technical means to allow electronic bidding	Section XI of Article 76 of the PEMEX Act

Recommendation 7. Modify internal rules regarding joint bids

PEMEX's public procurement regime could be amended to ensure that joint bids are permitted only when there are pro-competitive justifications (see section 3.2.4). To help procurement officials in their assessment of whether a specific tender is genuinely competitive or not, bidders could be required to specify the purpose, the merits and the pro-competitive effects of submitting a joint bid.

This recommendation could be implemented by modifying Article 19 of the Provisions and Point II.15.b.ii of the Policies accordingly.

Recommendation	Action	Legal basis
Modify rules regarding joint bids.	Modify Article 19 of the Provisions and Point II.15.b.ii of the Policies to allow joint bids only when there are pro-competitive justifications and require bidders to specify the purpose, the merits and the pro-competitive effects of submitting a joint bid.	Section V of Article 13 and Article 76 of the PEMEX Act. Article 75 of the PEMEX Act.

Recommendation 8. Modify internal rules regarding subcontracting

PEMEX could require bidders before the bidding process to: 1) provide details about the identities of the subcontracting companies; and 2) explain why subcontracting is necessary for the proper performance of the contract.

PEMEX could consider rejecting subcontracting between competitors when it is not justified by pro-competitive reasons.

This recommendation could be implemented by modifying point II.15.b.ii of the Policies to establish the conditions under which subcontracting is allowed.

Recommendation	Action	Legal basis
Deter the use of subcontracting as a means to implement collusion	Modify point II.15.b.ii of the Policies to establish the conditions under which subcontracting is allowed.	Article 75 of the PEMEX Act.

Recommendation 9. Enhance the participation of SMEs in open public tenders

PEMEX could consider dividing contracts into smaller lots to facilitate the participation of SMEs in open public tenders. PEMEX should, however, be careful when implementing this recommendation. Splitting a contract into lots may help cartel members to better allocate the market if, for example, lots are split in a predictable way.

It could, however, consider this strategy when market analysis shows that SMEs could provide part of the demand but do not have the production capacity necessary to respond to the total demand, which only few big firms could.

PEMEX could also consider helping SMEs through dedicated training so that SMEs that are interested in bidding have the required skills and knowledge to bid.

Recommendation	Action	Legal basis
Enhance the actual participation of SMEs in open public tenders	Allow dividing contracts into smaller lots to facilitate the participation of SMEs in open public tenders when SMEs could provide part of the demand but do not have the production capacity necessary to respond to the total demand. Dedicated trainings to SMEs.	Not required.

Recommendation 10. Keep the payment for tender documents exceptional

The payment for tender documents should be kept exceptional and proportional to the costs of providing information to potential participants. Procurement officials should also justify this on a case-by-case basis. The Internal Audit, the Audit Committee or any other body of control should monitor this.

Recommendation	Action	Legal basis
Reduce the cost of participating in a contracting procedure.	Payment for tender documents should be kept exceptional and proportional to the costs of providing information to potential participants. This should be justified on a case-by-case basis. A body of control should monitor this.	Not required.

Recommendation 11. Increase the use of functional requirements

PEMEX could further consider increasing the use of functional requirements, which would specify what PEMEX would like to achieve in terms of outcomes, rather than how to do so through a specific product or method.

This recommendation could be implemented by modifying Article 57 e) of the Provisions. This modification could consist in adding a preference for the use of functional requirements, when possible.

Recommendation	Action	Legal basis
Increase the use of functional requirements	Modify Article 57 e) of the Provisions by adding a preference for the use of functional requirements when possible.	Articles 13, paragraph V and 76 of the PEMEX Act.

Recommendation 12. Create two versions of the Annual Procurement Programme and only publish the summary one

PEMEX should be careful about publishing too detailed information on its planned acquisitions, in particular on volumes, costs, delivery places and schedules, as this can form the basis of a collusive scheme.

PEMEX should create two versions of the Annual Procurement Programme: a public one with a general description of its purchasing strategy (for example, aggregating the estimated amounts of the projects), and a more detailed version for internal use that is not made public but serves to guide the procurement staff.

This recommendation could be implemented by modifying Article 4 of the Provisions accordingly.

Recommendation	Action	Legal basis
Create a public version of the Annual Procurement Programme	Modify Article 4 of the Provisions requiring the creation of a public version and a version for internal use only of the Annual Procurement Programme.	Articles 13, paragraph V, and 76 of the PEMEX Act.

Recommendation 13. Protect sensitive information in the minutes of opening of proposals

The minutes of the opening of proposals contain the identity of the bidders, their proposals and the proposed prices. Publication of that information during the tender process facilitates communication and thus collusion among bidders about ongoing contracting procedures. Disclosure of such information after the contract has been awarded facilitates communication and collusion for future contracting procedures as well as the monitoring of a collusive agreement.

PEMEX should consider publishing information about the proposed bids without disclosing the identity or allowing the identification of bidders.

The identity of bidders or any information which could allow their identification could be protected under Article 116 of the General Law on Transparency and Access to Public Information, which considers confidential all information regarding commercial secrets. PEMEX may also protect this information under Article 111 of the PEMEX Act and Policies regarding the disclosure, filing and protection of information ("*Políticas para la revelación, resguardo y protección de la información*"), which provide that all information received by PEMEX or its productive subsidiary companies is public except for information which contains commercial secrets.

Recommendation	Action	Legal basis
Protect sensitive information in the minutes regarding the opening of proposals.	Do not publish the identity of bidders or information that allows their identification in the minutes of opening of proposals.	Article 116 of the General Law on Transparency and Access to Public Information, Article 111 of the PEMEX Act and Policies regarding the protection of information.

Recommendation 14. Avoid physical clarification meetings

In order to avoid bidders meeting each other and offering them opportunities to collude, PEMEX procurement officials could consider organising clarification meetings only when this is necessary.

Such meetings could be held with each bidder separately. Alternatively, clarification meetings could be conducted on-line (with bidders submitting comments and receiving answers electronically).

To ensure equal treatment and competition, the clarifications and/or modifications to the tender resulting from these exchanges should be made public. A document compiling this information, including the questions (without allowing the identification of the bidders asking them) and the answers by PEMEX could be published on PEMEX's website.

This recommendation could be implemented by modifying point IV.2.7 of the Guidelines accordingly.

Recommendation	Action	Legal basis
Avoid communication among bidders during clarification meetings.	Modify point IV.2.7 of the Guidelines requiring: • The organisation of clarification meetings only when necessary. • Clarification meetings with each bidder separately or on-line (with bidders submitting comments and receiving answers electronically) • Publication on PEMEX's website of minutes including the questions (without identification of the bidder asking them) and the answers by PEMEX.	Article 75 of the PEMEX Act.

Recommendation 15. Limit site visits to the minimum necessary

PEMEX should only organise site visits when strictly necessary and for the procedures mentioned in point III.6.1 of the Policies. Alternatively, if possible, PEMEX could publish videos of the premises on its internet site so all interested bidders can watch them. The minutes describing the issues discussed during the visit to the site should be published but they should not identify or allow the identification of the participants. This recommendation could be implemented by modifying point III.6.1 of the Policies.

Recommendation	Action	Legal basis
Avoid communication among bidders during visits to the site.	Modify point III.6.1 of the Policies requiring: • Alternatively to on-site visits, if possible, PEMEX could publish videos of the premises on its internet site so all interested bidders can watch them. • The publication of minutes without allowing the identification of the participants to the visit.	Article 75 of the PEMEX Act.

Recommendation 16. Abolish the practice of inviting external persons to the different events of the procurement procedure and of broadcasting these events on the internet.

The OECD fact-finding showed that PEMEX invites external parties (for example, industrial associations) to the different events of the procurement procedure. These events may also be broadcasted on the internet in order to be followed by "electronic witnesses". This practice should be abolished by adopting an internal rule formally prohibiting it.

Recommendation	Action	Legal basis
Abolish the so-called "invited witness" and "electronic witness" practices.	Internal rule formally prohibiting this practice.	Not applicable.

Recommendation 17. Require that bidders sign a Certificate of Independent Bid Determination and insert a clause in the calls for tender warning potential bidders of the sanctions for bid rigging

The OECD recommends PEMEX to require bidders to sign a CIBD. This requirement could be included in Article 53 of the Provisions which already obliges participants to declare under oath that they have established a plan to prevent and detect acts and practices of corruption. Alternatively, the obligation for participants to sign a CIBD could be set forth in a separate article in the Provisions.

PEMEX could consider annexing a template of the CIBD to the Provisions. This template could be inspired by the CIBD used in the United States (see Annex of this report).

Calls for tender could also include an anti-collusion clause making bidders aware of what constitutes bid rigging and warning them of the sanctions. The introduction of this clause could have a deterrent effect and would also raise the awareness of procurement officials.

Recommendation	Action	Legal basis
Require that bidders sign a CIBD	Modify Article 53 of the Provisions or insert a new article in the Provisions containing such requirement.	Articles 13, paragraph V and 76 of the PEMEX Act.
Introduce a clause in the call for tenders warning potential bidders of the crime and sanctions for bid rigging.	Insert this requirement in the PEMEX regulatory framework.	Not required.

Recommendation 18. Do not publish maximum and minimum reference prices

When PEMEX publishes maximum and minimum reference prices, it informs bidders of the price it is willing to pay for a certain contract and makes it easier for them to agree on prices and rig bids.

PEMEX should stop this practice by modifying point II.11 of the Policies, which regulates the auction mechanisms with maximum and minimum reference prices, as well as point VI of the Guidelines, which provides for an award criteria based on discounts on the basis of a maximum reference price.

Recommendation	Action	Legal basis
Stop publishing maximum and minimum reference prices.	Modifying point II.11 of the Policies and point VI of the Guidelines.	Article 75 of the PEMEX Act.

Recommendation 19. Set conditions under which a contract may be split

PEMEX should consider splitting a single contract between multiple suppliers only in exceptional circumstances where there is a real concern about the security of supply and this concern has been balanced against the potential anti-competitive effects of splitting the contract.

When contract splitting is used, it should not be announced in the tender terms. It could be announced at a later stage, i.e. during the opening of bids. In this way, PEMEX could reduce predictability and bidders would not have the opportunity to allocate the contract at an early stage.

This recommendation could be implemented by modifying point VI of the Guidelines and point II.10 of the Policies or by adopting a new separate point in the Policies or the Guidelines specifying the conditions under which PEMEX may consider splitting contracts.

Recommendation	Action	Legal basis
Setting conditions under which a contract may be split	Modifying point VI of the Guidelines and point II.10 of the Policies or adopting a new separate point in the Policies or the Guidelines.	Article 75 of the PEMEX Act.

Recommendation 20. Set up regular training on collusion

Fight against collusion should become part of PEMEX public procurement culture. PEMEX could set up regular trainings for procurement officials, as well as officials in the Internal Audit, Internal control Unit and Responsibility Unit, on collusion, eventually with support from the COFECE. PEMEX could also require social witnesses to attend these trainings. These trainings could be part of the certification process for PEMEX purchasing procurement agents.

Recommendation	Action	Legal basis
Set up regular trainings for procurement officials on collusion.	Organize regular trainings for procurement officials, as well as officials in the Internal Audit, Internal control Unit and Responsibility Unit. Require staff to follow these trainings to be certified as PEMEX purchasing procurement agents. Require social witnesses to follow these trainings.	Not applicable.

Recommendation 21. Temporarily exclude from tenders companies convicted for having participated in bid rigging

PEMEX should consider the possibility of excluding for a limited period of time from its tenders companies that have been convicted of participating in bid-rigging schemes. Debarment should be discretionary and take into consideration the characteristics of the relevant market. Blacklisting companies in a market with very few players and high barriers to entry could be counterproductive as it could result in a lack of supply or considerably reduce the number of participants for future contracting procedures. This recommendation could be implemented by inserting this faculty in Article 12 of the Provisions.

Recommendation	Action	Legal basis
Temporarily exclude from tenders companies that have been convicted of participating in bid-rigging schemes	Insert this faculty in Article 12 of the Provisions mentioning that the debarment should be temporary and discretionary taking into consideration the characteristics of the relevant market.	Section VI of Article 76 of the PEMEX Act.

Recommendation 22. Insert a contractual penalty for suppliers found to be involved in bid rigging

PEMEX could introduce a contractual penalty against suppliers found to be involved in bid rigging. This penalty could consist of a certain percentage of the amount of the contract.

Recommendation	Action	Legal basis
Introduce a clause in the contract obliging companies to pay a contractual penalty if they are found to be involved in bid rigging	Insert this requirement in the PEMEX regulatory framework.	Not applicable.

Recommendation 23. Develop a complete, comprehensive and easily accessible electronic record of the procurement documents

PEMEX public procurement framework already provides for the creation of an Electronic Institutional System for Procurement (Sistema Institucional para el Expediente Electrónico de Procura) (Point VI.6 of the Policies). This system will contain all electronic documents related to procurement. This is a good initiative and PEMEX should work on designing a complete, comprehensive and easily accessible electronic record of procurement information.

This system should be for internal use only and bidders should not have access to it. PEMEX could, however, make it available to COFECE and IFT. The competition authorities could consider using this information to identify suspicious behaviour.

Recommendation	Action	Legal basis
Develop a complete, comprehensive and easily accessible electronic record of the procurement documents.	Create an Electronic Institutional System for Procurement which is complete, comprehensive and easily accessible. This system should be for internal use only. PEMEX may, however, make it available to COFECE and IFT.	Point VI.6 of the Policies.

Recommendation 24. The Comprehensive Information Tool on Suppliers should be adapted to identify red flags in relation to the risks of bid rigging

The "Comprehensive Information Tool on Suppliers" ("Herramienta integral de información de proveedores", HIIP) should take into consideration information about suppliers' compliance with competition law, for instance, if a supplier has been fined for anti-competitive practices in Mexico, or even abroad.

PEMEX could include this information in the HIIP and adapt the tool to make it more suitable to identify red flags in relation to the risks of bid rigging.

This recommendation could be implemented by adapting point VII of the Guidelines.

Recommendation	Action	Legal basis
Adapt the HIIP to identify red flags in relation to the risks of bid rigging.	Adapt point VII of the Guidelines so that the HIIP takes into consideration information about suppliers' compliance with competition law. Technically adapt the HIIP to identify red flags regarding bid rigging.	Article 75 of the PEMEX Act.

Recommendation 25. Create a hotline and a system to report suspicions of bid rigging

In order to facilitate the reporting of suspicions of bid rigging, PEMEX should establish clear, predefined and secure reporting mechanisms and make procurement officials aware of them. PEMEX should take the necessary measures to protect the identity and the careers of procurement officials reporting suspicions.

PEMEX could appoint an official or a group of officials from the legal department to deal with suspicions of bid rigging reported by procurement officials. This specialised unit would analyse the seriousness of the suspicions and contact the competition authority if it considers that the indications of bid rigging are sufficiently serious.

As it is foreseen for complaints in relation to the Code of Ethics, PEMEX could also create a hotline in relation to suspicions of bid rigging. This hotline could be used by procurement officials to ask questions in relation to bid rigging and discuss patterns or behaviours that could indicate collusion. It should also allow anonymous reporting of suspicions.

Recommendation	Action	Legal basis
Create a system to report suspicions of bid rigging	Create a clear, predefined and secure system to report suspicions of bid rigging, as follows: a. PEMEX could appoint an official or a group of officials from the legal department to deal with suspicions of bid rigging reported by procurement officials. b. Train procurement officials about this reporting mechanism.	Not applicable.
Create a hotline for suspicions of bid rigging	Create a hotline where procurement officials can raise questions in relation to bid rigging and discuss patterns or behaviours that could indicate collusion before formally reporting suspicions of bid rigging.	Not applicable.

Recommendation 26. Create incentives for public procurement officials to fight bid rigging

PEMEX should reward procurement officials for complying with best practices in purchasing activities, including those related to fighting bid rigging. The award could vary, for example, from career recognition to financial rewards.

Recommendation	Action	Legal basis
Create incentives for public procurement officials to fight bid rigging.	Create a reward scheme for procurement officials complying with best practices related to fighting bid rigging. The award could consist in career recognition or financial rewards.	Section VI of Article 104 of the PEMEX Act.

Recommendation 27. Establish closer co-operation with COFECE and IFT

Co-operation between COFECE and the contracting authorities in Mexico has so far been successful but limited to specific cases. PEMEX should consider making a formal agreement of collaboration with the competition authorities. This would facilitate dialogue and communication channels for issues regarding competition in procurement procedures.

Recommendation	Action	Legal basis
Establish closer co-operation with COFECE and IFT	Formalise an agreement of collaboration with the competition authorities.	Not applicable.

Notes

1 A Decree of 20 December 2013 introduces modifications to Articles 25, 27 and 28 of the Constitution and 21 transitory articles.

2 See Press articles from el Universal and *Economíahoy:*
www.eluniversal.com.mx/articulo/cartera/finanzas/2016/02/22/adelantan-permiso-para-importacion-de-gasolinas-y-diesel.
www.economiahoy.mx/economia-eAm-mexico/noticias/7461199/04/16/Comienza-la-libre-importacion-de-gasolina-y-diesel.html.

3 Third transitory article of the PEMEX Act.

4 The state as the owner of the company will define the purpose and minimum organisational regulation of the company, will appoint and remove members of the Board and the CEO, will determine Board members' remuneration and the state dividend, and will evaluate the performance of the company.

5 *Estatuto orgánico de Petróleos Mexicanos del 28 de abril de 2015*.

6 The Public Procurement Act (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público, LAASSP*), the Public Procurement Regulation (*Reglamento de la Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*), the General Procurement Manual (*Manual Administrativo de Aplicación General en Materia de Adquisiciones, Arrendamientos y Servicios del Sector Público*), the Public Works Act (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*), The Public Works Regulation (*Reglamento de la Ley de Obras Públicas y Servicios Relacionados con las Mismas*).

7 Presentation provided by PEMEX, "Introduction to the impact of the energy reform on the structure and operations of PEMEX" (*Introducción a las implicaciones de la reforma energética a la estructura y operaciones de PEMEX*), page 22.

8 See OECD (2009), hereinafter the "OECD Guidelines".

9 See OECD (2012a).

10 The OECD's report to the Government of the State of Mexico was submitted in May 2012. See OECD (2012b), hereinafter the "GEM report".

11 The OECD's report to the ISSSTE was released on 14 November 2013. See OECD (2013a), hereinafter the "ISSSTE report".

12 The CFE report was released on 7 January 2015. See OECD (2015c).

13 For the purpose of the Recommendation, a "hard-core cartel" is defined as an anti-competitive agreement, anti-competitive concerted practice or anti-competitive arrangement by competitors to fix prices, rig bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.

14 Before these two authorities were created, the only entity that oversaw economic competition was the Federal Competition Commission (CFC), created in 1993 with the enactment of the Federal Law on Economic Competition (LFC 93), which was drawn up in the context of the signing of the North American Free Trade Agreement (NAFTA).

15 *www.diputados.gob.mx/LeyesBiblio/pdf/LFCE.pdf*.

16 COFETEL was created by an executive decree in 1996 under the provisions of Transitory Article 11 of the Federal Telecommunications Act. This law underwent several reforms before it was replaced by the Federal Telecommunications and Broadcasting Act on 15 July 2014, as a result of the constitutional reform of June 2013.

17 See also OECD (2015e).

18 The guidelines are available at *www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm*.

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 a legal representative of the company and is used to declare that there is no illegal 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 United States) although not yet in Mexico. See the version of this document used in the United States (Annex).

20 This figure does not include public corporations' procurement spending. See OECD (2015gh), Government at a Glance 2015, OECD Publishing, Paris, *http://dx.doi.org/10.1787/gov_glance-2015-en.*

21 This figure does not include public corporations' procurement spending. See OECD (2015g), Government at a Glance 2015, OECD Publishing, Paris, *http://dx.doi.org/10.1787/gov_glance-2015-en.*

22 CFE (2014); PEMEX (2013). Please note that the number of employees corresponds to 2012 data. Data for the assigned budget are from CEFP (2014). For data on IMSS see Excelsior (2013) and IMSS (2014), ISSSTE (2014) and ISSSTE (2015).

23 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 regard to price, quality, financing, opportunity and all other pertinent circumstances (…)".

24 The Directorate for Procurement and Supply (*Dirección Corporativa de Procura y Abastecimiento, DCPA*) is called Operative Directorate for Procurement and Supply (*Dirección Operativa de Procura y Abastecimiento, DOPA)* as of June 2016, maintaining the functions of the DCPA. PEMEX will update the Articles of Organisation in this respect.

25 *Disposiciones generales de contratación para Petróleos Mexicanos y sus empresas productivas subsidiarias*.

26 *Lineamientos Generales de Procura y Abastecimiento.*

27 *Políticas y Lineamientos para Procura y Abastecimiento*.

28 This group is chaired by the subdirector of the productive company that the Director General has appointed as responsible for concluding the contract, three subdirectors of the DCPA, a subdirector of Finance and a subdirector of the Legal Directorate. This group also includes a subdirector of the Institutional Internal Control Unit and one from the Internal Audit.

[29] This group is chaired by the subdirector of the productive company that the Director General has appointed as responsible for concluding the contract, two subdirectors from the DCPA and a subdirector of Finances and a subdirector of the Legal Directorate. This group also includes two permanent advisors: a subdirector of the Institutional Internal Control Unit and a subdirector of Internal Audit.

[30] PEMEX refers to these contracts as "*acuerdos preparatorios*".

[31] PEMEX refers to these contracts as "*acuerdos referenciales*".

[32] 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.

[33] 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. At least three bidders are invited to tender.

[34] The percentage increase in value of direct awards in 2015 is due to the conclusion in 2015 of two big contracts relating to a lease and supply of nitrogen (the latter is a 12 year contract).

[35] PEMEX reply of 14 September 2015 to the OECD's questionnaire for this project.

[36] PEMEX will check: 1) the legal and administrative capacity of the participants; 2) technical capacity, such as the human resources and the necessary infrastructure to perform the activity required by the contract; 3) financial capacity; and 4) relevant experience – the potential participant should prove the experience and the results obtained in projects of a similar nature and complexity.

[37] The award criteria may consist of: 1) Discounts on the basis of a maximum reference price. PEMEX will determine a maximum reference price as a result of the market analysis and will determine the percentage of discount that bidders may propose in relation to the maximum reference price. 2) The annual equivalent cost is the cost per year of owning and operating an asset over its entire lifespan. This is often used as a decision-making tool in capital budgeting when comparing investment projects of unequal lifespans. 3) Points or percentages. This criterion is used in projects where technical aspects, quality aspects, experience and performance are important. It consists of assigning points or percentages to each of those aspects taking into account their importance. 4) Cost/benefit. This criterion is used in contracting processes for goods or services which present different levels of investment and operation costs. It consists of calculating and comparing benefits and costs of different proposals. 5) Annual present value. This criterion is used in contracts involving a long-term project. It consists of the sum of the present values of incoming and outgoing cash flows over a period of time. Incoming and outgoing cash flows can also be described as benefit and cost cash flows, respectively. 6) Total cost of ownership. This consists of estimating the direct and indirect costs of owning a product or system. 7) A combination of the above criteria, or any other method established by the contracting strategy (Point VI of the Guidelines).

[38] PEMEX reply to the OECD's questionnaire for this project during a meeting of 22 October 2015.

[39] PEMEX reply of 31 August 2015 to the OECD's questionnaire for this project.

[40] The information refers to the nationality, location, legal constitution and economic activity of suppliers who are obliged to report modifications to the above-mentioned data.

[41] The Register indicates penalties, the meeting of deadlines for delivery and the qualitative performance of suppliers.

[42] IMSS: Mexican Social Security Institute (*Instituto Mexicano del Seguro Social*); SAT: Mexican Tax Administration (*Servicio de Administración Tributaria*); INFONAVIT: Institute of National Housing Fund for Workers (*Instituto del Fondo Nacional de la Vivienda para los Trabajadores*); STPS: Ministry of Labor and Social Welfare (*Secretaría del Trabajo y Previsión Social*). PEMEX will conclude co-

operation agreements with these authorities in order to obtain all the information related to their suppliers. Suppliers wishing to conclude a contract with PEMEX must give their written authorisation allowing the above-mentioned authorities to send the relevant information to PEMEX (Article 51 of the Regulation).

43 PEMEX reply to the OECD's questionnaire for this project during a meeting of 4 March 2016.

44 All of the information sources used in a market analysis should be verifiable.

45 See OECD (2016). According to this report, many suppliers of the ISSSTE have reported that they did not want to provide a real price quote during the market research phase because they were afraid that the information would leak and that their competitors would undercut their bid and win the contract. By the same token, suppliers sometimes quote inflated prices to gain margin for discounts during tenders or increase profit if they are awarded the contract.

46 PEMEX reply to the OECD's questionnaire for this project during a meeting of 4 March 2016. The different areas responsible for conducting market analysis are the following : *Gerencia de Planeación, Inteligencia de Mercado y Abastecimiento Estratégico, Gerencia de Contrataciones para Confiabilidad y Logística, Gerencia de Contrataciones para Producción, Gerencia de Contrataciones para Servicios a la Explotación y Perforación, Gerencia de Ingeniería de Costos y Análisis de Mercado para Exploración y Producción, Gerencia de Planeación, Evaluación y Consolidación de Contrataciones, Gerencia de Categorías de Exploración y Producción, Gerencia de Contrataciones para Proyectos, Gerencia de Contrataciones para Producción, Comercialización y Confiabilidad, Gerencia de Ingeniería de Costos y Análisis de Mercado para Transformación Industrial, Servicios de Soporte y Salud, Gerencia de Categorías de Transformación Industrial, Servicios de Soporte y Salud y Gerencia de Contrataciones para Servicios de Soporte y de Salud.*

47 See OECD (2016) and OECD (2013a).

48 Article 148 of the Articles of Organisation.

49 This Committee is one of the operating bodies of the Board of Directors (Article 40 of the PEMEX Act). It is in charge, among others, of approving exceptions to the open tender in certain cases.

50 The decision to grant an exception under these circumstances will be notified to the Group for the Authorisation of Exceptions to an Open Public Tender and the Audit Committee on a monthly basis.

51 The market investigation will include: 1) the object of the contract; 2) the volume, quantity and scope of the contract; 3) the deadline for the execution of delivery of goods; 4) the identified alternatives or substitutes to satisfy the demand; and 5) the estimated price taking into account the identified alternatives.

52 The following free-trade agreements have been signed by the Government of the United Mexican States: 1. North America Free Trade Agreement (NAFTA); 2. Mexico-Colombia Free Trade Agreement; 3. Mexico-Costa Rica Free Trade Agreement; 4. Mexico-Nicaragua Free Trade Agreement; 5. Mexico-Israel Free Trade Agreement; 6. Mexico-European Community, Economic Association and Co-operation Agreement; 7. Mexico-European Association Free Trade Agreement; 8. Mexico-Japan Free Trade Promotion Agreement; and 9. Mexico-Chile Free Trade Agreement. One of the goals of these free-trade agreements is to open up Mexican public procurement at all levels to foreign suppliers and their goods and services by reducing trade barriers.

53 International public tenders represent more than 50% of the annual procurement expenditure and often cover multiannual contracts. Therefore, the value of these procurements is high whereas the number of procurement procedures is relatively lower.

54 Pemex's Electronic Procurement System (*Sistema de Contrataciones electrónicas de Pemex*, or SISCeP), became operative on 1 July 2016. The SISCeP provides for a gradual adoption of the system by the

buyers and providers of PEMEX and its subsidiary productive companies, which will allow for all procedures to take place electronically as of November 2016.

55 PEMEX reply of 30 March 2016 to the OECD's questionnaire for this project.

56 PEMEX reply of 31 August 2015 to the OECD's questionnaire for this project.

57 Check point 2 of the design checklist. Available at: *www.oecd.org/daf/competition/guidelinesforfightingbidriggininpublicprocurement.htm*.

58 PEMEX reply to the OECD's questionnaire for this project during a meeting of 4 March 2016.

59 This information system should contain at least the following elements: 1) data on the suppliers and contractors, including nationality, location, legal constitution, economic activity; 2) information about the contracts concluded with PEMEX, the performance of the suppliers and contractors, including among other things, meeting of deadlines, application of penalties and quality of the goods, services and works; 3) compliance with norms regarding environment, industrial and operational security and labour responsibility; 4) certification of compliance with technical norms such as the quality norms; and 5) results of the evaluations of suppliers and contractors done by specialised companies. This information is available on PEMEX's website (*www.pemex.com*).

60 PEMEX reply to OECD's questionnaire of 14 September 2015 for this project.

61 PEMEX reply to OECD's questionnaires of 14 September 2015 for this project.

62 Subpart 24.2 of US Federal Acquisition Regulations provides that "contracting officers may receive requests for records that may be exempted from mandatory public disclosure. The exemptions most often applicable are those relating to classified information, to trade secrets and confidential commercial or financial information, to interagency or intra-agency memoranda, or to personal and medical information pertaining to an individual. Other exemptions include agency personnel practices, and law enforcement."

63 All information produced, obtained, acquired, transformed or kept by PEMEX and its subsidiaries is public, except information containing industrial or commercial secrets according to the Industrial Property Law and classified information according to the relevant provisions.

64 See OECD (2016) Towards Efficient Public Procurement in Colombia. Making the Difference. OECD Public Governance Reviews. OECD Publishing, *http://dx.doi.org/10.1787/9789264252103-en*.

65 PEMEX's reply to OECD questions of 14 September 2015.

66 The clause should include an explicit right of the procuring authority to report all suspected instances of bid rigging and share otherwise confidential tender information with the relevant competition authority; an explicit right of the procuring authority to receive information and approve any subcontractors; and an implicit guarantee that a bid has been developed independently and that no consultation, communication, contract, arrangement or understanding has been made between the supplier/bidder and any competitor. The clause may also include the obligation of the supplier/bidder to report if they, or any organisation or person associated with their tender, including directors and senior managers, have ever been subject to proceedings related to anti-competitive conduct domestically or overseas. *www.oecd.org/governance/procurement/toolbox/anti-collusiontenderclause.htm.*

67 PEMEX already takes these issues into account in relation to the reporting of infringements of the Code of Ethics. In those cases, PEMEX allows officials to make anonymous complaints and protects them from retaliation. The Responsibility Unit may also safeguard the anonymity of officials launching complaints (PEMEX reply of 31 August 2015 to the OECD questionnaire).

68 PEMEX reply of 24 August 2015 to the OECD's questionnaire for this project.

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Annex
US certificate of independent bid determination

(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 or 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 offeror's organization responsible for determining the prices offered in this bid or 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 an 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.

Source: US Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 52.203-2.

www.oecd.org/competition/bidrigging