



Fighting Bid Rigging in Public Procurement in Mexico

**A Secretariat Analytical Report on Legislation, Regulations and
Practices Relating to Procurement Undertaken by ISSSTE**

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FOREWORD

In June 2012 the OECD executed an Agreement with the Mexican competition authority (*Comisión Federal de Competencia, CFC*) and the State's Employees' Social Security and Social Services Institute (*Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado, ISSSTE*). The purpose of the Agreement was to assist ISSSTE in implementing the OECD Competition Committee's Guidelines for Fighting Bid Rigging in Public Procurement in its procurement processes. The Guidelines, approved in 2009, provide practical and applicable checklists for designing effective public procurement procedures and for detecting collusive practices during the course of tender processes, both with the aim of reducing the risk of bid rigging in public procurement.

Since June 2012, the OECD Secretariat, ISSSTE and the CFC have worked together to review and assess the laws, regulations, policies and practices governing public procurement at ISSSTE and to identify areas for possible improvement. This Analytical Report contains recommendations to ISSSTE on how to enhance its procurement procedures to avoid collusion among suppliers and to promote competition. The Analytical Report also reiterates a number of recommendations that the OECD has put forward in earlier reports to address limitations and undesirable features in Mexico's current legal framework relating to public procurement.

The implementation of the OECD recommendations contained herein, coupled with the increased awareness among ISSSTE procurement officials of the existence, risks and costs of collusion, will enable ISSSTE to increase the effectiveness of its procurement strategy to the benefit of its many clients and ultimately to the taxpayers of Mexico. The savings generated can then be used by ISSSTE to fund additional and better health care and social services.

This report was prepared by Ian Nielsen-Jones of the OECD Secretariat with the help of Leonardo Noyola Vogel. They would like to thank the following for their input and cooperation: Carolina Cabello Ávila at the OECD; Adelaida Muñoz, Hebe Cué and Bárbara del Castillo at ISSSTE; Paolo Benedetti, Benjamín Contreras, Carlos Mena and Heidi Sada at the CFC; and, Javier Dávila and Paris Pérez at the *Secretaría de la Función Pública*. Valuable assistance and useful information was provided by many ISSSTE procurement officials.

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LIST OF ACRONYMS

CCNPMIS	<i>Comisión Coordinadora para la Negociación de Precios de Medicamentos y otros Insumos para la Salud</i>
CFC	<i>Comisión Federal de Competencia</i> (Federal Competition Commission)
CIBD	Certificate of Independent Bid Determination
COMPRANET	<i>Sistema Electrónico de Información Pública Gubernamental</i> (Federal Electronic Data Base for Tenders)
DGRM	<i>Dirección General de Recursos Materiales</i> (General Directorate for Material Resources)
FOVISSSTE	ISSSTE's Housing Loans and Personal Loans Unit
GDP	Gross Domestic Product
GEM	<i>Gobierno del Estado de México</i> (Government of the State of Mexico)
IMCO	<i>Instituto Mexicano para la Competitividad</i> (Mexican Institute for Competitiveness)
IMSS	<i>Instituto Mexicano del Seguro Social</i> (Mexican Institute for Social Security)
INAP	<i>Instituto Nacional de Administración Pública A.C.</i> (National Institute for Public Administration)

ISSSTE	<i>Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado</i> (The State's Employees' Social Security and Social Services Institute)
LAASSP	<i>Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público</i> (Law on Acquisitions, Leases and Services in the Public Sector- Procurement Act)
LOPSRM	<i>Ley de Obras Públicas y Servicios Relacionados con las Mismas</i> (Public Works Act)
OECD	Organisation for Economic Co-operation and Development
OIC	<i>Órgano Interno de Control</i> (ISSSTE's Internal Control Unit)
PENSIONISSSTE	ISSSTE's Pension Management Unit
PPPA	<i>Ley de Asociaciones Público Privadas</i> (Public-Private Partnerships Act)
SFP	<i>Secretaría de la Función Pública</i> (Mexican Secretariat of Public Administration)
SUPERISSSTE	ISSSTE's Supermarket and Pharmacy Unit
TURISSSTE	ISSSTE's Travel Agency Unit

EXECUTIVE SUMMARY

The State's Employees' Social Security and Social Services Institute (*Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado*, ISSSTE in Spanish) is the second largest Mexican social service agency in terms of the annual volume of goods and services purchased. Although ISSSTE's level of purchases is less than half that of the largest social service agency, the Mexican Institute of Social Security (*Instituto Mexicano del Seguro Social*, IMSS in Spanish), ISSSTE is a significant public purchasing organisation and one that is involved in an important public function- health care and social services. ISSSTE spends **over 20 percent** of its annual budget on public procurement and is the fifth largest Mexican federal procurement group.

In June 2012, an Agreement was signed between ISSSTE, the OECD and the Mexican competition authority (*Comisión Federal de Competencia*, CFC in Spanish). The Agreement acknowledged the efforts ISSSTE was already undertaking to fight bid rigging in its public procurement processes and committed ISSSTE to continue to implement the OECD Competition Committee's Guidelines for Fighting Bid Rigging in Public Procurement in its procurement processes by adopting and implementing in its institutional policy the recommendations noted in point c) below that are deemed applicable.

With the support of the CFC, the OECD agreed to assist ISSSTE in its implementation of the Guidelines by:

1. providing capacity building for ISSSTE officials regarding: 1) the costs and risks of bid rigging; 2) the design of public procurement to reduce the risks of bid rigging and enhance the identification of bid rigging practices; and, 3) the process to follow when instances of bid rigging are found or suspected;
2. preparing an Analytical Report assessing the extent to which current public procurement legislation, regulation and practices governing ISSSTE's procurement are consistent with the Guidelines; and,
3. formulating recommendations for improvement in procurement legislation and regulation and in the procurement practices of ISSSTE in accordance with the Guidelines.

With respect to point 1), the OECD Secretariat – together with staff from the CFC – organised an intense, one-day education session for senior ISSSTE officials to acquaint them with the risks and costs of bid rigging and the work that the OECD and competition authorities around the world have undertaken to address the existence and impact of this costly issue. As well, in November 2012 the OECD and CFC conducted two, two-day

training courses for over 140 ISSSTE procurement officials from its various organisations and delegations (*delegaciones*) across Mexico, which included a review of many bid-rigging cases from Mexico and around the world.

This Analytical Report fulfils the OECD's commitments with respect to points b) and c) above. Specifically, Chapter 3 of the Report provides an overview of the existing legal framework governing public procurement by ISSSTE, and a summary of the laws and regulations that are applicable when ISSSTE procures goods and services, commissions public works and undertakes procurement via public-private partnerships, the latter in which ISSSTE has not engaged to date.

Chapter 4 of the Analytical Report summarises issues in the current federal procurement laws and regulations which the OECD believes restrict the scope for action by ISSSTE and other public procurement agencies and undermine their ability to obtain the best value from their purchases. These issues, some of which were reviewed in two OECD Secretariat reports published earlier for IMSS and the State of Mexico, include: preferential treatment in laws and procedures, limits to foreign bidders' participation in tenders; the use of procurement procedures which are less competitive than public tenders; certain disclosure requirements which may facilitate collusion; and, requirements or permitted practices which may also facilitate collusion such as mandatory clarification meetings and the use of joint bids, split awards and sub-contracting. Chapter 4 also recommends possible remedies for each concern.

Chapter 5 contains recommendations, tailored to ISSSTE's particular situation, regarding how to improve procurement procedures and systems. These recommendations address issues regarding the following subjects:

- establishing a coordination and oversight body for more effective procurement;
- optimising the use of ISSSTE's newly-formed Market Studies Unit;
- expanding ISSSTE's efforts to consolidate purchases;
- taking better advantage of framework agreements;
- adopting practices to increase the number of bidders;
- implementing a strict approach to deal with joint bids;
- limiting the use of split awards;
- deterring the use of sub-contracting;

- utilising remote procurement procedures more often;
- commencing the use of reverse auctions;
- ceasing to disclose the "maximum" price in public tenders;
- requiring Certificates of Independent Bid Determination;
- retaining records from procurement procedures;
- fostering a closer relationship with the CFC;
- expanding internal and external information-sharing;
- enhancing the functioning of the Coordinating Commission for Negotiating the Price of Medicines and Other Health Inputs;
- upgrading training and education opportunities;
- instituting procedures for staff to raise concerns relating to bid rigging;
- establishing a recognition/reward program;
- adopting a policy of seeking damages in bid-rigging cases; and,
- improving the process and timing for the approval of annual procurement plans.

Each of the recommendations in Chapter 4 and Chapter 5 is linked to one or more sections of the Design Checklist and or the Detection Checklist, which are found in the OECD's Guidelines for Fighting Bid Rigging.

Fighting bid rigging has become a key priority for ISSSTE as it has for public agencies and buyers around the world. Reducing the occurrences of collusion saves money (which can be used to satisfy other needs), fosters innovation and enhances a country's competitiveness. ISSSTE is to be commended for its recent initiatives and efforts in this area and for working with the CFC and the OECD to help identify additional courses of action it can pursue to reduce the number of instances it will be the victim of bid rigging or other collusive activity. The OECD is confident that by adopting the recommendations in this Analytical Report ISSSTE will enhance competition in its procurement procedures enabling the organisation to obtain better "value for money" from its purchases, to the benefit of its large number of clients and the taxpayers of the United States of Mexico.

CHAPTER 1: INTRODUCTION

1.1 Background

It is widely recognised that public procurement groups are often victimised by private sector companies through bid rigging and price-fixing activities. This problem is just one of six issues that confront public purchasing groups around the world when they undertake their procurement processes:

- a) too few suppliers;
- b) a lack of competition among suppliers;
- c) collusion on the part of suppliers;
- d) inappropriate legislation and regulations;
- e) inefficiencies in procurement procedures; and,
- f) dishonest or corrupt procurement officials.

The primary goal of public procurement groups like ISSSTE should be to purchase goods, services and public works in the most effective manner from a sufficient number of suppliers who are actively and genuinely competing to supply what is required. In order to achieve this goal, it is necessary to have the following in place: appropriate laws and regulations; clear and sensible procurement practices; and, procurement officials who are well trained and understand and follow the established laws, regulations and practices. Procurement laws should not place unnecessary burdens on procurement groups. The laws should be designed to help procurement officials make effective purchases that achieve the best value for money. They should not be designed chiefly for other public policy goals such as industrial policy, social policy and regional economic development.

Governments around the world at all levels have a tendency to encourage public procurement officials to award contracts to the lowest bidder as it is the safest course of action from transparency and public perception perspectives. Public buyers have a similar tendency because it is the easiest method of awarding contracts. However, this can be an overly simplistic approach to procurement. As well, it makes bid rigging more likely to occur as it removes some unpredictability from public procurement procedures. It is important to note that the Mexican federal procurement statutes recognise the importance of non-price factors such as quality, service, delivery terms, payment terms, warranties, etc. by permitting the use of such selection criteria in awarding contracts (see section 3.1 relating to the points-based criterion).

Evaluating bids and awarding contracts based on price alone makes the most sense when the product or service is simple in nature and the procurement process is routine. Using non-price evaluation factors is a more difficult approach to procurement but it can be the best approach when the good or service to be purchased is complex and there are a number of features or variables considered desirable (for example, public works projects). When utilising non-price factors procurement officials need to be careful in assigning the weights to each of the criteria. Governments should give their professional public procurement officials the responsibility of choosing what they believe to be the most appropriate approach to procurement in light of the requirements and circumstances before them.

It is vital that procurement officials are aware that some suppliers engage in bid rigging and other collusive activity in order to thwart competitive procurement processes for their own gain and contrary to the best interests of public procurement groups, stakeholders and taxpayers. To deal with this fact, procurement officials must therefore be trained about the forms that bid rigging takes and how to detect and avoid bid rigging.

One goal of the OECD is to assist governments and public procurement groups in establishing appropriate legal frameworks, putting in place suitable and effective procurement policies and practices, and providing the necessary training to professional and honest procurement officials. This assistance is designed to increase the ability of public procurement authorities to achieve value for money in their purchases to the benefit of governments and taxpayers. There is a close connection between promoting competition in procurement procedures and taking steps to diminish the likelihood of suffering from collusive activity on the part of bidders/suppliers.

With the knowledge of the issues facing public procurement officials noted above and with an awareness of the OECD's work with two other important Mexican public procurement organisations (see below and footnotes 1 and 2), the State's Employees' Social Security and Social Services Institute (*Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado*, ISSSTE in Spanish) signed an Agreement in June 2012 with the OECD and the Mexican competition authority (*Comisión Federal de Competencia*, CFC in Spanish).

The goal of this cooperation agreement was to enable the OECD – with the support of the CFC – to develop an Analytical Report, which would assess the extent to which procurement legislation and regulations and ISSSTE's procurement practices are consistent with the OECD Competition Committee's Guidelines for Fighting Bid Rigging in Public Procurement (hereinafter, the "OECD Guidelines" - see section 1.2 and Annex 1). Pursuant to the Agreement, ISSSTE committed to adopt and implement in its institutional policy the recommendations of the Analytical Report deemed to be applicable.

The OECD committed to support ISSSTE's implementation of the OECD Guidelines through:

1. providing capacity building for ISSSTE officials regarding the design of public procurement to reduce the risks of bid rigging and to enhance the identification of bid-rigging practices; and,
2. preparing an Analytical Report assessing the extent to which current public procurement legislation, regulation and practices governing ISSSTE's procurement are consistent with the OECD Guidelines and, recommending areas for improvement in procurement legislation and regulation and in the practices at ISSSTE in accordance with the OECD Guidelines.

The Agreement with ISSSTE was the third similar agreement signed in recent times with a significant Mexican public procurement group. In January 2011 the Mexican Institute of Social Security (*Instituto Mexicano del Seguro Social*, IMSS in Spanish) signed a Memorandum of Understanding (MOU) with the OECD and CFC. IMSS' primary goal was to have the OECD conduct a broad review of the integrity of its procurement processes to identify ways in

which IMSS could make its procurement more competitive and less susceptible to bid rigging. The OECD's report to IMSS was completed in December 2011.¹

In October 2011 the Government of the State of Mexico (*Gobierno del Estado de México*, GEM in Spanish) signed an Inter-institutional Agreement with the OECD and CFC for the purpose of implementing the OECD's Guidelines in GEM's procurement procedures. The OECD's report to GEM was submitted in May 2012.²

Each of the three agreements supports the MOU signed by the OECD and The Ministry of the Economy of the United Mexican States in September 2007 to strengthen competitiveness in Mexico. That MOU was renewed in January 2010.³

In May 2012, the OECD Secretariat – together with staff from the CFC – organised an intense, one-day education session for senior ISSSTE officials to acquaint them with the risks and costs of bid rigging and the work that the OECD and competition authorities around the world have undertaken to combat the existence and impact of this serious and costly crime. In November 2012 the OECD Secretariat conducted two, two-day training courses that were attended by over 140 procurement officials and other senior officials from ISSSTE. The

¹ Fighting Bid Rigging in Public Procurement in Mexico, A Secretariat report on IMSS' procurement regulations and practices, 2011 (hereinafter the IMSS Report), available at <http://www.oecd.org/daf/competition/fightingbidrigginginpublicprocurementinmexico2011.htm>.

² Fighting Bid Rigging in Public Procurement in Mexico, A Secretariat Analytical Report on Procurement Legislation, Regulations, and Practices in the State of Mexico, 2012 (hereinafter the GEM Report), available at <http://www.oecd.org/daf/competition/fightingbidrigginginpublicprocurementinmexicogemreport--2012.htm>.

³ Memorandum of Understanding between The Ministry of the Economy of the United Mexican States and the Organisation for Economic Co-operation and Development: Cooperation to Strengthen Competitiveness in Mexico, signed in Paris on September 26, 2007; Renewal of the Memorandum of Understanding between The Ministry of the Economy of the United Mexican States and the Organisation for Economic Co-operation and Development: Cooperation to Strengthen Competitiveness in Mexico, signed in Mexico City on January 7, 2010.

training was presented by officials from the CFC and the OECD and by an international expert. The content of the training covered: a description of bid rigging; how to design procurement processes to reduce the risk of bid rigging; and, how to detect bid rigging in public procurement processes. The training also provided the attendees with the details of many actual bid rigging cases from Mexico and across the world and with the opportunity to put the concepts and knowledge into practice by working on hypothetical cases.

This Analytical Report fulfils the second OECD commitment noted above. The Report has been prepared by the Competition Division of the OECD Secretariat and is based upon a review and analysis of a large volume of information gathered during numerous meetings with procurement officials from a cross-section of ISSSTE's operating units. Information was also provided by the CFC and the federal Secretariat of Public Administration (*Secretaría de la Función Pública*, SFP in Spanish).

The Analytical Report summarises the current public procurement legislation and regulations in Mexico that ISSSTE is subject to, and provides a list of areas for improvement in order for the current laws and regulations to become more closely aligned with the OECD Guidelines and for ISSSTE to be more effective in preventing and fighting collusion. The Report also includes a set of recommendations to ISSSTE regarding improvements that could be made to its own procurement policies and practices.

The Analytical Report is structured as follows. The next two sections in this Chapter summarise the OECD Guidelines and describe bid rigging and its negative consequences.

Chapter 2 provides an overview of ISSSTE's structure and operations and some pertinent procurement statistics. Chapter 3 then sets out the current legal framework governing federal public procurement in Mexico and describes the key legal provisions and the policies and guidelines which are applicable to ISSSTE's procurement activities.

The OECD's recommendations for improvements in the current federal procurement laws and regulations and for improvements in ISSSTE's procurement policies and procedures are presented in Chapters 4 and 5, respectively, and are summarised in Annexes 5 and 6, respectively.

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

On 17 July 2012, the OECD Council adopted a Recommendation on Fighting Bid Rigging in Public Procurement that calls for governments to assess their public procurement laws and practices at all levels of government in order to promote more effective procurement and reduce the risk of bid rigging in public tenders.⁴

The Recommendation is a step forward in the fight against collusion in public procurement that the OECD has been leading for a long time, especially through the issuance of its Guidelines for Fighting Bid Rigging in Public Procurement, which were adopted by the OECD Competition Committee in 2009, and the work related to their dissemination around the world.

Certain rules that govern procurement, the way in which a tender is carried out and the design of the tender itself can hinder competition and promote collusive arrangements or bid-rigging conspiracies between competitors. The 2012 Recommendation together with the Guidelines are essential instruments to help OECD member governments reduce such anti-competitive practices and to find effective ways of detecting them.

The OECD Guidelines list the most common strategies of bid rigging (e.g. cover bidding, bid suppression, bid rotation and market allocation- see section 1.3) and industry, product and service characteristics that facilitate collusion (i.e. a small number of suppliers, little or no entry, the existence of industry associations, identical or simple products or services, few if any substitutes, and little or no technological change). The OECD Guidelines also include two checklists- the first one on how to design procurement processes to reduce the risk of bid rigging and the second one on how to detect collusion in public procurement.

The checklist on how best to design procurement procedures contains a number of suggestions to procurement officials, including:

⁴ The text of the Recommendation is available in English and French at: <http://www.oecd.org/daf/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm> - see Annex 1 for the complete document.

- being informed before starting a tender procedure about market conditions, potential suppliers and prevailing price levels;
- designing the tender process to maximise the potential participation of genuinely competing bidders (e.g. by avoiding unnecessary restrictions and reducing constraints on foreign participation);
- defining contract requirements clearly and avoiding predictability (e.g. by aggregating or disaggregating contracts in order to vary the size and timing of tenders and working together with other procurement groups);
- designing the tender process to effectively reduce communication among bidders (e.g. by requiring bidders to sign a Certificate of Independent Bid Determination);
- carefully choosing the criteria for evaluating and awarding the tender in order to avoid favouring incumbents or giving any kind of preferential treatment to certain suppliers; and,
- raising awareness among procurement staff about the risks of bid rigging in procurement (e.g. by implementing regular training programs on bid rigging and cartel detection and retaining information from past tenders).

The checklist on how to detect bid rigging during the procurement process complements these suggestions and recommends that procurement officials remain alert for:

- warning signs and patterns when businesses are submitting bids (e.g. the same supplier wins all of the tenders or some companies always submit bids but never win or bidders appear to take turns winning tenders);
- warning signs in tender documents submitted (e.g. identical mistakes or similar handwriting in bid documents submitted by different companies);

- warning signs and patterns related to pricing (e.g. sudden and identical increases in prices that cannot be explained by cost increases or a large difference between the winning bid and other bids);
- suspicious statements (e.g. spoken or written references to an agreement among bidders or similarly worded statements that bidders use to justify their prices- “industry suggested price”, “standard market prices” or “industry price schedules”); and,
- suspicious behaviour (e.g. suppliers meeting privately before submitting bids or regularly socialising together or holding regular meetings).

The detection checklist concludes with a list of steps that procurement officials should take if they suspect bid rigging:

- gain an understanding of the laws regarding bid rigging in their jurisdiction;
- refrain from specifically discussing concerns about bid rigging with suspected participants;
- retain all bid documents, correspondence, envelopes, etc.;
- keep detailed records of all suspicious behaviour and statements including dates, who was involved, who else was present and what precisely occurred or was said;
- contact the local competition authority; and,
- consider, after consulting with internal legal staff, whether it is appropriate to proceed with the tender process.

1.3 The serious crime of bid rigging and its negative consequences

Bid rigging occurs when firms secretly conspire to increase the prices, or lower the quality, of goods and services, which are purchased by private and public organisations through a bidding process, instead of genuinely competing against each other to win a tender. Bid rigging is a very specific type of collusive or cartel activity that amounts to theft of, and fraud against, buying

organisations. Participants in cartels are usually well-organised and resourceful and they value secrecy.

Bid rigging can take various forms. For example, bidders can agree to submit phony bids which are higher than the bid of the designated winner (or submit bids which do not meet all of the technical requirements), to create the appearance of genuine competition – a practice known as “cover bidding”. In other cases, members of the conspiracy may simply refrain from submitting a bid or withdraw a previously submitted bid (“bid suppression”), thus enabling the designated winner to secure the contract.

In “bid-rotation” schemes members of the agreement continue to bid but take turns to submit the lowest bid and consequently win the tender. Conspiring bidders can also agree not to compete for certain categories of customers or in certain geographic areas or for certain products, thus dividing up or allocating the market amongst themselves (“market allocation”).

These mechanisms are not mutually exclusive and are not the only ones that dishonest bidders can use, and have used, to limit competition in a tendering or other procurement procedure. What all bid-rigging schemes have in common is a way for the colluding companies to share the excess profits generated by the illegal activity. As well, many of these schemes set up enforcement mechanisms to deal with companies that cheat on the rules established by the participants regarding sharing customers and profits.

No country is immune from these illegal practices, which result in buyers paying higher prices for their purchases and/or buying goods of lower quality. Occasionally, a portion of the increased costs are used to pay corrupt procurement officials. In addition to taking resources away from purchasing groups (and ultimately taxpayers in the case of public procurement), these practices can discourage entry by competing companies, diminish public confidence in competitive procurement processes and undermine the benefits of a competitive marketplace. Bid-rigging schemes serve the interests of the cartel members and not those of the customer and general public. Given the large amounts of money spent by public procurement groups (in Mexico, 800,000 million pesos at the federal level alone, which represents between 8 and 9 percent of the country’s GDP and 23 percent of the federal government’s 2012

budget⁵), it is critical that governments at all levels, and their procurement groups, do everything they can to combat this serious problem.

Table 1, which summarises six economic surveys concerning the level of cartel overcharges, suggests that the presence of a collusive agreement can increase prices by over 30 percent.

Table 1

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

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

Bid rigging is illegal in all of the OECD member countries and can be investigated and punished under their competition laws. In many OECD countries bid rigging is also a criminal offence (including Mexico, following the May 2011 reforms to the competition law- *Ley Federal de Competencia Económica*). Even before criminal penalties for bid rigging were introduced in Mexico, the CFC was investigating and punishing this offence. Since 2000 the CFC has tackled bid-rigging practices in four different cases, each involving

⁵ Information provided to the OECD by the SFP in October 2012.

products supplied to public health care organisations⁶ and each with the assistance of IMSS.

The most recent fines totalling MXN 151.7 million (the maximum amount allowed by the competition law applicable at the time in Mexico) were imposed in 2010 against six pharmaceutical companies as well as several individuals who had acted on behalf of the companies. The case involved the submission of identical bids to IMSS and the allocation of contracts among the participating companies with respect to two pharmaceutical products, human insulin and saline solutions. To make its case, the CFC undertook a sophisticated analysis of the bid submissions of the companies, which demonstrated numerous irregularities and implausible bid outcomes. The CFC also relied on cell phone records that revealed communications between the companies around the time periods when the tenders were published. The fines against two of the companies and one individual were upheld by the Federal Judicial Power (*Poder Judicial de la Federación*, PJF in Spanish) in December 2011.⁷ Decisions involving the remaining parties are expected in 2013.

It can be anticipated that the CFC will step up its investigations of bid rigging and other collusive activity in Mexico given the positive PJF decision in December 2011 and the amendments to Mexico's competition laws in May 2011, which provided the CFC with the power to conduct surprise on-site searches and increased the level of fines for companies and individuals. It should be noted that amendments to Mexico's Criminal Code (*Código Penal Federal*) now allow for the imposition of jail sentences of 3 to 10 years for individuals involved in collusive activity.

As part of ISSSTE's decision to increase its efforts to improve its procurement practices and to detect and combat bid rigging in its procurement activities, it committed, through the Agreement signed with the CFC and OECD, to adopt and implement in its institutional policy applicable recommendations emanating from this Analytical Report (those outlined in Chapter 5) and to coordinate the logistics associated with training sessions for its procurement officials. As noted above, education and training sessions took place in May 2012 and November 2012.

⁶ The cases involved surgical sutures, radiographic material, chemicals to process x-ray films, human insulin and saline solutions.

⁷ Opinion R.A 253/2011 of the Fourth Tribunal of the First Circuit on Administrative Matters, 8 December 2011.

It is anticipated that this Analytical Report prepared by the OECD Secretariat will provide ISSSTE with additional ways to make the organisation more efficient and effective with respect to an extremely important facet of public endeavour, procurement, as well as more informed to enable its procurement staff to more easily identify and avoid bid rigging. Adopting the recommendations contained in this Report will promote competition in public procurement and enable ISSSTE to obtain better “value for money” from its purchases, to the direct benefit of its many beneficiaries and ultimately to the taxpayers of the United Mexican States.

CHAPTER 2: ISSSTE'S STRUCTURE AND OPERATIONS

ISSSTE, which was established on December 30, 1959, is a decentralised agency of the Federal Public Administration. It is a social security institution responsible for providing social services, health care and other services to almost 11 percent of the Mexican population (12 million beneficiaries in 2010, 56 percent of which are over the age of 40),⁸ who are comprised of current employees of the federal government, retirees and the families of both of these groups. By contrast, IMSS had almost 55 million beneficiaries in 2011. ISSSTE's activities are governed by the State Employees Social Security and Social Services Institute Act (*Ley del Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado*).

As described in Chapter 3, public procurement undertaken by units within the ISSSTE organisational structure is governed by federal laws and regulations. At ISSSTE's central level, procurement is largely undertaken by three directorates- medicines and medical supplies, material resources and services, and public works (a much smaller fourth directorate is responsible for purchases related to the maintenance of buildings and medical equipment). ISSSTE also has 35 *delegaciones* across Mexico, which are engaged in public procurement activities- one in each of Mexico's 31 states and four (4) regional ones in the Federal District (Distrito Federal). As well, there are 14 hospitals and 1,168 medical clinics that are empowered to make purchases. Finally, the following four (4) decentralised administrative units buy goods and services: FOVISSSTE (provides mortgages and other loans to ISSSTE's beneficiaries); PENSIONISSSTE (manages the pensions of ISSSTE's beneficiaries); SuperISSSTE (operates 266 supermarkets and 70 pharmacies for its beneficiaries and the general public);⁹ and, TURISSSTE (provides travel agent

⁸ Available at <http://www.inegi.org.mx/sistemas/sispt/default.aspx?t=msoc01>

⁹ A large part of SuperISSSTE's purchases are made outside of the provisions of the Procurement Act under the auspices of an internal Supply Commission authorised by the statute establishing SuperISSSTE- information provided to the OECD during an August 2012 meeting with SuperISSSTE officials.

and tourism services to ISSSTE's beneficiaries). This structure makes for a complicated, decentralised and geographically dispersed procurement environment which, by consequence, is difficult to manage. This situation is compounded by ISSSTE's very large annual volume of purchases - ISSSTE is the fifth largest purchasing group at the federal level in Mexico.

Tables 2, 3 and 4 below outline the total purchases, in thousands of pesos, made by ISSSTE's various purchasing units for goods, services and public works, respectively, for the years 2007 to 2011, and the values as a percentage of ISSSTE's entire annual budget.

Table 2

	Goods	% of Total Budget
2007	11,921,716.3	12.97
2008	9,424,280.7	8.42
2009	9,742,716.8	7.36
2010	12,590,740.5	8.59
2011	17,868,645.3	10.67

Table 3

	Services	% of Total Budget
2007	6,752,754.1	7.34
2008	8,736,351.7	7.80
2009	10,150,778.9	7.67
2010	10,675,156.9	7.28
2011	14,906,477.9	8.90

Table 4

	Public Works	% of Total Budget
2007	475,027.3	0.51
2008	1,493,241.9	1.33
2009	2,573,606	1.94
2010	1,933,270.8	1.31
2011	820,800.2	0.49

Source: <http://www.issste.gob.mx/issste/anuarios/>

In 2011, ISSSTE's procurement groups purchased goods, services and public works valued at just over MXN 33,596 million (33.6 billion pesos), which constituted more than 20 per cent of ISSSTE's total budget of 167.36 billion pesos.¹⁰

The largest ISSSTE procurement group is the medical supplies and medicines directorate, which purchases on behalf of ISSSTE's hospitals and clinics. Over the period from 2008 until April of 2012, this directorate made purchases totalling almost 49 billion pesos. In 2011 this directorate purchased 14.4 billion pesos of drugs and pharmaceutical products, which represented 8.64 percent of ISSSTE's entire annual budget.¹¹ The material resources and services directorate purchased almost 43 billion pesos worth of goods and services over the 2008 to April 2012 time period while the value of contracts issued by the public works and maintenance groups together amounted to less than seven (7) billion pesos.

Tables 5 and 6 summarise data from 2007 until October 19, 2012, regarding the three types of procedures permitted under the federal procurement statutes.¹² Table 5 provides figures representing the percentage of the number contracts awarded by ISSSTE by procurement procedure while Table 6 outlines the percentages by the value of contracts.

¹⁰ Anuarios Estadísticos ISSSTE, <http://www.issste.gob.mx/issste/anuarios/>

¹¹ See footnote 10.

¹² Statistics compiled from COMPRANET data - (see footnote 26 for a detailed description of COMPRANET). The statistics do not include 300 contracts in 2011 for which information was not available.

Table 5: Percentage of total number of ISSSTE contracts

	Public Tenders	Direct Awards	Invitations to at least three suppliers
2007	76.15	19.38	4.47
2008	75.34	19.90	4.76
2009	70.04	26.00	3.96
2010	64.46	32.30	3.24
2011	38.03	32.72	11.56
2012	52.10	31.69	14.94

Table 6: Percentage of money value of ISSSTE contracts

	Public Tender	Direct Award	Invitation to at least 3 suppliers
2007	87.48	8.89	3.64
2008	86.88	11.70	1.42
2009	22.30	77.07	0.63
2010	83.36	16.32	0.32
2011	35.71	51.01	0.98
2012	47.30	23.63	12.64

The **number** of ISSSTE contracts that were entered into as a result of public tenders amounted to only 64.46 percent of all contracts over the period from 2007 until October 2012 (contracts with values over 18,000 pesos). However, the **value** of contracts subject to public tender processes was significantly higher, 83.36 percent during the same period.¹³ There are, however, noticeable differences in the statistics for certain procurement units. In 2011 the material resources and services directorate signed 300 contracts for goods and services. Of these, 67 percent were the result of direct awards, 20 percent were signed after a public tender procedure and 13 percent were the outcome of an invitation to at least three suppliers process. Just over thirty-six percent (36.5 percent) of the total value of contracts for goods and services was

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Based on information contained within COMPRANET.

the result of public tender processes whereas almost 63 percent of the total value of the purchases was the result of direct awards.¹⁴

For the same year, the medical supplies and medicines directorate signed 1,273 contracts. Of these 6.7 percent were the result of direct awards and 93.3 percent were signed after a public tender procedure. Seventy-four percent (74 percent) of the total value of contracts for goods and services was the result of public tender processes whereas 25.8 percent of the total value of was the result of direct awards.¹⁵ Table 7 below details the number and money value of contracts undertaken by way of direct awards based on some of the exceptions to the use of public tenders permitted under federal law (the exceptions are described in subsection 3.4.2).

Table 7: Medical Supplies Direct Awards 2008-2012¹⁶

Reason for the direct award	Percentage of the number of contracts	Percentage of money value
Public tender was declared void	43.9%	34.6%
Patent rights	17.5%	30.7%
Cause significant losses or costs	5.6%	30.3%
Other reasons	33.0%	4.4%

Finally, for the year 2011, the public works directorate signed 26 contracts. Of these, 92.3 percent were the result of direct awards and only 7.7 percent were signed after a public tender procedure. However, approximately 96 percent of the total value of their contracts for goods and services was the result of public tender processes whereas just 3.5 percent of the total value was the result of direct awards.¹⁷

ISSSTE's data reveals that the decentralised units are more likely to make purchases by way of direct awards.

¹⁴ Information provided to the OECD Secretariat by ISSSTE.

¹⁵ Information provided to the OECD Secretariat by ISSSTE.

¹⁶ Information provided to the OECD Secretariat by ISSSTE.

¹⁷ Information provided to the OECD Secretariat by ISSSTE.

The existence of ISSSTE's numerous decentralised procurement groups resulted in only 35 percent of ISSSTE's contracts being conducted by a central unit. However, this represented **81 percent** of the total value of contracts signed by ISSSTE's procurement units.¹⁸

A high percentage of ISSSTE's public procurement is only open to domestic suppliers but contracts of a larger value are more frequently awarded to international suppliers. During 2011, a total of 1,696 contracts were registered by ISSSTE in COMPRANET (this does not include contracts below approximately 18,000 pesos¹⁹). Of these, 480 related to international tenders involving free-trade agreements (66.92 percent of the total value of all contracts) and 101 involved international open tenders (representing just 2.86 percent of the total value of all contracts).

Tables 8 and 9 below outline, for the year 2011, the percentage and the money value of contracts by the three types of procurement procedures (see subsection 3.4.2 for a description of the procedures) and by the three types of contracts (see subsection 3.4.3 for a description of the types).²⁰ As can be seen, the vast majority of direct awards and invitations to at least three suppliers are won by domestic suppliers, 80 percent and 94 percent, respectively. From a money value perspective, 72 percent of public tenders and 67 percent of direct awards are awarded to bids submitted pursuant to international treaties. For invitations to at least three suppliers, national suppliers garner almost 95 of the money value of the contracts.

¹⁸ Based on information contained within COMPRANET.

¹⁹ The rules for the use of COMPRANET published in the Federal Official Gazette on June 28, 2011, require that contracts exceeding three hundred times the daily minimum wage for the Distrito Federal, without taxes, must be registered in COMPRANET.

²⁰ Based on information contained within COMPRANET.

Table 8: Percentage of total number of ISSSTE contracts for 2011

	International under treaties	International open	National
Public tender	45.58	4.80	49.61
Direct award	18.55	1.26	80.18
Invitation to at least 3 suppliers	2.55	3.06	94.38

Table 9: Percentage of total money value of ISSSTE contracts for 2011

	International under treaties	International open	National
Public tender	71.78	1.45	26.76
Direct award	67.04	1.06	31.89
Invitation to at least 3 suppliers	2.23	3.21	94.54

Some of ISSSTE's procurement units face highly concentrated markets. For example, over the period 2008 to 2012, the medical supplies and medicines directorate purchased 67 percent of its medicines from just five (5) suppliers. The remaining 33 percent of its medicines were sourced from 144 companies.²¹

As noted in Box 1 below, the initial training and work undertaken with ISSSTE by the OECD and CFC led ISSSTE procurement officials to examine some recent tender situations with their newly acquired knowledge of bid rigging. This has resulted in a number of incidents being brought to the attention of the CFC and the OECD for consideration and discussion.

²¹ Based on information provided to the OECD Secretariat by ISSSTE.

Box 1: Possible bid-rigging activity uncovered during the OECD's study

As a result of: 1) the training provided in May 2012 by the OECD and the CFC to a small group of ISSSTE procurement leaders; 2) the initial fact-finding meetings between ISSSTE and the OECD; and, 3) the training provided to over 140 ISSSTE procurement officials in November 2012, ISSSTE procurement officials were able to identify possible cases of bid rigging that had occurred in particular procurement procedures relating to four different procurement procedures, two involving goods and two involving services.

One of the four matters was already being examined by ISSSTE's Internal Control Unit (*Órgano Interno de Control*, OIC in Spanish) but only with respect to bribery and corruption of procurement officials. After a meeting with members of the OECD Secretariat, the investigation was expanded to include the possibility of bid-rigging behaviour on the part of the suppliers.

In the other three matters uncovered internally, ISSSTE officials believe that they may have found evidence of bid rigging undertaken by way of customer allocation, bid rotation, bid suppression and identical bids. As well, ISSSTE noted unexplainable changes in bidding behaviour, the same errors in a number of bid submissions and similar price increases by multiple bidders.

ISSSTE has made a formal complaint to the CFC regarding one of the matters and the OIC has met with the CFC regarding a second matter. In the third case, ISSSTE is assembling information that it will likely provide to the CFC for their consideration. The fourth matter is under review by the ISSSTE procurement group that raised the suspicious bidding behavior with the OECD Secretariat.

These initiatives demonstrate the importance of raising awareness among procurement officials regarding the different forms of bid rigging and the telltale signs of bid-rigging activity. These matters also point to a need for procurement officials and competition authorities to work closely together with respect to training and education and information sharing.

Due to the confidentiality requirements relating to investigations undertaken by both the CFC and ISSSTE's OIC, the OECD is not in a position to provide additional details in this report about the four matters currently under review.

CHAPTER 3: OVERVIEW OF THE EXISTING PUBLIC PROCUREMENT LEGAL FRAMEWORK AND THE PROCUREMENT PROCESSES AND PRACTICES UNDERTAKEN BY ISSSTE

3.1 Federal regulation of public procurement

As ISSSTE is a decentralised agency of the Federal Public Administration, its public procurement is subject to federal legislation and regulations.

The general requirements for federal public procurement are set out in Article 134 of the Political Constitution of the United Mexican States, which establishes the framework for administering public resources. Article 134 stipulates that public procurement processes must follow a sealed-bid tender process, that exceptions to the use of a sealed-bid tender process should be specified by law and that the exceptions should be utilised only when sealed-bid tenders are not suitable to achieve the best results in terms of price, quality, financing and convenience.

When ISSSTE undertakes public procurement one of the following federal statutes (and their associated regulations) is applicable: the Procurement Act, covering the public procurement of goods and services; the Public Works Act covering the commissioning of public works and related services; and, the Public-Private Partnerships Act.²² The Procurement Act and the Public Works Act have been amended a number of times, the latest revisions occurring in January 2012.

It should be noted that to date no ISSSTE purchasing group has conducted any procurement procedure via public-private partnerships, an increasingly

²² The full titles of these statutes in Spanish are: *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* (LAASSP); *Ley de Obras Públicas y Servicios Relacionados con las Mismas* (LOPSRM); and, *Ley de Asociaciones Público Privadas* (PPPA).

popular method of procurement in Mexico and around the world, especially for large infrastructure projects. As noted in Chapter 5, ISSSTE's relatively new market studies unit has been charged with the responsibility of assessing the merits of ISSSTE utilising this relatively new method of procurement in the future.

The Secretariat of Public Administration (SFP)²³ is currently responsible for issuing detailed guidelines to implement the provisions of the Procurement Act and the Public Works Act²⁴, which it has done so in the form of decrees. During the period from September 2010 to July 2011, the SFP issued five Decrees regarding the following public procurement matters²⁵: general guidelines governing public procurement and public works; revisions to the Administrative Manual of General Application governing the acquisition of goods and leasing; revisions to the Administrative Manual of General Application regarding the acquisition of general services; revisions to the Administrative Manual of General Application regarding the contracting of public works; and, the rules for the utilisation of the electronic system of government procurement information known as COMPRANET²⁶.

²³ Mexico's newly-elected government has announced its intention to disband the SFP and have its various functions taken over by other secretariats, including possibly the Finance department (*Secretaría de Hacienda y Crédito Público*). Consequently, recommendations in this Report that relate to the SFP with also refer to the SFP's successor organisation.

²⁴ See the penultimate paragraphs of Articles 1 of LAASSP and LOPSRM, Article 7 of LAASSP and Article 8 of LOPSRM.

²⁵ In Spanish: *Acuerdo por el que se emiten diversos lineamientos en materia de adquisiciones, arrendamientos y servicios y de obras públicas y servicios relacionados con las mismas; Acuerdo por el que se modifica el manual administrativo de aplicación general en materia de adquisiciones, arrendamientos y servicios del sector público; Acuerdo por el que se modifica el manual administrativo de aplicación general en materia de obras públicas y servicios relacionados con las mismas; Acuerdo por el que se modifica el manual administrativo de aplicación general en materia de recursos materiales y servicios generales; and, Acuerdo por el que se establecen las disposiciones que se deberán observar para la utilización del Sistema Electrónico de Información Pública Gubernamental, denominado COMPRANET.*

²⁶ COMPRANET is the electronic system for disseminating information regarding government procurement activity in Mexico for the different stages

The provisions in these Decrees provide additional relevant guidance and requirements to public procurement groups regarding the following five important subject areas:

- **the issuance of policies and guidelines**- pursuant to Article 1 of both LAASSP and LOPSRM, federal agencies and entities (and state agencies utilising federal funds for procurement) shall issue policies and guidelines (in Spanish, *Políticas, Bases y Lineamientos en Materia de Adquisiciones, Arrendamientos y Servicios*- POBALINES) to implement the provisions of the procurement laws, taking into account the federal procurement laws, their supporting regulations and the SFP's decrees. SFP's guidelines state that the policies and guidelines required pursuant to Article 3 and Article 9 of the implementing regulations governing the Procurement Act and the Public Works Act, respectively, must contain:
 - the administrative divisions within each public agency in charge of administering the public procurement acts and their implementing regulations;
 - the position and level of the procurement officials within each public agency responsible for supervising the different procedures during the tender processes; and,
 - the manner in which each public agency complies with the terms and conditions of the laws and implementing regulations.

of the procurement processes. The SFP is currently in charge of administering this system, which includes information regarding the annual procurement and public works plans of public agencies, the registry of suppliers and contractors (including sanctioned suppliers), calls for tenders and their amendments, the minutes of “clarification meetings”, the receipt and opening of proposals, the statements of “social witnesses”, contract information and complaint resolutions (Article 2, Subpart II and Article 56 of the Public Procurement Act). In 2011, 2,301 purchasing units from federal, state and municipal governments utilised this system.

These requirements are meant to ensure a reasonable level of accountability in the procurement undertaken by federal agencies and entities, a commendable objective.²⁷

- **the evaluation criteria for awarding a contract-** the Procurement Act allows for two methods of evaluation: the *points-based* or *cost benefit criterion*; and, the *binary criterion*. The Public Works Act only allows for the utilisation of the points-based criterion, which is used when the characteristics of the goods and services are highly specialised or innovative and may require an expert evaluation. Under this approach, factors in addition to price are considered and a value is assigned for each factor to determine the most qualified bid (tenders are scored higher the more they satisfy the technical/innovative requirements in the call for tender). The binary criterion awards the contract to the supplier which meets all of the conditions in the call for tender and offers the lowest price- this criterion is often used when the characteristics and specifications of the goods and services are standardised and well known in the market.
- **reductions in the amount of a financial guarantee-** suppliers must guarantee the satisfactory performance of their contracts.²⁸ However, public agencies can reduce the amount of the financial guarantee based on the supplier’s track record regarding past performance.²⁹

²⁷ ISSSTE’s two POBALINES currently in effect were issued by its Board of Directors and published in the Federal Official Gazette on March 2, 2012.

²⁸ Article 48 of both the Procurement Act and the Public Works Act.

²⁹ Third Provision of SFP’s Guidelines on the reduction of financial guarantees by suppliers, September 9, 2010.

% level of fulfilment in previous procedures	Reduction level
80-84	10%
85-95	20%
90-94	30%
95-99	40%
100	50%

- **the use of reverse auctions**- the use of reverse auctions³⁰ under the Procurement Act is limited to the procurement of standardised goods and services in competitive markets with at least five (5) national or foreign suppliers.³¹
- **prompt payments to suppliers**- public agencies are required to pay suppliers no later than thirty (30) calendar days after receiving the goods and services.³²

3.2 The impact of free-trade agreements on procurement

In addition to the federal laws and regulations governing procurement, Mexico has signed a number of free-trade agreements with other countries, which may have an impact on a particular public procurement process. In this regard, the Secretary of Economy, along with the SFP, have issued regulations, pursuant to Article 28, Subpart II and Article 30, Subpart II of the Procurement Act and the Public Works Act, respectively, for carrying out international public tenders under the free-trade agreements signed by the Government of Mexico.³³

The following free-trade agreements have been signed by the Government of the United Mexican States, each of which contains a chapter specifically related to public procurement:

1. North America Free Trade Agreement, NAFTA, Chapter X;
2. Mexico-Colombia Free Trade Agreement, Chapter XV;

³⁰ Article 2, VIII of the federal Procurement Act describes a reverse auction (in Spanish, *ofertas subsecuentes de descuento*) as a mechanism by which bidders are allowed to offer additional discounts after the opening of their initial bids- see subsection 3.4.6.

³¹ Third Provision of the SFP's Guidelines for the use of reverse auctions, September 9, 2010.

³² Article 51 of the Procurement Act and the Third Provision of SFP's Guidelines on the Promptness of Payments to Suppliers – in Spanish, *Lineamientos para Promover la Agilización del Pago a Proveedores*, September 9, 2010.

³³ In Spanish, *Reglas para la Celebración de Licitaciones Públicas Internacionales Bajo la Cobertura de Tratados de Libre Comercio Suscritos por los Estados Unidos Mexicanos*, December 28, 2010.

3. Mexico-Costa Rica Free Trade Agreement, Chapter XII;
4. Mexico-Nicaragua Free Trade Agreement, Chapter X;
5. Mexico-Israel Free Trade Agreement, Chapter VI;
6. Mexico-European Community, Economic Association and Cooperation Agreement, Title III;
7. Mexico-European Association Free Trade Agreement, Chapter V;
8. Mexico-Japan Free Trade Promotion Agreement, Chapter 11; and,
9. Mexico-Chile Free Trade Agreement, Chapter 15 Bis.

A critical goal 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. It should be noted that the Mexican Supreme Court has ruled that when a free-trade agreement has been approved by the President of the United Mexican States, ratified by the Senate and published in the Federal Gazette, it is then considered to be part of the national legal system.³⁴

Some of the pro-competitive aspects of these agreements are requirements that the parties shall ensure that: their procurement entities do not prepare, adopt or apply any technical specification with the purpose, or for the effect, of creating unnecessary obstacles to trade; any technical specifications prescribed by their procurement entities are specified in terms of performance criteria rather than design or descriptive characteristics and are based on international standards or building codes; and, their procurement entities invite tenders from the maximum number of domestic and international suppliers.

In relation to the award of contracts, the free-trade agreements state that, if an entity receives a tender that is much lower in price than other tenders submitted, the procurement entity may enquire of the supplier whether it can

³⁴ 2ª. LXXXIII/2007, Amparo en Revisión 120/2002, McCain Mexico, S.A de C.V.

really comply with the conditions of participation and is capable of fulfilling the terms of the contract.³⁵

The agreements state that the parties shall provide to each other an annual report containing statistics on the estimated value of the contracts awarded pursuant to the particular agreement.

Regarding technical cooperation, the agreements state that: the parties shall cooperate, on mutually agreeable terms, to increase the understanding of their respective government procurement systems in order to maximise the participation of their counterpart's suppliers; and, each party shall provide to their counterpart and to the suppliers of such parties, information concerning training and orientation programs.³⁶

Under the bid challenge sections, the free-trade agreements state that the parties shall adopt and maintain bid challenge procedures for procurement in order to promote fair, open and impartial procurement procedures. In this regard, each party shall: allow suppliers to submit bid challenges concerning any aspect of the procurement process; encourage suppliers to seek a resolution of any complaint prior to initiating a bid challenge; and, establish or designate an independent reviewing authority with no substantial interest in the outcome of procurements.

3.3 ISSSTE's procurement of single-sourced medicines

Before reviewing in some detail the federal procurement legislation and regulations governing how ISSSTE's various procurement groups must conduct their purchasing activities, it is important to note the unique situation regarding the procurement of patented medicines, which invariably can only be purchased from a single source, such as the manufacturer holding the patent. This

³⁵ In a similar vein, as noted in subsection 3.6.1, under the federal Procurement Act, if a public procurement agency receives a tender submission that is lower than the "convenient price", the bid should not be accepted.

³⁶ The training and orientation programs include: a) training of government personnel directly involved in government procurement procedures; b) training of suppliers interested in pursuing government procurement opportunities; c) a description and explanation of specific elements of each party's government procurement system, including its bid challenge mechanism; and, d) information about government procurement opportunities.

description is necessary because the procurement of this large category of goods falls outside of the scope of the legislation and regulations that are outlined later in this Chapter regarding the procurement of goods under the federal Procurement Act.

Until 2008, ISSSTE and a number of other federal institutions, including IMSS and the Secretary of Health, purchased brand name pharmaceuticals by direct award, which usually involved some degree of price negotiation. However, this led to large variations in the prices paid by these institutions, sometimes as great as **3,000 percent**.³⁷ This would suggest that the skills, knowledge and interest of the procurement officials at the various institutions differed greatly and resulted in widespread purchasing inefficiencies.

Given this situation and the obvious extra costs being endured by the Government of Mexico (and the country's taxpayers) for a large budget item,³⁸ in 2008 the Mexican Government established the Coordinating Commission for Negotiating the Price of Medicines and Other Health Inputs (*Comisión Coordinadora para la Negociación de Precios de Medicamentos y otros Insumos para la Salud*, CCNPMIS in Spanish). The purpose of the CCNPMIS was to have one entity negotiate with each drug manufacturer to establish a single, nationwide price for one year for all public institutions purchasing the particular drug. The same process can apply to other single-sourced health inputs.

As noted below in Box 2, this laudable initiative has generated immense savings for the institutions, the Government of Mexico and the taxpayers of the country. As also noted in Box 2, a number of challenges remain that need to be addressed to ensure that the CCNPMIS functions efficiently and effectively with respect to a very critical aspect of Mexican public procurement.

³⁷ *La Comisión Coordinadora para la Negociación de Precios de Medicamentos e Insumos para la Salud: Acciones y retos para reducción de precios del tratamiento antirretroviral en México*, Lamadrid J. Medina, Subsecretaria de Integración y Desarrollo del Sector Salud, 2011.

³⁸ ISSSTE alone spent approximately US\$1.2 billion in 2011-
<http://www.issste.gob.mx/issste/annuarios/>

Box 2: The Coordinating Commission for Negotiating the Price of Medicines and Other Health Inputs (CCNPMIS)³⁹

On 26 February 2008 the CCNPMIS was created through a presidential decree as an inter-institutional body with a President appointed by the President of Mexico for a term of two years. The current President is a former Director General of ISSSTE. The members of the Commission are the heads of the Secretariat of Finance and Public Credit, the Secretariat of Economy, the Secretariat of Health, IMSS and ISSSTE. The Secretariat of Public Administration (SFP) currently participates as an advisor to the CCNPMIS.

The CCNPMIS has the following committees:

- Clinical Technical Committee, which is in charge of analysing the effectiveness of drugs and health supplies to determine if they should be considered for purchases;
- Economic Evaluation Committee, which is responsible for collecting and analysing information regarding supply conditions, domestic demand and pricing in international markets, and for tracking the status of patents; and,
- Price and Patent Committee, which is in charge of assessing the cost effectiveness of patented drugs and health supplies relative to known alternatives.

State and municipal governments can have the benefits of the negotiated prices and conditions as long as the CCNPMIS and the companies agree to their participation.

The accumulated savings generated by the CCNPMIS initiative have been estimated at MXN 4,136 millions.⁴⁰ However, the Commission faces significant challenges which include: poor coordination among the institutions with respect to the timely preparation of background materials required for the negotiations; a lack of communication among the committees and between the institutions; and, a shortage of CCNPMIS staff members with the essential technical expertise.⁴¹

³⁹ Additional information concerning the CCNPMIS can be found in “A new entity for the negotiation of public procurement prices for patented medicines in Mexico”, Octavio Gomez-Dantes, Veroika J. Wirtz, Michael R. Reich, Paulina Terrazas and Maki Ortiz, Bulletin of the World Health Organisation, 2012; 90: pp 788-792 (the CCNPMIS Article).

⁴⁰ *Sexto Informe de Gobierno, Presidencia de la Republica*, http://sexto.informe.calderon.presidencia.gob.mx/pdf/INFORME_ESCRITO/03_CAPITULO_IGUALDAD_DE_OPORTUNIDADES/3_02_Salud.pdf

⁴¹ The CCNPMIS Article at page 788.

The balance of this Chapter describes in some detail the key provisions of the federal procurement laws and regulations that govern the processes by which ISSSTE's purchasing organisations procure goods and services, contract for public works and conduct procurement under public-private partnerships.

The information below is organised according to the four main stages of public procurement: 1) the pre-tender evaluation and tender design phase; 2) the tender process phase; 3) the bid opening, bid evaluation and contract award phase; and, 4) the post-award phase relating to the performance of the contract. The OECD Guidelines emphasise the importance of measures taken at every stage of a procurement process in order to minimise the risk of collusion and to enhance the detection of collusion.

3.4 The pre-tender evaluation/tender design phase

This phase involves deciding how a procurement process will be undertaken and therefore entails a number of important decisions regarding the procurement. It should be noted that prior to commencing any procurement process, ISSSTE and other federal purchasing agencies must prepare annual procurement and public works plans and publish them on COMPRANET⁴² and on their web sites by January 31 of each year (Articles 20 and 21 of the Procurement Act and Articles 21 and 22 of the Public Works Act). The plans are to be updated each month. In the case of annual procurement plans, a description and the amount to be purchased must be provided for goods and services that represent 80 percent of the agency's budget. For the remaining 20 percent, the approximate amount to be purchased for each item is to be published. Sections 5.1 and 5.2 of ISSSTE's procurement and public works POBALINES, respectively, outline ISSSTE's internal regulations for their annual plans.

3.4.1 Undertaking a market study

In order to plan effective procurement strategies and to design suitable tender documents and procedures, public procurement officials, whether required to do so by law or not, should always carry out market studies/investigations in order to better understand the market conditions in terms of the number and identity of suitable suppliers, the characteristics/features of the good or service to be procured, the prevailing

⁴² See footnote 26 for a detailed description of COMPRANET.

costs for inputs and market prices, recent pricing trends and the availability of similar, substitute products. This is an essential first step in any procurement process and provides the basis for making most of the other decisions noted in this section of the Analytical Report.

In that respect, Article 26 of the federal Procurement Act states that agencies shall conduct a market study prior to commencing any tender procedure. Article 30 of the implementing regulations to the Act stipulates that the market studies will be undertaken by a specialised group. If such a group does not exist, then the work is to be the joint responsibility of the requesting area (or the user) and the contracting unit unless the requesting area is also in charge of the contract. Article 30 also states that market studies are to be carried out sufficiently ahead of the procurement procedure.⁴³

Article 28 of the regulations implementing the Act states that market studies shall contain information obtained from at least two of the following sources:

- a) information available in COMPRANET or historic information from previous contracts;
- b) information obtained from specialised bodies, trade associations, retailers, manufacturers, wholesalers and distributors; and,
- c) information obtained from the Internet, phone calls or any other channel, for which the contracting authority must keep a record.

Article 29 of the regulations is useful as it outlines the following reasons for conducting market studies:

- a) to help choose the most appropriate procurement procedure to be used (i.e. public tender as opposed to one of the two exceptions allowed by the various procurement statutes);
- b) to consider whether to consolidate purchases;

⁴³ Section 5.5 of ISSSTE's procurement POBALINES deals with the issue of market studies.

- c) to support the decision to group several goods or services in a single lot;
- d) to consider whether it is appropriate to use reverse auctions; and,
- e) to determine non-acceptable and maximum prices- described in subsection 3.6.1.

In direct award procedures, where the value of the contract is equal to or greater than 300 times the minimum wage applicable in the Federal District, Article 30 of the regulations implementing the Act states that the market study requirement shall be satisfied if at least three quotations were obtained during the 30 calendar days preceding the award of the contract.

Article 2, Subpart XVI of implementing regulations to the federal Public Works Act states that contracting authorities can use market studies to determine the availability of contractors, labour force, machinery and equipment at the national level and to determine the estimated cost of the works. Article 15, Subpart VIII, states that a market study shall contain information from the same types of sources outlined in the Procurement Act.

The federal Public-Private Partnerships Act does not deal with the subject of market studies.

3.4.2 *Selecting the type of procurement procedure*

Article 26 of the federal Procurement Act (LAASSP) establishes that public agencies can use one of the following three procedures to buy or lease goods and services:

- a) public tenders;
- b) invitation to at least three suppliers; and,
- c) direct award.

In furtherance of Article 134 of the Political Constitution of the United Mexican States, the Procurement Act mandates that the general rule for public procurement is the use of public tenders involving sealed-bids and that the other two purchasing procedures are exceptions to be utilised only in certain

circumstances. Article 41 of LAASSP outlines twenty (20) justifications for utilising one of the two exceptions, which include:

- a) there is a patent right involved;
- b) there is only one supplier in the market;
- c) the country's national security interests are at stake;
- d) there are circumstances which may cause significant losses or additional costs;
- e) it is impossible to organise a public tender due to unforeseeable circumstances or *force majeure*;
- f) an awarded contract has been rescinded in which case it can be assigned to the second lowest bidder, if the differential with respect to the initial winning bid is less than 10 percent;
- g) a previous public tender was declared void; and,
- h) a framework agreement⁴⁴ is involved.

Article 40 of the Procurement Act requires that the selection of an exceptional procedure must be based on criteria of economy, efficacy, efficiency, impartiality and transparency.

Article 42 states that public agencies can also procure goods and services under alternative procedures to public tender when: the value of the contract does not exceed the maximum limit for each procedure specified in the Annual Federal Budget- see Annex 2; and, the total value of all contracts awarded under the alternative procedures does not exceed 30 percent of an agency's annual procurement budget.

With respect to public works, Article 27 of the federal Public Works Act (LOPSRM) outlines the same three procurement procedures as the Procurement Act. However, Article 29 specifies that contracting authorities shall select domestic contractors over foreign ones when their bids contain **similar** prices

⁴⁴ See subsection 3.4.5 and footnotes 49 and 50.

and levels of quality. Article 42 provides fourteen (14) justifications permitting procurement groups not to use public tenders which include:

- a) there is a patent right involved;
- b) there is a threat to the social order and public services due to unforeseen circumstances;
- c) there are circumstances which may cause significant losses or additional costs;
- d) the public works are for the defence sector;
- e) due to unforeseen circumstances or *force majeure* it is not possible to carry out a public tender;
- f) a previous public tender was declared void, or a previous contract award has been rescinded;
- g) when the services related to a public work are to be provided by the same contractor;
- h) a contractor, in order to settle a loan with the State, executes a deed of assignment in payment of the debt; and,
- i) there is an agreement between a research association and a public agency for the application of new technology to public infrastructure.

In addition, Article 43 enables public agencies to contract for public works and services utilising procedures other than public tenders when: the value of the contract does not exceed the maximum amount for each procedure outlined in the Annual Federal Budget- see Annex 2; and, the value of all contracts awarded under the alternative procedures does not exceed 30 percent of an agency's annual budget for public works.

With respect to the more recent approach to purchasing known as public-private partnerships (PPPs), Article 38 of the federal Public-Private Partnerships Act (PPPA) states that agencies shall carry out this type of procedure via public tenders which observe the principles of legality, competitiveness, objectiveness, transparency and publicity and that the contracts shall be awarded to the participants offering the best conditions with respect to price, quality and

financial terms. Article 39 indicates that when entering into public-private partnerships, public agencies should consider any recommendations provided by the CFC.

However, federal procurement agencies are permitted to use invitations to at least three suppliers or direct awards, if one or more of the following six (6) justifications outlined in Article 64 are applicable:

- a) there is only one technology supplier in the market, or there is a patent right involved;
- b) in the case of defence projects, an open procedure would violate the country's essential security interests;
- c) there are circumstances which may cause significant losses or additional costs;
- d) a previously awarded contract has been rescinded and the price of the second best offer does not exceed the price of the first award by more than 10 percent;
- e) there is a replacement of a constructor/supplier for reasons of early termination or rescission of a public-private partnership project in progress; and,
- f) there is an agreement between a research association and a public agency for the application of new technology for public infrastructure.

3.4.3 *Deciding who should participate*

During the pre-tender phase, a procurement agency needs to determine whether it can and should allow international bidders to participate. Contracting authorities should take into account whether the product or service has been previously procured, whether the market is rapidly changing, whether there are few known suppliers and, when there are only a few local or national suppliers, whether those suppliers appear to be competing vigorously.

Article 28 of the federal Procurement Act establishes three types of public tenders:

- a) **national**: only domestic suppliers are allowed to participate when the goods to be purchased are produced in Mexico and are of at least 50 percent of national origin. In the case of leasing goods or procuring services, only domestic suppliers can participate.⁴⁵
- b) **international in accordance with a free-trade agreement**: suppliers from countries with which Mexico has signed a free-trade agreement covering public procurement **must** be allowed to participate when the value of the contract is above the threshold values set forth in the agreements and **may** be allowed to participate when a previous national public tender was declared void because no bid was submitted or no acceptable bid was received.
- c) **international open**: any domestic or foreign supplier is allowed to participate when an international public tender subject to a free-trade agreement was declared void because no bid was submitted or no acceptable bid was received or it is a specified condition in a procurement that is being financed with external credit granted to the Government of the United Mexican States.

When a public tender is declared void, public agencies may use one of the two exceptions permitted by the Procurement Act rather than opening the procedure to non-Mexican suppliers.

With respect to invitations to at least three suppliers as well as direct awards, Article 40 of the Procurement Act establishes that, as in the case of public tenders, they can be reserved to Mexican suppliers only or be international in accordance with free-trade agreements signed by Mexico or be completely open.

When both domestic and foreign suppliers submit bids to a purchasing authority, the domestic supplier shall be given preference over the foreign supplier as long as the price differential does not exceed 15 percent.

⁴⁵

National public tenders normally involve contract values below the threshold values set forth in the free-trade agreements signed by the Government of the United States of Mexico. If a contract value is above such thresholds, the option in an agreement to reserve the contract to Mexican suppliers would then need to be exercised.

Article 30 of the federal Public Works Act is consistent with the provisions of the Procurement Act. However, there are two variations: international tenders in accordance with free-trade agreements are to be utilised when the value of the contract is estimated to be equal to or greater than the threshold values set out in a free-trade agreement;⁴⁶ and, under open international public works tenders, the Act requires the use of at least 30 percent Mexican labour.

With respect to the federal Public-Private Partnerships Act, Article 41 states that any supplier, regardless of nationality, may participate as long it meets all of the requirements set forth in the tender. Article 42 states that developers cannot participate in PPP tenders if:

- a) they share any kind of interest with the contracting authorities;
- b) they have been previously sanctioned under public procurement laws; and,
- c) they are in the midst of bankruptcy proceedings and or have declared bankruptcy.

3.4.4 Utilising a “social witness”

Mexico is somewhat unique in its use of social witnesses (*testigos sociales*, in Spanish) in procurement procedures. The principal objectives of utilising social witnesses are to enhance social participation and to promote transparency in tendering procedures. The utilisation of social witnesses is a mechanism to increase public participation in the most relevant public procurement procedures- those involving a high level of financial resources, social impact and economic and social development.

At the federal level, the Procurement Act and the Public Works Act (Article 26 Ter and Article 27 Bis, respectively) regulate the participation of social witnesses in tender procedures. In the case of procurement procedures, social witnesses are required to be used when the contract value exceeds 5 million times the minimum wage applicable in the Federal District or when the SFP considers it is appropriate due to the impact the tender may have on the

⁴⁶ For example, Article 1001 (1-c) of the North America Free Trade Agreement established US\$6.5 million and US\$8.0 million for contracts for construction services tendered by federal government departments and federal government enterprises (such as PEMEX and the CFE), respectively.

economy or society. With public works, the participation of social witnesses is required when the contract value exceeds 10 million times the minimum wage applicable in the Federal District or when the SFP considers that it is necessary. Article 43 of the PPPA states that the implementing regulations shall govern the participation of social witnesses in tendering procedures related to public-private partnerships. Article 62 of the PPPA implementing regulations states that in projects where the initial investment amount is not less than the equivalent of four million Mexican Investment Units (*Unidades de Inversión*)⁴⁷, the participation of a social witness is required. In projects with initial investment amounts less than that amount, the use of social witnesses is optional.

3.4.5 *Deciding whether to consolidate purchases*

It is generally recognised that public procurement groups can benefit from consolidating purchases across a number of secretariats and agencies. Consolidated purchases involve a joint procedure by multiple contracting authorities for the procurement of goods and services, which are typically highly demanded and commonly used by several agencies. Consolidations are likely to reduce purchase prices and to decrease the costs of procurement as the result of fewer procurement processes.

Article 17 of the federal Procurement Act permits public agencies to jointly purchase goods and grants the authority to the SFP and the Secretariat of the Economy to establish which goods and services of general use can be the subject of consolidated purchases in order to achieve the best terms in respect of price, quality, financing and convenience.⁴⁸

⁴⁷ Mexico's Investment Units were created in 1995 and are based on price increases. They are used to settle mortgage obligations or other commercial acts. The Banco de México publishes the value of Mexico's Investment Unit for each day of the month in the Official Federal Gazette.

⁴⁸ Some examples are vaccines, commercial insurance, medical insurance, oil and gas, airline tickets, printing, security and cleaning services. From September 2010 to June 2011, the SFP advised, among others, the Secretariat of Health, the Secretariat of Education, the Secretariat of Energy, the CFE, CONADE, COFEMER and PROFECO regarding the consolidation of purchases, which resulted in cost savings of up to 239 million pesos- Source: *Quinto Informe de Labores, Secretaría de la Función Pública, 2011*.

Article 13 of the regulations implementing the Procurement Act sets out the following requirements for consolidated purchases:

- a) the agencies shall sign an agreement stating the obligations for each party;
- b) the agencies shall jointly determine, based on a market study, the type of procurement procedure to be utilised; and,
- c) the agencies shall designate a representative of the group, who will be responsible for drafting the basis of the tender and for carrying out the procedure by applying its own procurement policies and guidelines.

According to section 5.6 of the ISSSTE's POBALINES for procurement, the head of ISSSTE's Administration Directorate is to authorise consolidated purchases with other agencies or entities as well as for ISSSTE's decentralised administrative units. In the case of medical supplies ISSSTE's the Director of the Medical Unit is responsible for authorising consolidate purchases. Section 6.3 of the POBALINES outlines the goods or services that are subject to consolidation. Other goods or services can be purchased on a consolidated basis with the concurrence of one of the above persons.

A **framework agreement** is one mechanism to put in place a form of consolidated purchases. It is entered into between one or more purchasing groups and one or more suppliers and sets out the general conditions of the contracts to be entered into within a certain period of time, particularly the conditions related to the price and quantities.⁴⁹ The SFP is in charge of coordinating the actions among contracting authorities who sign framework agreements.⁵⁰

⁴⁹ Procurement groups at the state and municipal levels can also participate in framework agreements- Article 17, second paragraph of LAASSP.

⁵⁰ There are currently ten (10) framework agreements being administered by the SFP for federal entities which cover, among other things, airline tickets, uniforms, gardening, call centres, cleaning services and logistical services for public affairs events. The most recent framework agreement was signed in October 2012. That agreement covers patented and single-sourced medicines. The SFP approved a framework agreement for food stamps in November 2010, which they estimate has resulted in savings of 42.8 million pesos.

Pursuant to Article 14 of the regulations implementing the Procurement Act, framework agreements are exempt from the application of the tender procedures outlined in the Procurement Act, but they must still respect the principles of “value for money”, effectiveness, efficiency, fairness and respectability in order to achieve the best results for Mexico. Article 14 also stipulates that at least five (5) agencies must be part of a framework agreement.

Prior to entering into a framework agreement, the SFP (along with the participating agencies) shall carry out a market study to determine:

- a) whether national suppliers may fulfil the conditions of the contract, in terms of quality and quantity;
- b) whether the suppliers may be able to perform the contract, according to the requirements of the contracting authorities; and,
- c) the prevailing prices in the market.

Terms and conditions in framework agreements must be supported by the results of the market studies. Any supplier that meets the requirements set forth in a framework agreement can participate in that agreement.

Contracting authorities have the flexibility to purchase from the suppliers under a framework agreement or from some other suppliers, if they think, based on a new market study, that they could obtain better value for money. If the latter should occur, SFP is to consider the new information and to decide whether to amend the particular framework agreement or to cancel it.

ISSSTE has used framework agreements for the procurement of medicines under patent, those from a single source, and medicines without reasonable alternative or substitute, as well as for foods stamps. The medicines framework agreement, which covers 151 medicines from 24 suppliers, was an initiative of the CCNPMIS- see section 3.3.

Both the federal Public Works Act and the Public-Private Partnerships Act are silent regarding the consolidation of purchases and framework agreements.

3.4.6 *Deciding whether to use a reverse auction*

Since May 28, 2009, the reverse auction mechanism — *ofertas subsecuentes de descuento*, OSD, in Spanish — has been included in the

Mexican federal procurement statutes⁵¹ as a result of the economic advantages that other countries seem to have experienced by using OSDs.⁵² Unlike in a traditional auction, suppliers compete to sell a good or service by bidding lower the price they originally proposed in their bid submissions without changing the specifications set forth in their technical proposal. Reverse auctions are obviously different from public tenders which entail only one price submission.

Article 28 of the federal Procurement Act allows for the possibility of using a reverse auction mechanism when the technical characteristics and specifications of the required goods and services are standardised and supplier proposals can be evaluated immediately after the opening of the sealed bids.

According to the guidelines issued by the SFP for the use of electronic reverse auctions⁵³, a contracting authority using the reverse auction mechanism must verify that:

- a) the goods and services are standardised;
- b) the market is competitive (there are at least five domestic and or foreign suppliers meeting the technical requirements);
- c) the volume of goods and services to be procured allows for economies of scale; and,
- d) the official in charge of carrying out the OSD has a certification in the field.

⁵¹ States in Mexico such as Baja California, Mexico and Nuevo Leon have also implemented this mechanism.

⁵² For example, Brazil, Colombia, Ecuador, England, Paraguay, Peru and the United States, as noted in the Gazette of the Government of the State of Mexico, September 3, 2010, p. 10, during the process to include OSDs in the State law. Between September 2010 and June 2011, the Federal Government reported cost savings of 196.8 million pesos from using reverse auctions-Source: *Quinto Informe de Labores, Secretaría de la Función Pública, 2011*.

⁵³ Chapter Four, Third Part of *Lineamientos para la utilización de la modalidad de ofertas subsecuentes de descuento en las licitaciones pública electrónicas*, September 9, 2010.

However, when micro-, small- and medium-sized businesses are participating on their own in a tender procedure, the use of an OSD is not permitted (Article 28 of the Procurement Act and Article 38 of the implementing regulations).

Procurement groups at ISSSTE have not used reverse auctions. According to information provided by ISSSTE, reverse auctions have not been undertaken because there has not been the technical support needed to carry them out. ISSSTE was, however, part of a consolidated purchase led by IMSS that used reverse auctions in five (5) calls for tenders for medicines in September 2012.

ISSSTE procurement officials advised the OECD Secretariat that they have frequently used a procurement process in which they reveal their “maximum” reference price (described in subsection 3.6.1) in a call for tenders and instruct any interested bidders to bid less than that price (maximum reference price with discount). An auction process then ensues but not electronically- the supplier submitting the lowest price wins the tender.

There are no provisions in either the Public Works Act or the Public-Private Partnerships Act relating to the use of reverse auctions.

3.4.7 *Choosing the type of contract*

A critical step in the pre-tender phase of procurement procedures is a procurement group’s assessment of which type of contract will best satisfy its needs and requirements. The contract is an agreement between the contracting authority and the supplier providing goods, public works and/or services and typically involves a fixed price and quantity. Contracts may also include provisions relating to the timing for the performance of the contract and the achievement of specified standards or objectives.

Article 44 of the federal Procurement Act states that contracts shall be *fixed price*, although in some circumstances (changes in the economic conditions), the contracting authority may make adjustments to the price. Pursuant to Article 52, the contracting authorities may change, under justified circumstances (i.e. *force majeure*), the quantity originally agreed upon, as long as the additional value of the supplies or services does not exceed 20 percent of the contract’s original value. A supplier may make a request under justified circumstances to a contracting authority to change the quantity in a contract provided that the change does not exceed 10 percent of the original contract volume.

Article 47 permits another type of contract, *open contracts*, which allows contracting authorities to acquire goods/services on an ongoing basis from a supplier who was selected through a public tender process or the two exceptions. To use an open contract, the procurement agency must do the following in its tender documents:

- a) specify the minimum and maximum quantities of the goods and services to be provided, as well as the budget to be spent on the contract; and,
- b) provide a complete description of the goods and services to be procured and their unit prices.

In open contracts involving several items or more, procurement authorities are allowed to modify the price and quantity of one or more of the goods or services by up to 20 percent of the value, as long as the total original value of the total contract does not change.

Section 5.7 of ISSSTE's POBALINES for public procurement specifies that the deputy director from the area making the purchase is responsible for authorising an open contract and for designating the person to administer the contract.

Article 45 of the federal Public Works Act provides for the following types of contracts:

- a) *unit price contract*- based on estimated quantities of items needed for the project and their unit prices with the final price dependent upon the actual quantities needed to complete the project;
- b) *lump sum contract*- a contractor agrees to do a specified project for a fixed price;
- c) *mixed contracts*; and,
- d) *scheduled amortisation*- the full payment amount is based on the approved budget for each component project of the public works.

LOPSRM does not contemplate open contracts.

Under justified circumstances (and considering the authorised budget), contracting authorities may amend unit price contracts, as long as the essential characteristics of the contract are not altered and the value/duration does not exceed 25 percent of the original contract (the SFP's authorisation is required for amendments exceeding that percentage). In the case of an amendment to a lump sum contract due to unforeseen economic circumstances, Article 59 of LOPSRM states that SFP's approval is required.

Article 13 of the federal Public-Private Partnerships Act establishes that contracting authorities intending to enter into a public-private partnership shall sign a *long-term contract* specifying the rights and obligations of the parties to the agreement. The Secretariat of Finance and Public Credit has to approve the budget for all public-private partnership projects in order for them to be included in the Federal Budget Plan, which is approved annually by the Chamber of Representatives (Article 24).

Framework agreements, which were discussed above within subsection 3.4.5 in the context of consolidated purchases, are another type of contract available to procurement groups. Their legal requirements are also outlined in subsection 3.4.5.

3.4.8 *Deciding whether to permit sub-contracting*

Also relevant to the issue of the type of contract is the question of whether procurement officials will permit sub-contracting in the performance of a contract. Sub-contracting is not covered under the federal Procurement Act.

However, Article 47 of LOPSRM allows contractors to sub-contract to another developer (for performing specific parts of the public works or for large device installations) with the approval of the contracting authority's supervisor for the public works contract. This approval is not necessary when the tender documents had specifically allowed for sub-contracting (Article 31, Subpart XXI). Article 63 of LOPSRM's implementing regulations states that developers who commit to sub-contract to small- and medium-sized businesses shall be awarded extra points in the bid evaluation.

Article 101 of the federal PPPA allows for sub-contracting as long as the contract contains specific provisions relating to the practice. The contracting authority must authorise the sub-contract and the developer selected pursuant to the procurement process remains accountable for the entire project.

3.4.9 *Deciding whether to accept joint bids*

Public procurement contracts, especially those involving public works, can be very large and, therefore, entities often combine to form consortia to be able to compete for and undertake the contract.

Article 34 of the Procurement Act allows for the submission of joint bids by multiple suppliers. Article 29, section XI of the Procurement Act states that calls for tender must include a justification when joint bids will not be accepted. In other words, joint bids are the general rule.

Joint bidders are not required to form a new company or joint venture for the specific tender as a joint bid must describe the obligations of each party to the agreement and how these will be fulfilled.

Article 44 of the regulations implementing the Procurement Act places a responsibility on public agencies to specify the necessary requirements for the submission of joint bids in their tender documents. When a joint bid succeeds, the participants are considered to be jointly/severally responsible for the contract.

Any consortia agreements entered into by joint bidders are subject to Mexico's competition laws regarding cartels and horizontal restraints. As a result, any bidder participating in a consortium agreement may request an opinion from the CFC concerning possible violations of Mexico's competition laws.

The provisions related to joint bids in the Procurement Act are very similar to those found in Article 36 of the Public Works Act, including compliance with the competition laws.

Article 41 of the PPPA allows for a number of economic operators to submit a joint bid. In such instances, the various companies are required to formally establish a group, in case they are awarded the contract. The joint bid submission must specify the representative of the consortium.

Article 39 of the PPPA specifies that, when drafting tender documents, contracting authorities shall take into account any recommendations that may have been made by the CFC. However, this provision does not explicitly refer to joint bids.

3.5 The tender phase

At this point in the procurement process, the contracting authority, having determined the project's key elements and taken a number of decisions regarding the nature of the procurement procedure, is now ready to draw up the tender documents, which will be used to notify suppliers of the intention to award a contract and to invite them to submit bids. This phase is important as it determines the terms and process of the tender procedure and tender submissions. It is vital that the tender documents provide detailed and specific information about the nature of the procurement, the procurement procedure and the evaluation of the bids submitted.

The federal Procurement Act, Public Works Act and PPPA each state that contracting authorities, in carrying out all stages of a tender procedure, shall consider any recommendations that might have been made to them by the CFC.

3.5.1 *Preparing tender documents*

Article 29 of the Procurement Act states that a tender document shall contain, among other things, the following:

- a) the conditions for suppliers participating in the tender, which are not to lessen competition and limit participation (for example, by requiring: a specific brand of goods; registration in the Register of Suppliers; to have had previous contracts with the contracting authority- Article 40 of the implementing regulations);
- b) a request for a signed affidavit wherein suppliers commit not to participate in agreements with contracting authorities in order to manipulate the results of the procedure (an Integrity Statement);
- c) the justification(s) for not accepting joint bids;
- d) an indication whether the split award option (see below) will be considered and the percentages to be assigned to the selected suppliers;
- e) the award criteria for the evaluation of the offers; and,
- f) the circumstances for dismissing the bids (among other reasons, verifiable participation of the bidders in an agreement with the

purpose of increasing the price of the required goods and services, or, in general, obtaining advantages over other competitors).

Article 31 of the Public Works Act states that calls for tender shall contain, among other things, the following:

- a) whether the tender is national or international in scope;
- b) a general description of the public works;
- c) the date, place and time for the site visit, if one is contemplated;
- d) the date, place and time for the clarification meeting(s)- see subsection 3.5.3;
- e) the contract award criteria;
- f) circumstances for dismissing the bids; and,
- g) a notice requiring a bidder's affidavit wherein it commits not to participate in agreements with contracting authorities in order to manipulate the results of the procedure.

An interesting amendment to the federal Public Works Act was enacted on January 16, 2012. Article 40 Bis enables contracting authorities to undertake joint calls for tenders in the case of concessions for the conservation or maintenance of infrastructure projects.

Article 45 of the PPPA states that calls for tender shall contain, among other things, the following:

- a) the technical specifications and the main characteristics of the project;
- b) the duration of the partnership;
- c) any conditions for sub-contracting;
- d) the date, place and time for the site visit;
- e) the contract award criteria; and,

- f) the circumstances for dismissing bids.

Any tender requirement that lessens competition will be considered void.

3.5.2 *Issuing calls for tender*

Article 29 of the Procurement Act indicates that contracting authorities may publish a draft call for tender in COMPRANET for at least 10 days in order to receive comments from bidders. Any comments received might be taken into account in the final version of the call for tenders.

Article 30 of the Procurement Act stipulates that contracting authorities shall publish calls for tender on COMPRANET and in the Federal Gazette. By virtue of Article 43, invitations to at least three suppliers must be put on an agency's web site and COMPRANET but do not need to be published in the Federal Gazette. A public tender procedure begins with the publication of the call for tenders on COMPRANET. Bidders have up to twenty (20) days from the publication of a call for tender bidders to submit their bids (Article 32).

Article 31 of the Public Works Act states that, when the value of a contract exceeds 10,000 times the minimum wage applicable in the Federal District, contracting authorities shall publish a draft call for tender in COMPRANET for at least 10 days in order to receive bidder comments, which might be considered in the final version of the call for tenders.

Article 32 of the Public Works Act states that calls for tender shall be published on COMPRANET and in the Federal Gazette and that bidders shall be able to obtain them at no cost. The period for submitting bids is twenty (20) days after the publication of the call on the internet or COMPRANET.

Draft calls for tender are not covered under the PPPA. With respect to calls for tender, Article 44 of the PPPA states that they shall be published on the contracting authority's web site and in the Federal Gazette, COMPRANET, and nationwide and local newspapers. In joint projects with states or municipalities, the calls for tender shall also be published in their official communication sources.

3.5.3 *Holding clarification meetings*

Bidders are entitled to ask for explanations and propose amendments to the tender documentation to the respective contracting authority at a “clarification meeting”.

Article 33 of the Procurement Act states that contracting authorities shall hold at least one clarification meeting to discuss questions bidders may have related to the call for tender documentation. During the clarification meeting a representative of the contracting authority shall respond to bidders’ questions and shall draft the minutes for the meeting, which are to be made public on COMPRANET (Article 33 Bis). The last clarification meeting must be held at least six (6) days before the bid openings.

The provisions regarding clarification meetings found in Article 35 of the Public Works Act are similar to those contained in the Procurement Act.

Article 50 of the PPPA states that contracting authorities may hold several clarifications meetings as needed and that contracting authorities shall answer any questions via written statements.

3.5.4 *Terms for the submission of bids*

Article 32 of the Procurement Act states that after the publication of a call for tenders on COMPRANET, interested bidders are given 15 and 20 calendar days for submitting bids in national and international tenders, respectively. By virtue of Article 33 of the Public Works Act, the same terms apply to calls for tender for public works.

Article 51 of the PPPA states that after the publication of a call for tenders on COMPRANET, interested suppliers are given 20 calendar days to submit their bids.

3.6 The bid opening, bid evaluation and contract award phase

In this phase a procurement group evaluates the bids it has received to ensure that all bidders meet the technical specifications and it rejects any bids that do not satisfy all of the conditions set forth in the call for tender. Specific procedures must be followed for the opening of bids and awarding the contract to one or more of the bidders.

3.6.1 *Establishing reference prices and margins of preference*

When a procurement group is using the *binary criterion* (see section 3.1) to select the winning bid in a tender under the Procurement Act, it must calculate the following reference prices:

- a) “*non-acceptable*” price- this is the upper bound above which no bid can be considered (Article 2, Subpart XI). It is calculated as 110 percent of the median of all of the prices collected during the market study. If it is not possible to calculate such a median price, the non-acceptable price will be 110 percent of the average of the technically acceptable bids submitted in response to the tender.
- b) “*convenient*” price”- this is the lower bound below which no bid can be accepted (Article 2, Subpart XII). It is calculated as the average of the prices of the technically accepted offers submitted in the tender process less a discount factor (not to exceed 40 percent) set forth in the POBALINES of every contracting authority (see section 3.1).
- c) “*maximum*” reference price- Article 29 of the regulations implementing the Procurement Act sets out the maximum price, which is a procurement agency’s reserve price or the most it is willing to pay. It is derived from pricing information obtained during the market study and may be lower than the non-acceptable price. The maximum price is not used in reverse auctions (Article 38 of the implementing regulations).

The Procurement Act also sets out preferences relating to bid evaluations in specific cases. For example, in the case of international open tenders (when all interested suppliers can participate irrespective of their nationality or whether Mexico has signed a free-trade agreement) the following applies:

- public agencies must give preference to goods produced in Mexico and which are of at least 50 percent Mexican origin (Article 14);
- Mexican goods are to be granted a margin of preference of up to 15 percent compared to imported goods, in accordance with regulations which are determined by the SFP; and,

- in determining the convenient price, the lowest prevailing price in the Mexican market enjoys a margin of preference of up to 15 percent compared to the price of imported goods (Article 28).

Both the Public Works Act and the PPPA use the points-based criterion to evaluate bids so there is no need to calculate the above-noted reference prices.

3.6.2 *Opening bids and awarding contracts*

The Procurement Act states that the opening of bids and the tender award must be done publicly. Article 35 of the Procurement Act states that a call for tender shall specify the date, time and place for the bid opening. The minutes of the bid opening session shall list the amount of each bid received and indicate the time and place when and where the award resolution will occur- this must be held within twenty (20) calendar days of the bid opening session. The minutes of the bid opening session are made public by putting them on COMPRANET.

Article 37 indicates that the tender award resolution shall contain the following, among other things:

- a) the list of bidders whose bids were rejected and the legal, technical and economic reasons for any rejections;
- b) the list of bidders whose bids were accepted with a general description of their bids;
- c) a copy of the market study, **if** one or more bids involved a non-acceptable price and/or contained a price below the convenient price (defined in subsection 3.6.1);
- d) the name of the bidder who was awarded the contract and the rationale for the award; and,
- e) in the case of a split award (see below), the share and value of the contract for each winner.

Article 29 of the Procurement Act allows contracting authorities to award a contract to multiple suppliers (split award - *abastecimiento simultáneo*, in Spanish), as long as the split of the award does not lessen the participation of suppliers- contracting authorities are to consider the CFC's recommendations in this regard. The highest acceptable bid to be awarded part of the contract in a

split award cannot be more than 10 percent higher than the winning bid (Article 39).

Article 36 Bis states, as a general rule, that in order to be awarded a contract a supplier shall meet all of the legal, technical and economic requirements set forth in the tender documents. Furthermore, pursuant to Article 36, the contract shall be awarded to:

- a) the bid which obtains the best score under the *points-based* or *cost-benefit criterion*; and,
- b) the lowest bid under the *binary criterion*.⁵⁴

In the case of reverse auctions, the contract shall be awarded to the lowest bid, unless it is not technically acceptable.

Article 39 of the Public Works Act has similar provisions regarding bid openings as those contained in the Procurement Act.

LOPSRM states that the contract shall be awarded to the bidder that meets all of the legal, technical and economic requirements set forth in the tender documents. When two suppliers meet all of the requirements under the points-based criterion, the contract will be awarded to the contractor offering the best conditions in terms of price, quality and financial opportunities (Article 38).

Contractors employing handicapped workers are to be given extra points in the bid evaluation.

Split awards are not regulated under this Act.

Article 55 of the Public-Private Partnerships Act states that the contracting authority shall issue a statement explaining the reasons for the award of the contract, which will be made public on COMPRANET within the time period set out in the call for tender.

A contract under the PPPA shall be awarded to the bidder that meets all of the legal, technical and economic requirements set forth in the tender documents (Article 54). When two bidders meet all of the requirements under the points-

⁵⁴ These criteria are described in detail in section 3.1.

based criterion, the contract will be awarded to the contractor offering the best conditions in terms of price, quality and financial opportunities (Article 52).

Split awards are not covered under the PPPA.

3.7 The post-award phase

3.7.1 Guarantees, penalties and rescission of contracts

Article 48 of the Procurement Act specifies that any supplier winning a contract must provide a financial guarantee. The contracting authority shall determine an appropriate guarantee by considering the track record of the supplier in supplying to the authority and may reduce the value of the guarantee.⁵⁵ Suppliers are exempt from having to provide a guarantee in the case of a direct award or an invitation to at least three suppliers procedure.

The value of the financial guarantee in an open contract under the Procurement Act (see subsection 3.4.7) is to be calculated as a percentage — determined by the contracting authority — of the maximum value of the contract.

Article 45, Subpart XIX of LAASSP specifies that each contract shall establish the terms and conditions for the application of penalties to suppliers in the case of a delay in the provision of goods and services. Article 86 of the implementing regulations states that the maximum amount of a penalty shall be determined by considering the value of the guarantee.

Contracting authorities may establish in a contract deductions from payments when a supplier only partially fulfils a contract. A contracting authority shall establish a maximum limit or amount of non-fulfilment, which will work as a base point for deciding either to rescind the contract or to cancel the portion of the contract that was not fulfilled (Article 53 Bis).

Article 54 states that contracting authorities may rescind the contract when suppliers do not comply with their obligations set forth in the contract. The rescission procedure begins with a notification of the non-fulfilment to the

⁵⁵ Contracting authorities shall consider the SFP's *guidelines on the reduction of financial guarantees by suppliers*, referred to in footnote 29.

supplier, who has five (5) working days to reply and provide rebuttal or explanatory evidence. The contracting authority then has fifteen (15) days to decide whether or not to rescind the contract, based on the evidence and arguments provided. The contracting authority has to notify the supplier of the decision. If the rescission proceeds, the contracting authority shall process payments to the suppliers for any unpaid good or service that was actually supplied. Rescission of a contract can be suspended at any time during the procedure, even when the parties had requested a conciliatory procedure.

The provisions in the Public Works Act relating to guarantees and rescission of contracts are similar to those contained in the Procurement Act.

Penalties under the Public Works Act are applicable when the progress of a public works project is delayed due to the fault of a contractor. Penalties are calculated based on the percentage of the unfinished works. Article 46 Bis of LOPSRM states that the amount of the penalty shall not exceed the amount of the guarantee.

With respect to the federal PPPA, financial guarantees are only put in a contract if the call for tenders contained a provision regarding a guarantee. The value of the guarantee cannot exceed:

- a) 15 percent of the value of the works of the contract; and,
- b) 10 percent of the value of the services of the contract.

Penalties are applicable under the PPPA when a contractor does not comply with its obligations. Pursuant to Article 129, a contracting authority may establish in a contract deductions from payments that will apply when a supplier only partially fulfils a contract.

Article 116 of the PPPA specifies that a contracting authority may intervene in a project when it is believed that a contractor is only partially fulfilling a contract.⁵⁶ After investigating, if the contracting authority is of the view that the contractor will not be able to satisfactorily perform the contract, then the contracting authority shall proceed with the rescission of the contract.

⁵⁶ For example, the cancellation or abandonment of the project or the suspension of public services for more than seven (7) calendar days (Article 122).

3.7.2 *Infringements and fines*

Article 59 of LAASSP stipulates that any supplier or bidder infringing the provisions of the Act shall be sanctioned by the SFP, with fines ranging from 50 to 1000 times the minimum wage applicable in the Federal District at the time of the infringement. When a contractor omits to sign a contract, the value of which is less than 50 times the minimum wage in the Federal District, the sanction shall be a fine of 10 to 40 times the minimum wage.

By virtue of Article 60, the SFP is authorised to temporarily restrict any sanctioned bidders or suppliers from participating (directly or indirectly) in public tenders for a period ranging from 3 months to 5 years when:

- a) a bidder has failed to sign two consecutive public contracts within a two-year period;
- b) a supplier has had a contract rescinded by two different public agencies within a period of three years;
- c) a supplier did not comply with its obligations set forth in a contract and, as a consequence, caused serious damage to a contracting authority; and,
- d) a supplier or bidder provided false information, or acted with deceit or in bad faith at any stage of a tender procedure.

When imposing sanctions the SFP is to consider:

- a) the damages caused by the infringement;
- b) whether the infringement was committed intentionally or not; and,
- c) the financial condition of the company and/or individual committing the infringement.

Public procurement agencies are to refrain from receiving bids from, or awarding a contract to, any sanctioned supplier.

The provisions related to infringement and fines in the Public Works Act (Article 77) and the PPPA (Article 30) are similar to those found in the Procurement Act.

CHAPTER 4: ALIGNMENT OF FEDERAL PROCUREMENT LEGISLATION AND REGULATION WITH THE OECD GUIDELINES

As mentioned in section 1.1, in the Agreement signed by the OECD with ISSSTE and the CFC in June 2012 the OECD committed to: a) preparing an Analytical Report regarding the extent to which current public procurement legislation, regulation and practices governing ISSSTE's procurement are consistent with the OECD Guidelines for Fighting Bid Rigging in Public Procurement; and, b) recommending improvements to public procurement legislation and ISSSTE's procurement practices to make them more consistent with the Guidelines.

As noted in Chapter 1, one requirement for effective public procurement is a legal framework of appropriate laws and regulations. The procurement and public works statutes (and their implementing regulations) at the federal level have undergone significant changes recently. Most of the changes were positive and gave contracting authorities additional flexibility to procure goods and services effectively (e.g. through the use of reverse auctions and the participation of social witnesses).

There are, however, a number of additional changes that could be made to the federal procurement laws and regulations in order for such laws and regulations to be more closely aligned with the OECD Guidelines. These changes would enhance competition and increase the safeguards against collusion in public procurement.

The OECD's recommendations for possible improvements in the federal procurement laws and regulations are presented in this Chapter. It should be pointed out that most of the recommended changes outlined in this Chapter were also recommended in the OECD Secretariat's IMSS and GEM reports (noted in footnotes 1 and 2), which is not surprising as all of three of these procurement organisations are subject to the same federal procurement laws and regulations.

As most of the changes recommended in this Chapter would benefit all procurement agencies subject to the three federal procurement statutes, the OECD recommends that ISSSTE officials work with other federal agencies (notably IMSS and the SFP's successor organisation) and with the State of Mexico to obtain added support whilst pursuing legislative and regulatory change. The CFC would also be a valuable ally in this regard.

Chapter 5 outlines the OECD recommendations to ISSSTE on how to improve its own procurement procedures and systems, which will assist the organisation in its fight against bid rigging.

4.1 Remove preferential treatment in laws and procedures

- 1. Current federal procurement rules regarding who can participate in procurement procedures and those granting preferential treatment in certain circumstances can be discriminatory towards foreign bidders and sometimes even national bidders, thus limiting their ability to sell goods and services to ISSSTE and other public procurement agencies. The OECD recommends that current restrictions on participation should be abolished so that all qualified bidders are treated equally, irrespective of their nationality and of the origin of the goods and services they intend to provide.**

Articles 28, 30 and 41 of the federal Procurement, Public Works and Public-Private Partnerships Acts, respectively, distinguish between national and international procurement procedures in the case of both public tenders and the two other procurement procedures that are admissible exceptions. For example, only Mexican nationals can participate in national procedures, whereas participation is open to foreign bidders as well in the case of international procedures. In the latter case, however, participation may be restricted to nationals of countries with which Mexico has signed a free-trade agreement before participation is opened up to all interested bidders regardless of their nationality.

Additionally, as noted in subsection 3.4.2, Article 29 of the Public Works Act specifies that contracting authorities shall select domestic contractors over foreign ones when their bids contain **similar** prices and levels of quality without defining "similar". Furthermore, as mentioned in subsection 3.6.1, Mexican bidders benefit from preferential treatment in certain bidding circumstances, e.g. in the evaluation of bids in international open tenders (see Article 14 of the Procurement Act) and in the calculation of the convenient price (Article 28).

These various provisions effectively limit the pool of bidders willing and able to sell goods and services to ISSSTE and other public procurement agencies. With less competition, contracting authorities likely end up paying higher prices or they purchase goods or services of a lower quality, compared to when there are no restrictions relating to the participation of bidders. Moreover, reducing the number of potential bidders may facilitate collusion because it is easier to agree on, and enforce, a collusive arrangement when there are relatively few bidders. Of course, there will be many instances in which the participation of international suppliers will not make sense given the nature and or size of the procurement.

The OECD recommends that ISSSTE work with the SFP's successor organisation and other interested procurement agencies to propose changes to a number of restrictions in the federal procurement statutes.

The CFC, or the SFP's successor organisation or the Mexican Institute for Competitiveness (Instituto Mexicano para la Competitividad, IMCO in Spanish)⁵⁷ should conduct an evaluation of the impact that opening up tenders more fully to foreign participation will have on national suppliers and, in particular, on small- and medium-sized enterprises. This is not meant to suggest that this recommendation might be ignored but rather that the evaluation would provide the federal government with sound advice on the best way to proceed with legislative changes.

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IMCO has played an active role recently with respect to procurement issues in Mexico. In 2011, they released a report evaluating the procurement laws of Mexico's 31 states and the Federal District (*Competencia en las compras públicas: Evaluación de la calidad normatividad estatal en México*, September 2011, see:

http://imco.org.mx/images/pdf/COMPRAS_PUBLICAS),

which was highlighted in the GEM Report at page 28, and a report evaluating the implementation by IMSS of the recommendations contained in the OECD's IMSS Report, *Evaluación del Acuerdo de Trabajo IMSS-OCDE-CFC*, Jana Palacios, Marcelina Valdés and Stephanie Zonszein, Diciembre 2011. In 2012, IMCO published a model procurement statute, *Ley Modelo de Adquisiciones, Arrendamiento de Bienes Muebles y Prestación de Servicios de las Entidades Federativas*, and a report dealing with transparency in Mexican public procurement, *Rendición de cuentas y compras de gobierno*, Jana Palacios Prieto, Marcelina Valdés Stankiewicz and María José Montiel Cuatlayol.

As well, in the future, the CFC, IMCO or the SFP’s successor organisation should assess the financial and qualitative benefits that have been achieved by ISSSTE and other public procurement agencies from having had access to additional market participants.

These recommendations are consistent with Section 2 of the OECD’s Design Checklist- maximising the potential participation by genuinely competing bidders and Section 5- carefully choosing criteria for evaluating and awarding a tender.

4.2 Limit the use of the exceptions to public tenders

- 2. It is recommended that ISSSTE and other public agencies limit their use of the exceptions to public tenders that are permitted under the federal Procurement Act and the Public Works Act as the use of these exceptions results in fewer bidders and lessens the likelihood that “value for money” is being achieved in many purchases. It is also recommended that the SFP’s successor organisation undertake an initial review and periodic reviews of the incidence of use of these exceptions by ISSSTE and other public agencies in Mexico.**

In addition to the exceptions to the use of public tenders listed in Article 41 of the federal Procurement Act (see subsection 3.4.2), Article 42 establishes a “*de minimis*” exception to the use of public tenders. That provision enables public agencies to assign contracts either directly to a specific supplier or to make awards through an invitation to at least three (3) suppliers provided that:

- the value of each contract is below the maximum amount established each year in the federal Budget;⁵⁸ and,
- the total value of contracts awarded each year using this exception is below 30 percent of the agency’s annual procurement budget (only applies to the federal Procurement Act).

The federal Public Works Act and the PPPA also contain lists of possible exceptions to the use of public tenders and the Public Works Act contains a similar “*de minimus*” provision.

⁵⁸ See Annex 2 for the 2012 federal levels to which ISSSTE must adhere.

As noted in Chapter 2, ISSSTE's procurement groups, like many federal and state purchasing organisations, utilise the exceptions quite regularly. Without a comprehensive study it is not known whether the use of the exceptions is excessive and or without reasonable justification in many instances.

It makes sense for the law to provide public agencies with a "*de minimis*" exception since it gives them flexibility and allows cost savings in the case of small-value contracts or purchases that are best made locally for resource and time reasons. However, the overall value of contracts covered by this exception can be quite significant – up to 30 percent of a contracting authority's annual procurement budget- and especially given the size of ISSSTE's annual procurement budget.

Finding the appropriate balance in respect of the use of these permissible exceptions can be a challenge. On the one hand, flexibility is obviously desirable and sensible. For highly technical contracts, invitations to qualified bidders may result in a more effective and efficient tender, and achieve greater value from the contract award. In markets with a limited number of participants, a requirement for invitations to a greater number of bidders would defeat their purpose. Additionally, where the timeline for a tender is extremely limited, utilising one of the two exceptions to a public tender may save the contracting authority from being required to expend scarce resources to qualify bidders. Finally, when tenders are based upon invitations to at least three suppliers, there may be fewer occurrences of non-performance, sub-standard performance or contract defaults.

On the other hand, ignoring sealed-bid tenders open to all potential bidders and utilising invitations to just a small number of qualified bidders raises a number of potential anti-competitive concerns. Firstly, they limit the pool of bidders and raise the potential for collusion. Invitation-only bids may also preclude new entrants or bidders who may have innovative solutions to a tender. Moreover, invitation-only bids, if frequently used or employed on successive tenders, may raise the potential for bid rigging by the known participants and increase the opportunity for corruption. In addition, they can also prevent cost savings based upon an aggregation of tenders, which can be significant, as the OECD Guidelines and international experience have shown.

It is recommended that regular reviews be conducted by the SFP's successor organisation of the level of use of these exceptions by contracting authorities. Among other things, such reviews could shed some light on

whether competition is unnecessarily restricted in the case of a sizeable portion of the public procurement budget and whether “value for money” is still being achieved for these purchases. **Additionally, the reviews should determine whether flexibility requirements and restrictions to competition are currently appropriately balanced in practice and whether the upper threshold of 30 percent of a contracting authority’s annual procurement budget is appropriate (and, if not, propose the necessary modifications to the procurement laws).** Finally, **it is recommended that the initial study of this issue by the SFP’s successor organisation should include an assessment of whether federal and state procurement groups are actually taking advantage of these exceptions by creating multiple contracts out of larger contracts.**

The increased use of electronic tendering for federally-funded purchases and the centralised procurement information becoming increasingly available through the COMPRANET portal would provide additional tools to more effectively evaluate the number and scope of the use of the exceptions to public tenders and to assess the impact on achieving the greatest value for taxpayers.

These four recommendations are all in accordance with Section 2 of the Design Checklist- maximising the potential participation in procurement procedures by genuinely competing bidders.

4.3 Remove the requirement in the Procurement Act to establish a “convenient price”

3. The requirement, when using federal resources, that public buyers in Mexico cannot accept bids below the minimum threshold represented by the “convenient price” may undermine their ability to obtain the best value from their purchases. The OECD recommends that establishing a convenient price no longer be a requirement.

As noted in subsection 3.6.1, the federal Procurement Act requires that the winning bid in a federally-funded tender must be above the convenient price. This requirement limits price competition among bidders and, as a result, undermines the ability of public procurement groups in Mexico to obtain the best value from their purchases. This lower bound – if leaked outside the procurement agency before or after a tender – may have a number of potentially anti- competitive consequences. First, it may serve to establish a “floor” price for similar future tenders where the convenient price established by the agency in the second instance is actually lower, thereby artificially increasing the prices

submitted from bidders. Second, it may facilitate collusion by providing bidders with some indication of the threshold from which they should raise bid prices in a rigged bidding situation. Third, if bid rigging is already present in an industry or among a group of competitors, leakage of the convenient price furthers the ability to collude on prices for the subsequent tender and to monitor compliance within the cartel.

It should be noted the federal Public Works Act and the federal Public-Private Partnerships Act do not require procurement agencies to establish a minimum acceptable price.

If the Procurement Act is not amended to abolish the need to establish a convenient price, **the OECD recommends that, in the alternative, public agencies should be permitted to utilise a larger discount factor than 40 percent when establishing a convenient price and be permitted to award a contract below the convenient price, if certain safeguards and guarantees are met.** These could include higher performance bond guarantees (multiples of the normal guarantees), greater monitoring of performance, adjustments to progress payment requirements and other methods to assure performance.⁵⁹

If there are justified concerns about a particular supplier bidding too low and subsequently being unable to fulfil the contract or about the quality of goods and services being supplied, this is better addressed by strengthening the framework for penalties and guarantees rather than by restricting price competition (see section 4.12). To protect bidders from arbitrary assessments on the part of the procurement officials, contracting authorities should have a verification procedure for evaluating bids. As well, before any bid is rejected, bidders should be given the opportunity to prove that their bid submissions are sustainable and that they will be able to perform the contract on the terms and prices tendered.

This recommendation is consistent with Section 2 of the OECD's Design Checklist, maximising potential participation by genuinely competing bidders.

⁵⁹ The Mexican Supreme Court of Justice has held that a "*convenient price*" does not infringe the principles of efficiency and efficacy established in the Federal Constitution. It ruled that a convenient price helps to ensure that procurement officials obtain good quality goods and services. The Court stated that if bids below the convenient price were accepted, it would encourage suppliers to provide low quality goods and services, which would lessen the quality of public services- 1a. CCXXI/2011, November 2011.

4.4 Change a number of requirements relating to clarification meetings

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

The federal Procurement Act and Public Works Act at present each require that contracting authorities hold at least one clarification meeting to address bidders' queries about each call for tenders. On the other hand, the federal PPPA allows for the possibility of answering supplier queries via written statements and does not include an obligation to hold any clarification meetings.

It is also important to note that Articles 65 and 83 of the federal Procurement Act and the Public Works Act, respectively, likely encourage bidders to participate in clarification meetings by establishing, as one requirement for filing a review application, the need to have attended a clarification meeting.⁶⁰ **The OECD recommends that this requirement be removed from both statutes.**

The OECD Guidelines highlight the potential for collusion during a tender when bidders are provided the means to know the identities of their potential competitors and to meet with them. Clarification meetings, site visits, lists of those who have requested information on tenders or expressed an interest in the tender, list of bidders, public bid openings and the public disclosure of the bid price submitted by each bidder have all been identified by the OECD Guidelines as things to be avoided in tendering situations.

The OECD Guidelines are based upon extensive international experience that suggest such practices often facilitate collusion and should be eliminated from tender procedures whenever possible. Where elimination of the opportunity for potential bidders to meet and interact is not feasible, such practices should be minimised and carefully monitored. Some OECD jurisdictions specifically prohibit group meetings involving bidders and the

⁶⁰ The Mexican Supreme Court of Justice has ruled that this requirement infringes the due process clause of the Constitution since, by filing a review application, the supplier intends to challenge the actions taken by the contracting authority during all of the phases of the procedure and not only during the clarification meetings (2a. XCV/2010).

disclosure of the identity of potential bidders. International experience confirms that clarification meetings mandated by statute provide a natural forum where potentially colluding bidders can discuss or finalise an agreement or exchange competitively sensitive information.

It is recommended that these collusion concerns be addressed in the short term by requiring that, whenever feasible, clarification meetings are held “virtually”, i.e. by using “remote” technology to eliminate face-to-face meetings of competitors. Eventually, the mandatory requirement for a contracting authority to hold at least one clarification meeting during each tender should be eliminated. It should be possible for contracting authorities to use alternative methods to address bidders’ questions (for instance electronically) and to share the responses with all potential bidders without the necessity of disclosing the authors of the questions or the identity of the potential bidders with whom the responses are shared. These alternative procedures should be drafted in a fashion to permit some discretion and flexibility to contracting authorities to deal with questions effectively and efficiently. Any changes in procedures should take into account the ability of smaller suppliers to adopt the new procedures.

Any material released by procurement groups (such as the minutes of clarification meetings) should not list nor identify the participants in a procurement process - see the recommendations in section 4.5.

As well, it is recommended that site visits only be held when they are absolutely necessary and not as a routine procedure. Alternatively, if not prohibitive cost-wise, there can be multiple site visits to divide up the competitors or site visits can be done on a virtual basis.

Each of these recommendations in section 4.4 is consistent with Section 4 of the Design Checklist, reducing communication among bidders.

4.5 Eliminate several problematic disclosure requirements

5. Some current disclosure requirements (e.g. relating to reference prices, the identities of bidders and the value of the bids they submit) can facilitate bid rigging and should accordingly be eliminated or substantially circumscribed.

It is recognised that transparency is a key requirement of procurement procedures in Mexico, a core principle which governs and guides Mexican

procurement laws and procedures. Transparency is mandated to allow maximum participation and competition in public tenders and to deter corruption. However, there is often a tension between transparency and maximising competition and deterring collusive activity in public procurement. The OECD's recommendation is designed to reduce collusion. A delicate balancing of policy objectives and practices is required to achieve the twin policy goals of transparency and obtaining value for money in all procurement processes. It is therefore critical to establish the proper timing, degree and audience for the disclosure of information in order to attempt to optimally balance the conflicting objectives and risks.

The three federal procurement statutes contain a number of mandatory disclosure requirements that create greater possibilities for collusion among competitors. In addition to the requirement of a clarification meeting discussed in section 4.4, contracting authorities must publish the list of potential bidders attending a clarification meeting, including their questions, and the list of bids received (including both rejected and accepted bids) for each tender, including the identity of the bidder and the amount of the bid.

As well, the federal Procurement Act and Public Works Act (Articles 56 and 74, respectively) require the SFP to compile a unified register of suppliers and contractors and identify their track record in terms of contracts won and fulfilled. Also, procurement agencies are required to post on COMPRANET their annual procurement plans, which contain a large amount of detail that could assist would-be bidders to more effectively set up and pursue collusive activity.

Compiling the information and posting it on the COMPRANET portal or on the contracting authority's portal should be carried out in a fashion to permit procurement officials access to important information about bidders and tenders throughout Mexico. Information made available to bidders and the public should be carefully assessed in light of the risks and benefits from disclosure and confidentiality concerns. The timing and form of public disclosures should also be carefully considered in light of the dual mandates of transparency and obtaining maximum value from public expenditures on procurement.

It should be recognised that the use of COMPRANET by the CFC, the SFP and procurement agencies as a means to effectively monitor all aspects of tenders offers enormous potential to uncover collusion and corruption. Ongoing efforts to make COMPRANET a robust, fully functional portal that serves public policy goals should focus on making it a tool by which procurement

officials and agencies can attain the best value from public tenders. The second policy goal of transparency should be very carefully assessed to determine the optimum timing and content of public disclosures concerning tenders in order to minimise the opportunities for collusion on current and future projects.

Some of the information which is currently disclosed during public tendering processes in Mexico may facilitate collusion because it can be used by dishonest bidders to reach a collusive agreement as well as to monitor whether all members are complying with such agreements. **The OECD recommends that information about the identity of bidders and the amount they bid should only be released in a form which does not explicitly identify bidders (e.g. bidders should be identified by letters or numbers, not by their names). Alternatively, fuller information could be made available with a certain time lag (more than six months after the conclusion of the tender), when its usefulness to dishonest bidders would be more limited.**

The OECD further recommends that information about contracts won and fulfilled by individual suppliers should be made available either to procurement officials only or, if that is not possible, to the general public but again with some appropriate time delay. Even a short delay in releasing the information to the public may hinder or disrupt the monitoring and enforcement of a collusive scheme.

All of these recommendations relate to Section 4 of the Design Checklist-reducing communication among bidders.

4.6 Enact legislative changes to deal with joint bids

6. Currently, procurement officials at ISSSTE and other federal purchasing groups must accept joint bids unless they justify why they are not going to allow joint bids. Federal legislation should be amended so that joint bids are permitted only when tender documents expressly mention that they will be accepted. As well, ISSSTE and other federal procurement groups should have the legislative right to reject one or more joint bids submitted in a response to a call for tenders that allowed for joint bids.

Joint bids can be a useful way for suppliers with different capabilities or strengths (e.g. a presence in different areas of Mexico, or a focus on different parts of the supply chain or active/specialised in only part of the bid requirements) to get together and submit a more competitive bid by taking

advantage of economies of scale, cost sharing and risk reduction. As well, smaller companies can join forces to bid on a tender in which they otherwise would not have been able to participate. In this way, competition is fostered. However, joint bids can also be used to reduce competition among bidders and to implement a collusive scheme aimed at sharing the market among the participants. Joint bids are less problematic the greater the number of competing suppliers of a good or service.

As noted in subsection 3.4.9, consortia agreements entered into by joint bidders are subject to Mexico's competition laws regarding cartels and horizontal restraints (Articles 34 and 36 of the federal Procurement Act and Public Works Act, respectively). As well, these provisions stipulate that joint bidders may request an opinion from the CFC regarding the legality of their joint bid although, according to the CFC, very few do so.

Although the federal Public-Private Partnerships Act permits joint bids, it does not make reference to compliance with Mexico's competition laws or seeking advisory opinions from the CFC when submitting joint bids. **Amendments to this statute should be enacted for consistency and with the goal of promoting competition.**

On balance, it would not be appropriate to go as far as prohibiting the use of joint bids. However, **the OECD also recommends that the current wording of the three federal procurement statutes should be strengthened to state that joint bids will only be permitted when procurement officials explicitly allow for joint bids in tender documents.**

As well, in order to make attempts to collude in public procurement more difficult **the OECD recommends that the Mexican federal procurement laws be amended to require bidders, when joint bids are allowed by a procurement group, to specify the rationale and benefits of their joint bid in their bid submission.** This would help procurement groups in their assessment of submitted bids and in their determination of whether or not a specific tender is genuinely competitive. In addition, it would make it easier for public procurement officials to detect possible bid rigging.⁶¹

⁶¹ For a survey of how joint bidding is regulated in Europe, and its possible pro- and anti-competitive effects, see: Gian Luigi Albano, Giancarlo Spagnolo and Matteo Zanza, Regulating joint bidding in public procurement, *Journal of Competition Law and Economics*, vol. 5(2), 2008, pages 335 – 360.

These recommendations are consistent with Section 2 of the Design Checklist- maximising the potential participation of genuinely competing bidders, Section 3- defining requirements clearly and avoiding predictability and, Section 6- raising awareness among public procurement officials. As well, these recommendations relate to Section 1 of the Detection Checklist, which deals with looking for warning signs and patterns when businesses are submitting bids. These recommendations are supplemented by the recommendations contained in section 5.6 of Chapter 5.

4.7 Assess the need for legislative changes relating to split awards

7. Splitting a contract among multiple suppliers may facilitate collusion. As a result, the OECD recommends that a study be undertaken to gauge the relative merits of awarding split contracts and to assess the need for legislative change in this area.

Article 29 of the federal Procurement Act allows contracting authorities to split contracts among multiple suppliers (*abastecimiento simultáneo*, in Spanish). Public procurement agencies are required to indicate in their tender documents whether a contract is to be awarded to a single supplier or whether it will be split among multiple suppliers. If the latter, the tender document is to specify the total number of winning suppliers, the share of the contract attributable to each and the admissible difference in bid prices (compared to the winning bid). Article 39 of the federal Procurement Act specifies that a bid, which may be awarded a portion of the contract, cannot be more than 10 percent higher than the winning bid.

Both joint bidding (discussed above in section 4.6) and split awards provide contracting authorities with the flexibility to award a contract when a single supplier may not have sufficient capacity to perform the entire procurement itself and or where there is a lack of alternate sources of supply. Both practices also serve the laudable policy goal of permitting small- and medium-sized enterprises to compete to secure all or a portion of a contract when they might not otherwise be able to do so.

However, both practices can also facilitate bid rigging and collusion. A “winner-takes-all” procurement approach encourages aggressive bidding and is likely to provide the best price for procurement groups. On the other hand, when bidders know with reasonable certainty that a public agency intends to split a contract among several of them, this may provide an incentive for several

bidders to establish a focal price and then minimise the differences in bids, so that each of them is awarded part of the contract.

When competition among competitors is weak or when bid rigging is already in place, advertising the fact that multiple suppliers may be chosen allows the cartel to effectively divide up the procurement and monitor bid prices. If split awards are used on successive or recurring contracts, then the tender processes can be used to set up a bid rotation/market sharing scheme in which each member of the cartel can obtain a portion of a procurement agency's business. To dishonest bidders, such a situation may be far more attractive than a traditional bid rotation scheme that requires all bidders, except the winning bidder, to forego the benefits of the cartel until a future date. The negative consequences may be exacerbated for those products with few suppliers.

It is acknowledged that contracting authorities need to have the flexibility in all tenders to ensure that they obtain bids sufficient to allow the contract to be awarded, particularly with respect to procurements for products with a limited number of suppliers or in remote areas of Mexico where requirements may be difficult to fill. However, these considerations should not take away from the primary goal of obtaining value for money.

Given these conflicting issues, **it is recommended that a study be conducted with all or a reasonable sample of public buyers in Mexico to assess how often split contracts are used, the justifications for employing split contracts and the reasonableness of the justifications.** The study should examine the results produced by split contracts in terms of performance, price and other policy goals. Specific emphasis should be placed on those split contracts where identical prices have been submitted by bidders, which could indicate the existence of collusion. The study should also examine the rates of, and reasons for, default and non-performance in split contracts.

Since there are many common policy and competition issues surrounding split awards and joint bids, it would seem sensible to conduct a study of both provisions at the same time in order to gain a complete picture. **Such a study should, for example, be conducted by the SFP's successor organisation in cooperation with the CFC.**

Based on the results of the study, the SFP's successor organisation should recommend appropriate changes to the law or regulations or procedures and produce guidance for federal and state contracting authorities regarding how to best construct split contracts to maximise the

incentives for competition and minimise the incentives for collusion. For example, split award procurements could be designed so that the amount of the contract available to be split is limited to as a small percentage as is necessary to ensure security of supply.

These recommendations are consistent with Section 1 of the Design Checklist- being informed about the market, Section 5- carefully choosing criteria for evaluating and awarding the tender, and Section 6- raising awareness among public procurement officials. The recommendations are supplemented by recommendation 7 in Chapter 5.

4.8 Institute disclosure requirements regarding sub-contracting

8. Disclosure requirements should be imposed by law on bidders to make it more difficult for them to use sub-contracting as a mechanism to implement a collusive agreement.

Currently, the federal Public Works Act and Public-Private Partnerships Act regulate sub-contracting.⁶² The federal Procurement Act is silent concerning this subject perhaps because sub-contracting is most prevalent in construction and infrastructure projects. While legitimate in most cases, sub-contracting can, however, be part of a collusive agreement in which the winner of a tender sub-contracts part of the contract to one or more of the unsuccessful bidders in order to remunerate them for their participation in a bid-rigging scheme. Consequently, procurement authorities should be aware of the possible collusion issues when permitting sub-contracting.

In most truly competitive situations firms are extremely reluctant to sub-contract to rivals. There are few plausible reasons why the winner in a tender procedure – who bid alone and therefore expressed an ability to fulfil the contract without relying on rivals – should subsequently assign part of the contract to one or more unsuccessful competitors. In fact, international cases have demonstrated that this practice is frequently one of the mechanisms used to ensure and reward cooperation in a collusive agreement. Smaller firms, however, often legitimately engage in sub-contracting as they do not have the capacity to undertake all of the contract requirements or to complete them in the specified time period.

⁶² See subsection 3.4.8.

Some of the risks associated with sub-contracting could be reduced if bidders were required to undertake certain disclosure requirements in their bid submissions, for example: i) advise the contracting authority of their intention to sub-contract; ii) clearly identify the firms to which they are sub-contracting; and, iii) explain why sub-contracting is necessary for the proper performance of the contract. In the alternative, ISSSTE and other procurement agencies could institute these disclosure requirements in all of their tenders- see recommendation 8 in Chapter 5.

This recommendation is one way of complying with Sections 3 and 5 of the Design Checklist- defining requirements clearly and avoiding predictability and, carefully choosing criteria for evaluating and awarding tenders, and with Section 1 of the Detection Checklist- looking for warning signs and patterns when businesses are submitting bids.

4.9 Allow micro-, small- and medium-sized companies to participate on their own in reverse auctions

9. The OECD recommends abolishing the provision in the Procurement Act that prohibits micro-, small- and medium-sized companies from participating on their own in reverse auctions.

This prohibition in the Procurement Act requires smaller companies to participate in reverse auctions only on a joint bid basis. According to the preliminary recitals of the 2009 Congressional Committee studying amendments to the Procurement Act, the rationale for the prohibition was that, as reverse auctions are designed to enable public procurements to purchase goods and services at the lowest price, the participation of smaller companies in such a procurement process could undermine their economic stability. The OECD is of the view that decisions whether or not to participate in a reverse auction should be left entirely up to individual firms and that the prohibition likely prevents or discourages some companies from becoming involved in reverse auction procurement procedures, thereby reducing competition.

This recommendation would help ISSSTE to comply with Section 2 of the OECD's Design Checklist- designing the tender process to maximise the potential participation of genuinely competing bidders.

4.10 Amend the three federal procurement statutes to require Certificates of Independent Bid Determination

10. The federal procurement statutes should be amended to require bidders to submit a “Certificate of Independent Bid Determination” as part of their bid submissions. This requirement would be in addition to the “Integrity Statement” already mandated by Article 29, Subpart IX and Article 31, Subpart XXXI of the federal Procurement Act and Public Works Act, respectively. As well, the federal Public-Private Procurement Act should be amended to make it mandatory for bidders to submit an Integrity Statement in tenders covered by that statute.

As noted in subsection 3.5.1, bidders are required to submit, along with other documents, an Integrity Statement in which they must declare that they have not engaged, and will refrain from participating, in any scheme of behaviour intended to manipulate the evaluation of the bids, the outcome of the tender or any other aspect of the procedure (Articles 29 and 31 of the Procurement Act and Public Works Act, respectively). It is recommended that the federal PPPA be amended to make it mandatory for bidders to submit an Integrity Statement in tenders covered by that statute.

The Integrity Statement is certainly another useful tool to fight corruption of officials in public procurement⁶³ and arguably it covers some bid-rigging activities and likely discourages some bidders from engaging in certain anti-competitive conduct. However, in its current formulation it does not specifically address collusion among bidders and therefore it likely has a limited impact on preventing and fighting bid rigging.

It would be highly beneficial for ISSSTE and other public procurement agencies if the federal procurement statutes were amended so that bidders were also required to submit a Certificate of Independent Bid Determination (“CIBD”) such as the two examples contained in Annex 3 (Canada) and Annex 4 (the United States). Such a requirement would be an excellent way to raise awareness with suppliers about the serious nature of bid rigging.

⁶³ The Anticorruption Act, passed on June 12, 2012, addresses issues such as the sanctions for public officials and individuals involved in corruption practices related to procurement in Mexico.

With this Certificate bidders are required to disclose all material facts about any communications that they have had with competitors pertaining to the invitation to tender. ISSSTE and other public procurement groups should also require that CIBDs be signed by an individual of authority at any firm submitting a bid, as recommended in the OECD Guidelines- see recommendation 12 in Chapter 5.

The use of this Certificate should make collusion riskier and more expensive for dishonest bidders and therefore discourage bid rigging. As well, it alerts bidders to the fact that procurement agencies and officials are aware of bid rigging and are attempting to detect and avoid this illegal conduct. In addition, a CIBD can provide an independent basis for prosecution under Mexican criminal law. If a bidder falsely or inaccurately certifies that it did not collude, the bidder can be prosecuted for the false statement made on the CIBD.⁶⁴

Recommendation 10 is consistent with Section 4 of the OECD's Design Checklist, reducing communication among bidders. Alternatively, ISSSTE and other procurement agencies could institute the requirement for CIBDs in all of their tenders- see recommendation 12 in Chapter 5.

4.11 Enhance the participation of social witnesses

11. The role of social witnesses in tendering procedures should be enhanced by having them focus on competition issues in addition to transparency concerns and adherence to laws and procedures.

At the federal level, the Procurement Act and the Public Works Act (Article 26 Ter and Article 27 Bis, respectively)⁶⁵ regulate the participation of social witnesses (*testigos sociales*, in Spanish) in tender procedures- in the case

⁶⁴ Under the Federal Criminal Code it is possible to prosecute an individual who lies in response to a question asked by a government official (false statement- Article 247, Subpart V- sanction: 300 days of the individual's salary at the time of committing the crime and the possibility of a period of incarceration ranging from four to eight years).

⁶⁵ For the PPPA, Article 43 states that the Act's implementing regulations shall govern the participation of social witnesses in tendering procedures related to public-private partnerships. The PPPA was passed on January 16, 2012. On November 5, 2012, the Act's implementing regulations were published in the Federal Official Gazette to take effect on the following day.

of the Procurement Act, when the contract value exceeds 5 million times the minimum wage applicable in the Federal District or when the SFP considers it is appropriate due to the impact the tender may have on the economy or society. With public works, the participation of social witnesses is required when the contract value exceeds 10 million times the minimum wage applicable in the Federal District or when the SFP considers that it is necessary. The main objective of utilising social witnesses is to enhance social participation and transparency in tendering procedures.

The OECD Secretariat was advised by ISSSTE procurement officials that they often found social witnesses did not provide useful input and sometimes did not display a sound understanding of current procurement rules and procedures and or the specific needs of the ISSSTE procurement organisation. These views were similar to those expressed by GEM procurement officials.⁶⁶

The OECD recommends that ISSSTE and the SFP's successor organisation ensure that they hire individuals and firms with the background and experience that will enable them to provide expert procurement advice to the benefit of public procurement officials.

Social witnesses should be well acquainted with federal and State procurement laws and regulations and bid-rigging and competition issues. Also, they should have a good understanding of the role they are expected to play during a tender process.

Article 26 Ter (g) of the federal Procurement Act and 27 Bis (g) of the federal Public Works Act state that in order to be registered in the federal Register of Social Witnesses it is mandatory to attend to the training sessions currently provided by the SFP. **It is recommended that the SFP's successor organisation (with the advice of the CFC and the assistance of one or more educational institutions) design training courses for social witnesses which include a focus on bid rigging and competition issues and the current legal framework for procurement.** As they participate during all stages of a procurement procedure, social witnesses might then be better able to identify anti-competitive behaviour of bidders and advise contracting authorities.

These recommendations are consistent with Section 6 of the Design Checklist- raising awareness among procurement officials of the risks of bid

⁶⁶ GEM Report, page 99.

rigging- although social witnesses are not procurement officials they do participate in the tender process.

4.12 Revise penalties, guarantees and rescissions of contracts

12. It would appear that the current procurement laws and regulations provide a weak framework for penalties related to the partial or non-fulfilment of contracts awarded via public tender. The SFP's successor organisation should study the incidence of contract problems of all sorts and recommend changes to the various types of penalties set forth in the three federal public procurement statutes, including whether there should also be guarantees in direct award contracts and in contracts awarded through invitations to at least three suppliers.

The current federal framework for penalties and guarantees relating to contract fulfilment is summarised in subsection 3.7.1, including the provision that a penalty imposed by a contracting authority in case of a delay in the delivery of goods and services cannot exceed the value of the guarantee provided (Article 86 of the implementing regulations to LAASSP). For public works, the penalties at the federal level are proportional to the amount of work not completed.

During the OECD's study of public procurement in the State of Mexico some municipal procurement officials advised the OECD Secretariat that it was relatively common to contract with already known suppliers and pay higher prices rather than accept bids from new and relatively unknown suppliers/contractors and possibly face a non-performance situation.⁶⁷

At the federal level, procurement officials from IMSS advised the OECD Secretariat that winners of contracts awarded by IMSS often only partially fulfilled their contracts- for example, some suppliers did not supply goods in areas of Mexico where delivery was too costly or complicated compared to the volumes required and or where the supplier did not have a local base.⁶⁸

When suppliers do not comply with their contract obligations regarding certain products or locations, public procurement agencies are often forced to

⁶⁷ GEM Report, page 104.

⁶⁸ IMSS Report, page 68.

buy the goods they require in a hurry and at a higher price (and often through an emergency procedure).

Late delivery and non-fulfilment or partial fulfilment of contracts suggest that the current legal framework for penalties is weak in the sense that it is relatively inexpensive for suppliers to fulfil only part of the contract and that they are not appropriately punished. It should be noted that this regulatory weakness also has an impact on other aspects of procurement legislation. As discussed earlier in this Chapter, federal procurement statutes mandate that admissible bids must be above a certain threshold and allow for contracts to be split among multiple suppliers, both of which are designed to reduce the incidence of partial or non-fulfilment of contracts.

However, these provisions can also facilitate collusion. Appropriate penalty levels for partial or non-fulfilment of contracts can deter bid rigging undertaken by way of bid withdrawal and non-fulfilment of contracts. These are two methods used by colluding companies to foster an appearance of competitive bidding while at the same time increasing the prices when a procurement agency is forced to seek supplies from suppliers that bid higher prices, when their supply needs are not satisfied by the winning bidder. In a fashion, this situation is akin to a winning bidder sub-contracting to a losing firm or firms in order to share the profits from collusive behaviour. Procurement officials should investigate situations of contract non-fulfilment as they may be manifestations of bid-rigging activity when they are recurring and or when there are no apparent justifications.

A more appropriate and less problematic way to address non-fulfilment, and with the added benefit of deterring collusive activity, is by strengthening the penalty framework rather than by introducing distortions and limiting competition during the tendering stage.

Accordingly, **it is recommended that the current framework for penalties be revised by removing the provision that the amount of the penalty cannot exceed the value of the guarantee and by establishing higher penalties.** Any changes in this regard would need to be consistent with the current legal framework regarding civil penalties in contracts, which decrees that the punitive damages cannot exceed the value of the main obligation stated in the contract.⁶⁹

⁶⁹ Article 1873 of the federal Civil Code.

The structure of a typical contract could be modified to provide disincentives for partial performance and remove the capacity of bidders to selectively perform the contract. These contract provisions could be highlighted in the tender documents and be explicitly made a part of the contract terms.

Providing the proper disincentives for partial performance might be accomplished by linking progress payments to the satisfactory performance of the contract in those geographic areas which the market study has shown will be the most costly for bidders to satisfy or for those products which are known to have little, if any, profit margin. Contracts could stipulate that progress payments for all aspects of the contract will be withheld entirely (or substantially reduced) pending performance with respect to the most problematic locations/products. Conversely, a “carrot” rather than a “stick” approach might be considered which would provide incentives for early delivery to remote locations or of less profitable products. Additionally, where the product is durable and can be adequately accommodated, the contract might require full delivery to the most remote or costly locations first.

In addition, it is recommended that bidders be required to provide specific information in their bid submissions concerning their cost structure in supplying the most remote and underserved locations and the least profitable goods and services, which would enable procurement groups to establish better convenient and non-acceptable prices and to set performance bonds at levels appropriate to the risks of partial or non-performance.

Finally, it is recommended that ISSSTE and other procurement groups at the federal and state levels adopt the practice of consistently sharing their lists of problematic and sanctioned suppliers and contractors with the SFP’s successor organisation and that the SFP’s successor organisation ensures that all Mexican procurement agencies have knowledge of, and easy access to, this information. This would put less scrupulous suppliers on notice that the issue of partial or complete non-fulfilment of contracts is being addressed at both the federal and state levels, and, importantly, in a coordinated fashion.

These recommendations would help ISSSTE to comply with Section 1 of the OECD’s Design Checklist- being informed about the market- and Section 3- defining tender specifications clearly, and they relate to Section 5 of the Detection Checklist dealing with suspicious behaviour such as not fulfilling a contract for no obvious reason.

4.13 Sanction suppliers convicted of bid rigging in Mexico

13. Provisions in the Procurement Act and the Public Works Act enable the SFP to prohibit suppliers from participating in public procurement for various reasons (see subsection 3.7.2). The OECD recommends amending the laws to allow for firms and individuals convicted of bid rigging by the CFC to be prevented from participating in public procurement for a specified period of time provided that, before the SFP's successor organisation makes such a determination, it must seek an opinion from the CFC regarding the competitive consequences of such a prohibition and abide by the CFC's opinion.

Many companies depend heavily upon securing contracts from government agencies for much of their profit and even their continued existence. In such cases, losing the ability to compete for government contracts for months or years could be a strong deterrent to engaging in bid rigging or other cartel activity. However, in some industries there are very few suppliers so that banning one or more companies from bidding for government contracts could be seriously detrimental to competition. Consequently, the OECD recommends that the CFC be actively involved in any decision by the SFP's replacement group to sanction suppliers by prohibiting their involvement in government procurement procedures. **The OECD also recommends that views be sought from public procurement agencies which depend on the goods and services provided by the convicted companies and individuals.**

Implementing this recommendation would add another approach to maximise the participation of genuinely competing bidders in procurement processes undertaken by ISSSTE and other public procurement groups, in compliance with Section 2 of the Design Checklist. It would also send a strong message to companies currently engaged in collusion and those considering the establishment of a bid-rigging scheme.

CHAPTER 5: RECOMMENDATIONS AIMED AT FIGHTING BID RIGGING IN PROCUREMENT AND IMPROVING ISSSTE'S PROCUREMENT PRACTICES

In the June 2012 Agreement signed between the OECD, the CFC and ISSSTE, the efforts ISSSTE had already undertaken to fight bid rigging in its public procurement were acknowledged. These initiatives, which are outlined below in Box 3, have also helped ISSSTE's procurement groups to purchase more effectively and they have fostered competition in its tendering processes.

Pursuant to the Agreement signed in June 2012, ISSSTE committed to adopt and implement in its institutional policy applicable recommendations emanating from the Analytical Report of the OECD Secretariat and specifically those outlined in this Chapter.

The various recommendations detailed in this Chapter are designed to build upon ISSSTE's recent procurement improvements and successes described in Box 3 below so that the organisation will enhance its procurement procedures, foster competition in its purchasing processes and create a more informed organisation such that its procurement staff will be able to more easily identify and avoid bid rigging. As with Chapter 4, the OECD's recommendations are linked to one or more sections in the two Checklists comprising the OECD's Guidelines. Some of the recommendations in this Chapter are complements to recommendations in Chapter 4 or they are alternatives to Chapter 4 recommendations, if a particular law is not abolished or amended or if the process of change appears to be occurring too slowly.⁷⁰

⁷⁰

For example, see recommendations 4.3 and 5.11 (reference prices), recommendations 4.6 and 5.6 (joint bids), recommendations 4.7 and 5.7 (split awards), recommendations 4.8 and 5.8 (sub-contracting), recommendations 4.9 and 5.10 (reverse auctions) and recommendations 4.10 and 5.12 (Certificates of Independent Bid Determination).

It should be noted that, in order to successfully tackle collusive bidding practices, recommendations need to be adopted in a flexible and dynamic way. No single recommendation is likely to be valid for all tender situations or to remain effective over the long term. Bidders who have colluded in the past (or wish to do so in future) may be expected to react to policy and procedural changes instituted by procurement groups and to explore new and more inventive and secretive ways to collude. To combat collusion and obtain the best value for its purchases, ISSSTE needs to be constantly vigilant and ever ready to change “the rules of the game”, if that appears to be necessary.

Box 3: Recent pro-competitive initiatives undertaken by ISSSTE

ISSSTE has initiated the following actions within the last year:

1) established a comprehensive database to enable the organisation to track inventory levels, procurement actions, suppliers, purchase prices and non-delivery issues, which has led to fewer product shortages and less overstock situations;

2) centralised purchases of many goods and services rather than having individual purchasing units buying separately, which has resulted in savings;

3) set up a market studies unit in March 2012 to ensure that such studies are carried out and that they contain useful and appropriate information; and,

4) sought additional opportunities to consolidate purchases with IMSS.

With regard to the last initiative, in September 2012 ISSSTE joined with IMSS and two other federal and state health care buying groups, National Defence (*Secretaría de la Defensa Nacional*, SEDENA in Spanish) and the State of Baja California, in a public tender involving the consolidation of purchases for nine (9) drugs. Reverse auctions were utilised in five (5) of the purchases in an attempt to achieve better tender results. The other four (4) consolidated purchases involved a process in which a maximum price is published and suppliers are expected to offer discounts through a reverse auction-type process (this procurement method is described in greater detail in subsection 3.4.6). It has been estimated that the four procurement groups have achieved savings totalling 1.7 billion pesos. ISSSTE’s savings amounted to over 420 million pesos.⁷¹

Each of these actions is an important and commendable step in support of ISSSTE’s decision to detect and combat bid rigging in its procurement activities and to increase its efforts to improve its procurement practices.

⁷¹

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

5.1 Establish a coordination and oversight body for effective procurement

- 1. The OECD recommends that ISSSTE establish a new group within its organisation to ensure that its various pro-competitive procurement initiatives and the recommendations of this Analytical Report are implemented in a consistent, effective and timely manner.**

Chapter 2 described the expansive and complicated nature of ISSSTE's procurement structure. Information obtained by the OECD Secretariat during interviews with ISSSTE procurement personnel points to a number of inconsistencies and other problems with respect to the adoption of procurement procedures and requirements- different procurement procedures, multiple supplier registries, few market studies undertaken, no procedures for reporting suspicious bidding activity, little information sharing, budget approval and timing issues, etc.- see section 5.2 for additional matters identified by ISSSTE's new Market Studies Unit. As a result, the OECD is of the firm view that the most important change ISSSTE could implement to improve its procurement practices would be to establish a coordination and oversight body to deal with the current lack of coordination and communications within ISSSTE, two critical issues which typically undermine a totally effective approach to procurement in large and decentralised organisations such as ISSSTE.⁷²

Many of the OECD's other recommendations later in this Chapter would stand a better chance of being successfully implemented if there was a coordination and oversight function vested in a single ISSSTE group that is ultimately responsible for a myriad of procurement-related issues. For the basis of this Report, this new unit will be referred to as the Procurement Coordination Unit or the PCU.

The OECD recommends that this new ISSSTE Procurement Coordination Unit be responsible for the following activities:

⁷² The OECD put forward a similar recommendation to the State of Mexico (GEM Report, pages 130 - 132), which also has to contend with a structure in which many diverse organisations engage in public procurement. On the other hand, the State's purchasing units are not as geographically dispersed as those found within ISSSTE.

- **ensuring that the documentation and procedures for the various types of procurement procedures undertaken by ISSSTE are appropriately standardised across ISSSTE's directorates, hospitals, clinics and other operating units such as SuperISSSTE, TURISSSTE, etc. (described below in this recommendation);**
- **overseeing the Market Studies Unit and ensuring that it plays a key role in future ISSSTE procurement procedures (see recommendation 2);**
- **coordinating future consolidations of purchases across ISSSTE's numerous purchasing units and the use of reverse auctions (see recommendations 3, 4 and 10);**
- **standardising ISSSTE tender documents and procedures, taking into account the SFP manuals and ISSSTE's POBALINES, and removing unnecessary duplication in the various guidelines (described below in this recommendation);**
- **studying and reporting on a number of important procurement matters such as: the use of joint bids, split awards and sub-contracting; analyses of the rationales for their use; the degree of non-fulfilment of contracts; and the reasons that bidders cease pursuing some ISSSTE's contracts (see recommendations 5, 6, 7 and 8);**
- **communicating with non-ISSSTE public procurement groups regarding matters of common interest (see recommendations 15 and 16);**
- **being the repository for suspicious bidding behaviour reported anonymously or otherwise by ISSSTE procurement staff and working with the CFC, as appropriate, to deal with these staff reports (see recommendations 14 and 18);**
- **coordinating training with the CFC and the SFP's successor organisation (see recommendation 17);**
- **assessing whether ISSSTE's budget processes, approvals and timelines are resulting in adverse consequences for competitive**

procurement and possibly supporting collusive activity (see recommendation 21); and,

- **interfacing with the SFP's successor organisation and the CFC regarding procurement issues with competitive consequences such as the identification of best practices, the preparation and dissemination of market studies, the use of social witnesses, framework agreements, reverse auctions, and public-private procurements, etc.** (see recommendations 2, 4, 10, 12, 14 and 20 of this Chapter).

The OECD believes that in order for ISSSTE to implement meaningful and timely changes to its procurement practices, it needs to put in place a champion responsible for ensuring that its diverse number of groups and individuals are stirred to action. **It is recommended that the Procurement Coordination Unit should be an independent unit within ISSSTE's organisation, possibly within the Director General's office, with sufficient resources and autonomy to ensure that ISSSTE achieves the twin objectives of realising more competition in its procurement procedures and detecting and avoiding bid rigging in those same procedures.** This new unit could also be charged with tackling efficiency and effectiveness issues and, along with ISSSTE's Internal Control Office, integrity issues.

A key function of ISSSTE's Procurement Coordination Unit should be to ensure that, whenever feasible, ISSSTE's various purchasing groups use standardised tender documents and procedures as described in the SFP's manuals.⁷³ Inconsistent adoption of procurement procedures and requirements, as described above, may have adverse consequences for competition on tenders, may increase the possibility for collusion, and may lead to conflicts between ISSSTE and suppliers bidding on tenders. Greater standardisation of

⁷³ On August 9, 2010 and June 27, 2011, the SFP published the procurement and public works manuals, respectively, which must be adopted by public agencies in Mexico when they utilise federal funds for the procurement of goods and services and the commissioning of public works. They replace any internal manual, regulation or guidelines adopted by agencies unless mandated by law. The manuals are a valuable tool as they provide step-by-step guides for all stages of the procurement cycle (i.e. from planning and organising the tender to awarding the contract) and standardise existing procedures in the Mexican public administration.

procurement procedures will clarify and simplify the procurement officials' administrative tasks and allow them to focus on the more critical ones. In addition, it will also simplify the gathering by ISSSTE's PCU of comparable historical information regarding procurement. As well, ISSSTE would have a body within its vast organisation responsible for data collection, study, analysis and recommendations. Finally, this coordination and oversight body would ensure that meaningful and valuable communication occurs between ISSSTE's various procurement groups and with outside organisations like the CFC and the SFP's successor organisation.

This recommendation will enable ISSSTE to be in a better position to comply with all of the Sections contained in both the OECD's Design Checklist (in particular, Section 3- defining tender requirements clearly- and Section 5- carefully choosing criteria for evaluating and awarding tenders) and its Detection Checklist.

5.2 Optimise the use of ISSSTE's newly-formed Market Studies Unit

2. The OECD recommends that ISSSTE's Market Studies Unit (MSU) should be responsible for the following activities:

- **establishing the minimum content of an acceptable market study through the creation of a checklist, which takes into account best practices and can be used by ISSSTE procurement groups when they undertake their own market studies (this function should be conducted in cooperation with the CFC and the SFP's successor organisation in order to obtain additional insight and so that other Mexican procurement agencies can also benefit);**
- **ensuring that they collect a sufficient amount of information from a variety of reliable and knowledgeable sources (including international data and comparisons) to make an informed choice of the tender procedure to use, to establish meaningful reference prices and to assess the desirability of allowing foreign bids;**
- **working in conjunction with the Procurement Coordination Unit, preparing ex-post assessments of procurement procedures in order to: 1) assess the efficacy of specific procurements and the groups conducting them; and, 2) identify possible instances of collusion; and,**

- **sharing all or a sample of the ex-post assessments with the CFC and the SFP's successor organisation to help to achieve more competition and efficiency in Mexican procurement.**

Article 26 of the federal Procurement Act and Article 2 of the implementing regulations to LOPSRM require public agencies to conduct a market study before starting **any** tender procedure. Having a requirement in law to conduct market studies is commendable and in line with the OECD Guidelines. As noted in subsection 3.4.1, market studies are a vitally important and valuable preparatory tool. They should be undertaken even when there is no legal requirement to do so. A thorough understanding of all prevailing market conditions and potential suppliers is essential, if contracting authorities want to both buy effectively and detect and avoid bid rigging.

During its fact finding with ISSSTE the OECD noted a large variance in the quality of market studies prepared by ISSSTE procurement officials across the numerous purchasing groups, a fact borne out by a review undertaken by ISSSTE's Market Studies Unit- see below. From the fact-finding exercise, the OECD is not aware of any ISSSTE market study that covered the scope of existing/potential suppliers, alternative products, price trends over time, differences in prices between private and public procurement markets, costs and other competitive variables, as suggested in the OECD Guidelines. The market studies were sometimes only a couple of price quotes obtained by contacting potential bidders over the phone. As well, it has been relatively common for procurement officials not to prepare a market study at all and to rely on past experience with similar purchases. In addition, the information collected during market studies was seldom shared among ISSSTE's procurement groups.

In recognition of these shortcomings, ISSSTE took the positive step in March 2012 of establishing a market studies unit.⁷⁴ During its initial start up, the Market Studies Unit sought the advice of the National Institute of Public Administration (*Instituto Nacional de Administración Pública, INAP* in Spanish) regarding the design, structure and development of their operational model.

⁷⁴ IMSS established such a unit in January 2011, in Spanish, *Division de Investigación de Mercados*. In its GEM Report (pages 120 and 121), the OECD Secretariat recommended that the State of Mexico establish a market studies unit.

This specialised unit's initial responsibility has been to assemble the market studies that were prepared in the past by ISSSTE procurement officials and that are still available. The review by the Market Studies Unit of the studies it was able to collect uncovered the following:

- a) there are 200 different registries of suppliers and historical prices in 96 ISSSTE buying units;
- b) the studies often did not deal with the characteristics and specifications of the goods and services;
- c) the studies rarely contained historical or comparative prices;
- d) in the majority of procurements it was decided to utilise the binary system of bid evaluation because it was easy; and,
- e) many officials are unfamiliar with the provisions of the Procurement Act and its regulations.

Once the MSU is completely operational it will be responsible for preparing market studies for ISSSTE's central administrative units but not for the decentralised organisations. For the latter group, the Market Studies Unit will only review the studies they prepare and will attempt to standardise their content and method of preparation. **The OECD recommends that as soon as operationally possible the MSU should be responsible for the preparation of all market studies required by ISSSTE's procurement groups.**

The Market Studies Unit has also been tasked with reviewing when ISSSTE should undertake procurements by way of public-private partnerships.

The OECD recommends that ISSSTE's Market Studies Unit should be comprised of individuals with procurement and/or research expertise, and be staffed with a sufficient number of personnel. ISSSTE should consider whether this unit should be a component of the Procurement Coordination Unit described in recommendation 1.

For public-private partnership contracts, specialised procurements and emergency situations or, in times of limited available resources within the Market Studies Unit, the OECD recommends that ISSSTE should initially consider outsourcing the preparation of the relevant market studies to an external body (e.g. a specialised private sector agency). Such

an approach would solve the immediate problem, provide ISSSTE with additional examples of quality reports, broaden their expertise and possibly reduce the risk of information leakage.

A number of ISSSTE officials advised the OECD Secretariat that there is often a lack of coordination between the planning and budgetary functions and the procurement functions within ISSSTE- see section 5.21. This is a common complaint of procurement officials in many organisations. ISSSTE procurement personnel commented that this problem results in some market studies often being done in a hurry and without sufficient information gathered. As a result, ISSSTE's Procurement Coordination Unit and the Market Studies Unit might wish to establish a plan (with input from a cross-section of ISSSTE procurement officials) setting out the chronology of events in ISSSTE's procurement procedures. Such a plan is currently under consideration by IMSS.⁷⁵ Streamlining internal procedures and reducing the number of tenders (e.g. with multi-year tenders) would improve this situation. **ISSSTE should consider changes to its planning procedures to ensure that there is adequate time to carry out informative market studies.** Dealing with this issue would also likely help to address the problem identified in section 5.21, improving the process and timing for the approval of annual procurement plans.

The OECD's three procurement studies in Mexico have clearly demonstrated that there is very limited exchange of market studies among Mexican public procurement groups at all levels of government. To the OECD's knowledge, ISSSTE has never requested access to market studies prepared by other procurement agencies, nor has it ever received a similar request from another government procurement agency. This is despite the fact that the SFP has been attempting to rectify this problem at the federal level by requesting that procurement agencies submit their quality market studies to the SFP. **The Market Studies Unit should ensure that its future market studies are shared among ISSSTE purchasing groups and, working with the SFP's successor organisation, that sharing occurs with other federal agencies. ISSSTE should explore the merits of combining the research resources of its MSU with those of IMSS' newly-established unit and other health sector organisations to save time and resources and to broaden the knowledge base** (see also recommendation 15).

⁷⁵ IMSS Report, pages 86 and 88.

The OECD recommends that ISSSTE's Procurement Coordination Unit and its Market Studies Unit discuss with the SFP's successor organisation whether the latter should include a course in its training programs regarding the subject of how to carry out market studies.

During its work with the State of Mexico the OECD was advised that sometimes bidders asked for and were given information about reference prices before a tender (e.g. during the preliminary meeting to clarify questions- *junta de aclaraciones*).⁷⁶ This is not advisable as it gives an unfair advantage to some bidders and also reduces the competitive tension among bidders. It does not appear that ISSSTE procurement officials engage in this practice but **it is recommended that the Market Studies Unit should remind constantly ISSSTE procurement officials not to disclose any type of information contained in the market studies to bidders before or during the tender process.**

The above recommendations are consistent with Section 1 of the OECD's Design Checklist, being informed about the market, which is absolutely fundamental to effective procurement and to reducing the risk of bid rigging. They would also help to ensure that ISSSTE's procurement groups adhere to Section 3 of the Design Checklist- defining tender requirements clearly- to Section 4 of the Design Checklist- reducing communications among bidders- and to Section 6- raising awareness among procurement officials (studying of past tenders).

5.3 Expand ISSSTE's efforts to consolidate purchases

3. The OECD recommends that ISSSTE, through its Procurement Coordination Unit highlighted in recommendation 1 of this Chapter, continue to explore additional opportunities to consolidate purchases across its many procurement units and to look to enhance its participation in consolidated purchases with the secretariats and agencies of the federal government and states. The coordination body should also look for appropriate situations in which to utilise multi-year tenders.

As ISSSTE is the fifth largest federal procurement group in terms of the money value of annual purchases (almost 33.6 billion pesos in 2011), the

⁷⁶ GEM Report, pages 124 and 125.

organisation has enormous buying power which it can use to its benefit with suppliers anxious to win some of ISSSTE's business. When ISSSTE engages in consolidated purchases and or utilises multi-year tenders it takes advantage of this buying power. Experience from many international jurisdictions suggests that the consolidation of purchases often causes, or contributes to, the disruption of existing collusion. Consolidations may also discourage companies from establishing bid-rigging agreements in the first place because they are not prepared to forego the chances of winning large-scale contracts.

To its credit, ISSSTE has been consolidating purchases of certain goods and services across its many purchasing groups for some time and in recent years it has increased the number of purchases made on a joint basis with IMSS. In addition, as noted in section 3.3 and Box 2, ISSSTE is part of the CCNPMIS, which consolidates purchases of federal institutions requiring single-sourced, patented medicines. As well, in September 2012 ISSSTE joined with IMSS and two other purchasing organisations to consolidate purchases on nine (9) calls for tenders involving medicines- see Box 3 earlier in this Chapter for more details regarding this particular consolidated purchase.

Although the consolidation of purchases has several key benefits (large savings, reduced costs and fewer human resources), the OECD reminds purchasing groups to be careful to ensure that such a strategy does not limit the participation of bidders (e.g. by locking in a pre-determined number of suppliers for a long time) or prevent public procurement groups from obtaining future price reductions in line with prevailing market conditions. In addition, procurement organisations need to also be careful not to permanently reduce the number of suppliers who are capable of participating in a tender (e.g. because they do not have sufficient capacity or cannot cover the entire territory) below the optimal number of suppliers that will foster continued vigorous competition and ensure a stable source of supply. Otherwise, in the longer term public buyers may be left with a pool of suppliers which is smaller than the original one and results in a lessening of competition. The possibility of these adverse consequences should be discovered during the market study phase of the procurement process.

One way to avoid these potential drawbacks – which has the additional advantage of reducing the predictability of ISSSTE's tender formats – is to periodically vary the volume of consolidated purchases put out for tender. For example, when consolidating purchases ISSSTE could in one year procure goods and service for most of its units while in another year split the purchases

into three or more tenders, and in a subsequent year perhaps have just two tenders, and so on.

An additional issue related to consolidated purchases was raised by a number of ISSSTE procurement officials during meetings with the OECD Secretariat. Whenever consolidations are contemplated it is essential that officials confirm that the product or service to be part of a consolidated purchase is indeed a common and standard product. Apparently when ISSSTE recently conducted a consolidated purchase of uniforms for its many hospitals and clinics it did not realise that the type of uniform varied by use and geographic location. As a consequence, some ISSSTE locations received uniforms that did not meet their needs. As well, the cost and quality of the uniforms were in some cases worse than when individual units purchased on their own. This is likely due to a significant reduction in the number of bidders because many firms were not capable of supplying across all of Mexico. Procurement groups should always be involved in any decision-making process related to the consolidation of purchases.⁷⁷

In the future, the work of the Procurement Coordination Unit and the Market Studies Unit should assist ISSSTE in pursuing the most appropriate approach to the consolidation of purchases within its organisation and with other federal and state procurement groups.

These recommendations are consistent with Section 2 of the Design Checklist of the OECD's Guidelines- maximising the potential participation of genuinely competing bidders- and with Section 3- avoiding predictability in procurement processes.

5.4 Take better advantage of framework agreements

4. The OECD recommends that ISSSTE work with the SFP's successor organisation to initiate and take advantage of appropriate "framework agreements" undertaken pursuant to the provisions of the federal Procurement Act.

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A similar issue (but involving hospital linens) was mentioned by IMSS during a meeting with the OECD and the CFC in November 2012 to discuss the work undertaken by IMSS with respect to the recommendations contained in the OECD's IMSS Report.

Framework agreements are a specific form of consolidated purchases. As noted in subsection 3.4.5, the law requires that at least five (5) federal, state or municipal procurement agencies, or any combination thereof, must be part of a framework agreement. The SFP is currently in charge of coordinating the activities relating to the implementation of framework agreements. To date, the SFP has tended to focus on goods and services supplied by only a few suppliers when it has arranged for framework agreements. At the present time there are ten (10) agreements in place (see footnote 50) but ISSSTE is a party to only one of them, which is the most recent agreement relating to certain patented medicines that resulted in the consolidated purchase for nine drugs that is described in Box 3 earlier in this Chapter.

Given ISSSTE's significant annual procurement budget, and the fact that it is one of the largest federal purchasing agencies, the organisation should be more proactive in identifying and pursuing appropriate instances warranting the use of a framework agreement. One possibility in this regard would be to identify candidates for framework agreements/consolidated purchases from the Secretariat of Health's web program known as CES_MED, which reports on the procurement plans for medications for over 60 public health agencies. ISSSTE's actions in this area could be led by its Procurement Coordination Unit. The benefits and cautions noted above with respect to the consolidation of purchases are also applicable to framework agreements.

As with the recommendation regarding the consolidation of purchases, this recommendation is consistent with Section 2 of the Design Checklist of the OECD's Guidelines- maximising the potential participation of genuinely competing bidders- and with Section 3- avoiding predictability in procurement processes.

5.5 Adopt practices to increase the number of bidders

- 5. ISSSTE should always ensure that participation in its procurement procedures is as extensive as possible. In that regard, whenever a national tender is declared void, ISSSTE should open the tender to foreign suppliers/contractors rather than using one of the exceptions to a public tender.**

With respect to federal procurement, public tenders, and the two exceptions allowed by both the Procurement Act and the Public Works Act, can be open to Mexican suppliers only or to foreign bidders as well (but in some

cases only to foreign bidders who are nationals of a country with which Mexico has signed a free-trade agreement)⁷⁸.

As noted in Tables 8 and 9 in Chapter 2, very few ISSSTE contracts are awarded pursuant to international open tenders. Although the monetary value of public tender awards involving foreign suppliers is over 70 percent, much of this is due to purchases of medicines that are only supplied by foreign companies or purchases that fell under the auspices of free trade agreements.

ISSSTE is likely to experience substantial benefits from using the most open tender format available, e.g. public tenders, and from processes in which all interested national and foreign bidders are allowed to participate, since this enhances competition among bidders, makes collusion more difficult and may possibly disrupt any existing collusive agreements. Utilising simple and straightforward procurement processes will also aid in this regard.

It is recommended that ISSSTE's new Market Studies Unit make the sourcing and identification of additional potential bidders a top priority.

Utilising its Marketing Studies Unit and or its Procurement Coordination Unit, ISSSTE should regularly and proactively monitor the number of bidders for each major category of expenditure and check that the numbers do not fall below acceptable levels. If the numbers reach unacceptable limits for certain categories of goods and services, the units should investigate whether it is possible to replace exiting bidders with other potential entrants (including from outside Mexico).

Related to this, one or both of these new ISSSTE units should proactively investigate why bidders decide not to bid any longer and recommend remedial actions (e.g. lowering participation costs, aggregating purchases, removing any unnecessary bureaucratic procedures), take appropriate actions to remove obstacles to participation or report suspected bid-rigging behaviour to the CFC.

These last two recommendations stem from comments made by a number of ISSSTE procurement officials about the declining number of suppliers for some goods and services and the fact that the changing circumstances were seldom investigated or explored in a market study.

⁷⁸ See section 3.2 and subsection 3.4.3.

All of the recommendations within this section are consistent with Section 2 of the OECD's Design Checklist, maximising potential participation by genuinely competing bidders. As well, implementing these recommendations would help ISSSTE comply with Section 1 of the Design Checklist- being informed about the market, and, possibly with Section 5- carefully choosing criteria for evaluating and awarding the tender.

5.6 Implement a strict approach to deal with joint bids

6. ISSSTE's procurement policies should make it clear that joint bids will only be accepted when there are pro-competitive justifications such as:

- **two or more suppliers are 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 are providing a single integrated service which none of them could supply independently; or**
- **two or more suppliers active in different geographic areas are submitting a single bid for all of Mexico or for multiple states that include areas that no single supplier can accommodate on its own.**

As noted in subsection 3.4.9, federal procurement legislation allows two or more competitors to submit a joint bid. Article 44 of the regulations implementing the Procurement Act requires public agencies to specify the necessary requirements for the submission of joint bids in their tender documents.

Allowing joint bids in the circumstances noted above can enhance competition by enabling smaller competitors to join forces to compete against larger suppliers. This is especially true in large public works projects. Conducting a detailed market study should identify whether one or more of the above justifications exist and competition will be enhanced. However, there is little, if any, plausible justification – apart from the intent to collude – for the case when two (or more) bidders initially provide individual quotations to ISSSTE when a market study is being carried out and then submit a joint bid. Indeed, it is reasonable to assume that, when a bidder submitted a quotation to the agency at the market study stage, the company expected to be able to fulfil the contract alone and without relying on cooperation with competitors. It is

quite likely that submitting joint bids is the method chosen by colluding suppliers to share the “spoils” of a rigged tender.

Although there is no statistical evidence regarding the frequency of joint bids in ISSSTE’s tender processes, the OECD Secretariat’s study clearly revealed that ISSSTE procurement officials regularly utilise joint bids because, as noted in subsection 3.4.9, joint bids are always permitted unless a procurement group justifies why they do not intend to permit that type of bid submission. In addition to the OECD’s recommendations in section 4.6 regarding legislative changes relating to joint bids, the OECD recommends the following procurement policies be instituted by ISSSTE.

It is recommended that ISSSTE’s procurement groups not allow joint bids, if bidders had previously submitted individual quotations during the market study, or, if it is clear that the bidders could satisfy the contract requirements individually.

If, as a result of the findings of a market study, an ISSSTE procurement group is prepared to accept one or more joint bids, the OECD recommends that they include a requirement in the call for tenders that bidders must submit an explanation in their bid submissions outlining the pro-competitive aspects of the joint bid, if such a requirement is not mandated by law as a result of the recommendation in section 4.6.

When ISSSTE does permit joint bids in a particular procurement procedure its Procurement Coordination Unit should carefully scrutinise the bid submissions and the results of the procurement process to assess whether there appears to have been anti-competitive activity and to ensure that the pro-competitive justifications for such practices clearly outweigh the prospective risks.

These recommendations would assist ISSSTE in complying with Section 2 of the OECD’s Design Checklist- maximising the potential participation by genuinely competing bidders, Section 3- avoiding predictability in procurement practices, and Section 4- reducing communications among bidders.

5.7 Limit the use of split awards

- 7. ISSSTE should only split a single contract among multiple suppliers in exceptional circumstances. In cases where there is a concern regarding the security of supply, ISSSTE should consider either issuing multiple**

tenders involving smaller amounts (and awarding each of them to a single supplier, which can be feasible for smaller players) or consolidating purchases in order to attract additional large bidders.

Pursuant to Article 39 of the Procurement Act, public agencies may split a contract among multiple bidders (if the price differential is within a certain range). The details of how to implement these options in a specific tender, as well as the decision of whether to implement them at all, are left to the individual contracting authorities. The OECD Secretariat was advised by ISSSTE procurement officials that they sometimes award split contracts and that, when they do so, they are generally awarded on a 60/40 basis.⁷⁹

In section 4.7 of this Report the OECD recommended a study of the issue of split awards in order that the legislation/regulations can be appropriately amended to prevent this type of contract award from contributing to collusive activity.

The OECD recommends that ISSSTE should rarely allow for split awards as they encourage collusive activity especially when they are required to be advertised in the tender documents. When bidders know that a contract is going to be split among several of them, they may tend to converge on a focal price and minimise differences in bids, relying on the possibility that each of them will be awarded part of the contract – a sort of implicit (or even explicit) market-sharing agreement, which may, for example, take into account the supply capacity of the different bidders at the time of the tender. There may be cases when splitting a contract can be justified, e.g. because ISSSTE wishes to have multiple suppliers and increase its security of supply, or it wishes to encourage new entrants or smaller firms to compete. However, these circumstances should be regarded as exceptions rather than the general rule. In such cases, it would be preferable to award contracts to different bidders in different tenders, rather than to split a contract among the various bidders. It is possible that by not splitting a large contract in a consistent fashion between several suppliers ISSSTE may disrupt or prevent collusion because the balance of gains and risks of each colluding party is altered. As with the case of joint bids, split awards can be used by colluding suppliers to share the gains from bid-rigging activity.

⁷⁹ This split was permitted in the September 2012 call for tenders for nine drugs undertaken with three other health procurement groups- see Box 3 earlier in this Chapter for more details.

As likewise recommended for joint bids, ISSSTE's Procurement Coordination Unit should carefully scrutinise the use and effects of split awards in specific cases to ensure that they did not stifle competition nor facilitate collusion and that the pro-competitive justifications clearly outweighed the prospective risks.

Recommendation 7 would assist ISSSTE with respect to Section 3 of the Design Checklist- avoiding predictability in procurement practices- and Section 4- reducing communications among bidders.

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

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

Sub-contracting is another method by which firms engaged in bid rigging share the "spoils" among the colluding companies. As noted earlier, the federal Procurement Act is silent regarding the issue of sub-contracting while the federal Public Works Act and the federal PPPA allow for the possibility of sub-contracting as long as contracting authorities indicate their intention to do so in tender documentation.⁸⁰

ISSSTE procurement officials advised the OECD that sub-contracting is common in their public works projects and in some other contracts but that they do not have records regarding the incidence of such activity.

If the OECD's recommendation 8 in Chapter 4 is not acted upon, then the OECD recommends that ISSSTE's procurement agencies should adopt a policy of only allowing sub-contracting when the disclosure requirements indicated above are imposed. Additionally, ISSSTE should consider also requiring similar disclosure obligations in the contract signed by the winner of the tender. This would make ex-post examinations of collusive practices easier for ISSSTE and or the CFC.

⁸⁰ See subsection 3.4.8.

The OECD recommends that ISSSTE's contracting authorities be required to submit records relating to sub-contractors participating in contracts to the Procurement Coordination Unit for possible study and investigation. Again, this practice would make ex-post monitoring of collusive practices by ISSSTE or the CFC easier.

These recommendations are consistent with Section 3 of the OECD's Guidelines- defining tender requirements clearly, potentially Section 4- reducing communications among bidders, Section 5- carefully choosing criteria for evaluating and awarding tenders and, with Section 1 of the Detection Checklist- looking for warning signs and patterns when businesses are submitting bids.

5.9 Utilise remote procurement procedures more often

9. ISSSTE should adopt remote and electronic tender procedures for as much of its purchases as possible and at all stages of the procurement process.

Federal Mexican procurement law requires tender notices and documents to be available on line (e.g. in COMPRANET and on agencies' websites) and also allows tenders to be conducted remotely using electronic procedures. Article 26 Bis of the Procurement Act and Article 28 of the Public Works Act state that procurement procedures can be conducted remotely (i.e. through COMPRANET), in the traditional way (where bids are submitted in person or by mail/courier and bidders physically attend clarification meetings) or by using a combination of these two methods. The federal Public-Private Partnerships Act mentions only the traditional way to conduct procurement processes.

ISSSTE's numerous procurement units, like most purchasing groups, have rarely utilised remote procedures in their procurement processes and, indeed, they have never undertaken a reverse auction, which requires the use of an electronic tender procedure. ISSSTE would likely benefit if the use of remote procedures were given more priority and made the default choice relative to the traditional procurement procedure. The use of remote procedures may result in significant cost savings and efficiency gains for ISSSTE and other public procurement agencies. In addition, by limiting the opportunities for bidders to meet in the same place to coordinate their bids or to participate in other collusive activity (e.g. when attending a clarification meeting or site visit), the risk of bid rigging in public procurement may be lessened- see also recommendation 4 in Chapter 4.

One obvious area in which ISSSTE could adopt remote procedures is for clarification meetings (*juntas de aclaraciones*, in Spanish), at which potential bidders ask ISSSTE to provide clarifications regarding certain aspects of a tender. Apart from benefitting from efficiency gains, ISSSTE would once again avoid creating opportunities for bidders to come together in a single place and possibly agree to collude.

Electronic bidding is also likely to lower the cost of tendering for potential bidders, thus encouraging participation and competition in procurement. It will also help to ensure that readily accessible records are available to the PCU, the Market Studies Unit and CFC (see recommendation 13 below).

As noted in section 4.4, any changes in procedures should take into account the ability of smaller suppliers to adapt to the new procedures and, as well, the ease of using the system, two factors which might lead to a decline in the number of suppliers participating in tenders.

This recommendation would enable ISSSTE to reduce communications among bidders in accordance with Section 4 of the OECD's Design Checklist and it is consistent with Section 2 of the Checklist, maximising potential participation by genuinely competing bidders, and Section 3, avoiding predictability in procurement procedures.

5.10 Commence using reverse auctions

10. The OECD recommends that ISSSTE's new Procurement Coordination Unit spearhead an initiative to have ISSSTE begin to utilise reverse auctions.

As noted in subsection 3.4.6, ISSSTE has not begun to use reverse auctions that have been authorised by federal law since May 2009. ISSSTE was part of a recent consolidated purchase led by IMSS that did utilise this pro-competitive mechanism to source five drugs (see Box 3 above in this Chapter). International and Mexican experience with this type of procurement procedure has resulted in sizeable savings (see footnote 52 and Box 3). Indeed the IMSS-led reverse auctions are estimated to have saved the four health organisations approximately 1.7 billion pesos, of which ISSSTE's share was roughly 400 million pesos.

ISSSTE's recent indirect experience with reverse auctions and the considerable benefits that were achieved should provide the impetus for the

Institute to adopt this recommendation. It is interesting that Baja California, one of just a few states to implement the use of reverse auctions, was one of the four organisations involved in the consolidated purchase via reverse auctions.

Implementing this recommendation would help ISSSTE to maximise potential participation by genuinely competing bidders (Section 2 of the Design Checklist), to avoid predictability in procurement procedures (Section 3) and to reduce communications among bidders in accordance with Section 4 of the Checklist. Undertaking reverse auctions will assist ISSSTE in implementing recommendation 9 above regarding the utilisation of electronic procurement procedures.

5.11 Cease disclosing the “maximum” reference price in public tenders

11. The OECD recommends that ISSSTE and other procurement groups not disclose maximum reference prices in any tender documents as this type of information may assist suppliers involved in bid rigging to set inflated bid prices.

As noted in subsection 3.4.6, ISSSTE’s procurement agencies regularly undertake procurement processes in which they reveal their maximum reference price (defined in subsection 3.6.1) in the call for tenders and instruct any interested bidders to bid less than that price, hoping to secure discounted prices in a form of reverse auction that is not done electronically. As well, ISSSTE procurement officials advised the OECD that the maximum reference price is sometimes provided to suppliers in other procurement processes, again in the hope that their bid prices will come in much lower than this reference price.

The OECD notes that there is no reference in the Procurement Act to this type of procurement process. This procedure is, however, mentioned in Article 39, Section II, paragraph c) of the Procurement Act’s implementing regulations, which states that a maximum reference price must be disclosed in tender documents when this type of procurement process is undertaken. It is therefore possible that this form of procurement is not permitted under federal procurement legislation.

In any event, the OECD is not convinced that such an approach to procurement produces the intended results because all interested bidders, whether engaged in bid rigging or not, are provided with the purchasing unit’s highest acceptable price. Without such information the bidders would have been forced to independently establish what prices they were willing to accept.

Furthermore, if there is bid rigging present, knowledge of the maximum price may well lead to the rigged bids being even higher. It should be acknowledged that there can be some instances in which revealing a maximum price makes sense. One example is when the maximum price of a procurement group is quite low and it is anticipated that the costs and time associated with preparing a bid submission for a number of suppliers are likely to be wasted as their bid prices would be expected to be above the maximum price. In such cases, the disclosure of the maximum price would help maintain good relationships with certain suppliers and often with those that are smaller in size.

This recommendation is consistent with Section 2 of the OECD's Design Checklist, maximising potential participation by genuinely competing bidders and Section 4, reducing communications among bidders by carefully considering what information is disclosed to them.

5.12 Require Certificates of Independent Bid Determination

12. ISSSTE should require that a Certificate of Independent Bid Determination must accompany all bid submissions.

One way to make it more costly and risky for dishonest bidders to collude is to always require those bidding for ISSSTE's contracts to submit a Certificate of Independent Bid Determination (CIBD).

CIBD rules elsewhere in the world typically require each company submitting a bid to sign a statement that it has not: agreed with its competitors about bid prices and requirements; disclosed bid prices to any of its competitors; and, attempted to convince a competitor to rig or withdraw bids. Samples of CIBDs from Canada and the United States are included in Annex 3 and Annex 4.

CIBDs may make bid-rigging conspiracies less likely because:

- they inform bidders about the illegality of bid rigging;
- they signal that procurement officials are alert to the issue of collusion;
- they may make the prosecution of colluding parties easier;

- they add additional penalties, including possibly criminal penalties, for the filing of false statements by the conspirators; and,
- they may make prosecution of a firm that attempts to rig bids possible, even when other bidders do not agree, or cannot be proved to have agreed, to the proposed scheme.

The OECD strongly recommends that ISSSTE immediately consider requiring CIBDs in all of its future tenders while it awaits the deliberations regarding the possible legislative change regarding CIBDs recommended by the OECD in section 4.10.

As well, it is recommended that ISSSTE make it mandatory that CIBDs be signed by senior corporate officials in order to increase the likelihood of collusive activity being investigated, terminated or avoided by those usually in positions to affect collusive conduct.

The exact wording of the certificate can be agreed upon with the CFC, within the cooperation agreement suggested in recommendation 14 of this Chapter and in light of the CFC's recent initiative to develop a CIBD-type template for use by Mexican procurement groups (non-collusion document or *Escrito de no Colusión*).⁸¹ The SFP's successor organisation should also be involved in the discussions in order to ensure consistency with the Mexican legislative framework and to hopefully stimulate a process that will ultimately result in all federal and state procurement groups adopting the use of CIBDs.

This recommendation is one approach outlined in Section 4 of the OECD's Design Checklist to reduce communications among bidders.

5.13 Retain records from procurement procedures

13. ISSSTE's various procurement organisations should be instructed to retain all of their hard copy and electronic records relating to all of their procurement procedures for a period of at least five (5) years to enable the procurement groups, the Procurement Coordination Unit and the CFC to more easily analyse, identify and investigate any suspicious bidding activities and patterns.

⁸¹ The CFC recently provided the Secretariat of Education with its template for possible use in the procurement of computers.

Articles 56 and 74 of the Procurement Act and the Public Works Act, respectively, allow procurement agencies to destroy or otherwise dispose of documents relating to a tender or other procurement procedure 60 days after the award of a contract. During the meetings that the OECD held with various ISSSTE procurement officials, the OECD Secretariat was advised that the retention of documents pertaining to past procurement procedures was not standardised within ISSSTE's many procurement units and that frequently tender documents were disposed of 60 days after the award of a contract. This results in an inability to access a historical data base of previous tenders. This problem has been partly addressed by ISSSTE's introduction earlier in 2012 of a comprehensive data base. However, the summary data base needs to be supplemented by hard copy and electronic records (including IP addresses), which are the best sources for identifying the many types of clues identified in the OECD's Detection Checklist that point to collusive activity on the part of bidders/suppliers.

The OECD recommends that the Procurement Coordination Unit be responsible for ensuring that this recommendation is implemented as the PCU would benefit from the information collected when undertaking its study and analysis of the procurement issues identified in recommendation 1 of this Chapter. A minimum retention period of five (5) years has been recommended as that is the statute of limitations for the CFC's investigation of bid rigging and other collusive activity pursuant to the Mexican competition laws.⁸²

The OECD also recommends that the PCU should regularly remind ISSSTE procurement officials to take notes of any suspicious events and conversations, sign and date the notes and place them in the relevant procurement file. This will enable procurement officials, the PCU and the CFC to be aware of past conduct when future events are examined during an investigation of possible collusive activity. Such notes would also be valuable and credible evidence in any prosecutions that might ensue.

These recommendations would assist ISSSTE in complying with Section 1 of the Design Checklist- being informed about the market- and would be helpful regarding all of the Sections of the OECD's Detection Checklist.

⁸² Article 34 Bis of the *Ley Federal de Competencia Económica*, December 24, 1992.

5.14 Foster a closer relationship with the CFC

14. The OECD recommends that ISSSTE should continue to develop the relationship it recently commenced with the CFC and should make it more formal by entering into a protocol of cooperation.

Clearly the CFC and ISSSTE have a shared interest in the fight against bid rigging. On several occasions in the latter half of 2012 ISSSTE had discussions with the CFC regarding possible bid rigging situations uncovered in a number of tenders (see Box 1 in Chapter 2). The two parties have also communicated with respect to an opinion sought by ISSSTE concerning the trade-off between competition and transparency relating to the release of information contained in the Institute's recently developed data base. It is recommended that such communications be expanded and be made more formal by signing an official protocol of cooperation. These efforts could be spearheaded by the Procurement Coordination Unit described in recommendation 1.

The protocol could specify the following initiatives: advice from the CFC on tender designs and tender mechanisms⁸³; more frequent and comprehensive exchanges of information (see recommendations 15 and 18 below); assistance in the design of Certificates of Independent Bid Determination (see recommendation 12 above); participation in ongoing training programs (see recommendation 17 below); and, information regarding the status of any CFC bid-rigging prosecutions in which ISSSTE, as a victim, intends to seek damages (see recommendation 20 below). ISSSTE has already benefitted from the CFC's expertise during the training sessions conducted by the OECD and the CFC for ISSSTE officials and procurement staff in May and November of 2012.⁸⁴

This recommendation relates to Section 6 in the Design Checklist- raising awareness among public procurement officials- as well as to all of the Sections

⁸³ For instance, the CFC has advised both the Sea Port Sector and the Federal Electricity Commission regarding tendering procedures related to permissions and grants under the Federal Sea Port Act and concessions and contracts for independent electricity generators. The CFC issued guidelines on October 28, 2008, and October 3, 2011, respectively, which dealt with enhancing and protecting competition during those tendering procedures.

⁸⁴ See Chapter 1 and section 5.17 for more details regarding these training sessions.

in the Detection Checklist and, in particular, to Section 7, steps to take when bid rigging is suspected.

5.15 Expand internal and external information-sharing

15. ISSSTE, through its Procurement Coordination Unit, should proactively engage in a systematic dialogue with other public agencies in order to share best practices, market intelligence (e.g. price information, identity and performance of suppliers) and experiences with suspicious bidding behaviour.

One goal of recommendation 1 in this Chapter is to enhance information-sharing across ISSSTE's many procurement groups in order to improve communications, share knowledge and experience and avoid duplication of efforts. Outside of ISSSTE, the OECD suggests that it would be worthwhile for the Institute to proactively engage in a regular dialogue with other federal and state procurement groups in order to share best practices, market intelligence and instances of suspicious bidding behaviour (in addition to exploring opportunities to consolidate purchases with federal and state agencies). This dialogue should be coordinated by ISSSTE's new Procurement Coordination Unit and should involve the SFP's successor organisation and the CFC, where appropriate. The information-sharing activities would best occur through a formal consultation forum/mechanism to ensure that this positive endeavour does not end up being a short-lived exercise. It is recommended that the interested parties establish some sort of council of procurement officials that meets regularly and has a CFC official as a permanent advisor.

The benefits of this cooperation would be threefold:

- to avoid becoming victims of systemic collusion by discussing common "red flags" and seeking opportunities to contact the CFC;
- to ensure that ISSSTE is attracting similar and the same number of qualified bidders; and,
- to ensure that ISSSTE is paying prices which are in line with those paid by other Mexican public procurement groups (especially for standardised goods).

This recommendation is consistent with Section 1 of the Design Checklist-being informed about the market- and Sections 1-5 of the Detection Checklist, all of which deal with various forms of suspicious bidding behaviour.

5.16 Enhance the functioning of the Coordinating Commission for Negotiating the Price of Medicines and Other Health Inputs (CCNPMIS)

16. ISSSTE and its federal partner agencies in the CCNPMIS should address the current shortcomings in the way that the CCNPMIS operates.

As noted in section 3.3, since 2008 ISSSTE and other federal agencies involved in the provision of health care to the citizens of Mexico have been jointly involved in the CCNPMIS, an inter-institutional coordinating committee charged with negotiating the purchase prices for single-sourced patented medicines (and other single-sourced health inputs). Box 2 in Chapter 3 describes the success of the CCNPMIS in terms of the level of savings generated through this worthwhile initiative. However, in other areas of endeavour the CCNPMIS has not functioned as well as it could.

It is recommended that ISSSTE and the other members of the CCNPMIS immediately establish a working committee to examine the extent of the problems in the structure and operations of the CCNPMIS, including those identified in Box 3, and to suggest changes that will make that organisation more efficient and effective. Given the importance of the CCNPMIS and the volume of purchases and savings at stake this recommendation should be quickly acted upon. Implementing this recommendation would also be a good first step and complementary to recommendation 15 above dealing with enhanced information sharing.

5.17 Upgrade training and education opportunities

17. ISSSTE should implement a permanent training program for its procurement staff focusing on how to detect and avoid bid rigging and how to increase the level of competition in the different types of procurement procedures permissible in Mexico.

It is absolutely critical for public procurement groups to recruit staff with the appropriate education and experience to function as responsible and professional procurement officials. In addition, public procurement agencies

need to constantly upgrade the skills and knowledge of their procurement staff through ongoing training and education.

Pursuant to the terms of the Agreement signed by the OECD, the CFC and ISSSTE in June 2012, approximately 140 procurement officials from ISSSTE's purchasing directorates and its 35 delegations attended one of two, two-day training sessions held in November 2012. The sessions focussed on ways to fight and detect collusion in public procurement and on practices to implement to improve public procurement practices.

The training involved the participation of staff from the OECD and the CFC as well as an international competition expert. It included presentations describing the different forms of bid rigging, the two Checklists comprising the OECD's Guidelines, international bid-rigging cases and examples of warning signs, which should alert procurement officials to the possible occurrence of bid rigging in their tender situations. Officials from the CFC described the laws pertaining to collusion in Mexico and reviewed the circumstances relating to the four prosecutions they undertook with respect to bid rigging on bids submitted to IMSS (described in Chapter 1). The ISSSTE participants also had the opportunity to participate in two hypothetical exercises to gain hands-on experience with these issues, to ask questions of the experts and to provide examples and feedback from their own procurement experience.

It is recommended that ISSSTE, in cooperation with the CFC, regularly organise this type of training for its staff as part of its ongoing commitment to fight bid rigging in its procurement, to improve the quality of its purchasing practices and to enhance competition in its purchasing processes. The training program should reflect lessons learned from previous initiatives and include case studies of actual ISSSTE tenders. The training programs should include the participation of ISSSTE's Procurement Coordination Unit and the SFP's successor organisation because of the knowledge, roles and responsibilities they have or will have with respect to public procurement.

It is also recommended that ISSSTE regularly sponsor some of its procurement officials to attend the education programs recently announced by the SFP and the Instituto Tecnológico de Estudios Superiores de Monterrey (ITESM).⁸⁵ Such sponsorship could be partially

⁸⁵ On October 9, 2012, the SFP held a public event at the Santa Fe campus of *ITESM* to announce the launch of education programs relating to public

reserved for deserving candidates from the recognition and reward program recommended in section 5.19.

In addition, **the OECD recommends that members of ISSSTE's Internal Control Unit (OIC) be specifically included in any training relating to the detection of bid rigging in public procurement.** As noted in Box 1 in Chapter 2, members of the OECD Secretariat met with OIC officials during the fact-finding portion of the Analytical Report. At the time, the OIC was in the midst of investigating a bribery and corruption case involving some ISSSTE officials. During the discussions between the OECD and the OIC it became apparent that the case may have also involved some collusive activity. OIC officials were candid about their unfamiliarity with bid rigging and pointed out that identifying occurrences of such behaviour was not specifically in their mandate. As the OIC is actively involved in reviewing many of ISSSTE's procurements in detail, it would make sense for their investigators and senior officials to be knowledgeable about bid rigging and its warning signs as they may ultimately be in a position to identify suspicious or unusual activities in procurement procedures.

Finally with respect to the important issue of training, the OECD learned during its fact-finding mission with ISSSTE that many procurement officials are not particularly knowledgeable about the goods and services that they are procuring, especially with respect to the complicated field of medicines. **It is recommended that ISSSTE's new Procurement Coordination Unit ensure that the enhanced training program addresses this shortcoming.** In that regard, ISSSTE procurement officials might wish to take advantage of their Scientific and Medical Advisory Board (*Consejo Asesor Científico y Médico*), which is comprised of experts from the fields of medicine, research and training.

These four training recommendation will help ISSSTE to comply with Section 6 of the Design Checklist- raising awareness among public procurement

procurement (in Spanish, "*Programa Profesionalización de Servidores Públicos Responsables de Contrataciones en la Administración Pública Federal*") in order to increase the level of professionalism of procurement officials in Mexico. The courses, which commenced in November 2012, are being initially taught by professors from ITESM, SFP officials and qualified outside personnel. The programs will have durations of 12, 18 and 24 months depending upon the type of certification/degree. Training will include Masters and Executive programs.

officials- and with all of the Sections of the Detection Checklist, which outline what procurement officials should know and do about bid-rigging activity.

5.18 Institute procedures for staff to raise concerns relating to bid rigging in their procurement procedures

18. ISSSTE should set up clear procedures and reporting lines for its procurement staff to report any suspicious instances of collusion during tenders. Reporting procedures should take into consideration the possible need to keep the identities of procurement officials confidential. Consideration should also be given to establishing a formal whistleblower program as the work of ISSSTE's OIC has already demonstrated that ISSSTE officials are periodically involved in bid rigging activity, knowingly or not.

At the present time, ISSSTE does not have a formal process in place for staff to report suspicious bidding behaviour or to report the possible involvement of ISSSTE officials. The Procurement Coordination Unit could be the principal avenue through which such behaviour is reported. It would be important for ISSSTE to communicate to procurement officials that, when there are suspicious instances of collusion during tenders, it is not their conduct which is under scrutiny and they are not being faulted in any way for reporting such instances. In fact, as recommended below in section 5.19, identifying and reporting possible instances of bid-rigging behaviour could lead to recognition and reward.

ISSSTE should consider – in consultation with the CFC – whether an anonymous hotline is another effective way for ISSSTE procurement officials to report suspicious bidding behaviour. If this approach is also considered desirable, the PCU and the CFC could work in concert to deal with the information provided and to take any appropriate and necessary follow-up action.

As reporting bid-rigging activity is clearly a government-wide matter, the PCU, the CFC and the SFP's successor organisation may wish to address this issue on a more global basis. It will be important that procurement officials are advised that providing information to the CFC does not pose any legal issues.

This recommendation would help ISSSTE comply with Section 6 of the OECD's Design Checklist- raising awareness among procurement officials- and

with all of the Sections of the OECD's Detection Checklist and, in particular, Section 7 which covers steps to take when bid rigging is suspected.

5.19 Establish a recognition/reward program

19. The OECD recommends that a reward and or recognition program be set up at ISSSTE to encourage procurement officials at ISSSTE to identify and report instances of suspicious or unusual behaviour by bidders.

Establishing a recognition/reward program would send a clear signal to ISSSTE staff that the organisation is committed to fighting bid rigging and would encourage employees to become a major part of the efforts to combat the problem. Any monetary reward could be partially based on the savings achieved as the result of stopping the collusive activity and the recognition could take into account the successful prosecution by the CFC of the suppliers engaged in the illegal activity.

Once again, this recommendation would help ISSSTE comply with Section 6 of the OECD's Design Checklist- raising awareness among procurement officials- and with all of the Sections of the OECD's Detection Checklist.

5.20 Adopt a policy of seeking damages in bid-rigging cases

20. It is recommended that ISSSTE proactively seek opportunities to obtain compensation for damages under the Ley Federal de Competencia Económica (LFCE) whenever ISSSTE has been a victim of any collusive conduct investigated and successfully prosecuted by the CFC.

Article 38 of the LFCE enables parties that have suffered losses or damages because of absolute monopolistic practices (collusive activity) to seek compensation in the courts. Parties may exercise this right individually, under the LFCE, or collectively through a class action proceeding pursuant to the Mexican Civil Procedure Code (*Código Federal de Procedimientos Civiles*). In the case of a class action suit, ISSSTE would be required to claim for damages with the CFC as a party to the proceeding unless it was joined in the suit by at least twenty-nine (29) other aggrieved parties. The ability to pursue a class action suit is the result of an amendment to the *Código Federal de Procedimientos Civiles* on August 28, 2011.

The OECD recommends that ISSSTE (and any other federal or state procurement agency) take advantage of this legal right in order to recoup the losses it has suffered as a result of bid-rigging activity. If ISSSTE and other public procurement groups actively and regularly sought damages from colluding parties, this would likely deter some companies from engaging in bid rigging on public tenders. As well, it would send a clear message that public procurement groups were fighting back in the battle against bid rigging. Also, it would be a complement to recommendation 14 of this Chapter, fostering a closer relationship with the CFC.

Implementing this recommendation would be consistent with Section 7 of the Detection Checklist, which outlines steps to take when bid rigging is encountered by public procurement officials. In addition, it would help raise awareness among staff of the existence and risks of bid rigging, which is the subject of Section 6 of the Design Checklist.

5.21 Improve the process and timing for the approval of annual procurement plans

21. It is recommended that the heads of ISSSTE’s key purchasing units work with the Procurement Coordination Unit to assess whether the internal budget processes and timelines and the approval process at the centralised level are undermining the ability of ISSSTE and other public procurement groups and officials to effectively undertake their procurement procedures and obtain the best value for money. If the various officials do come to such a conclusion, it is recommended that they bring this issue to the attention of the appropriate ISSSTE and federal officials to have the matter rectified.

A number of ISSSTE procurement officials advised the OECD Secretariat that the lack of certainty regarding the timing of the approval and or receipt of financial resources limits their ability to best prepare and execute their annual plans for purchasing goods and services.⁸⁶ Some officials noted that this uncertainty is magnified because procurement plans are also part of the process for the approval of ISSSTE’s overall budget. Delays in the various approval processes often result in procurement officials purchasing goods and services at higher prices- for example, some suppliers accept delayed payments in exchange for charging a higher price or,

⁸⁶ This problem was also highlighted by procurement groups in the State of Mexico- see the GEM Report at pages 128 and 129.

speed up the delivery of necessary goods and services in exchange for a higher price. Contracting authorities often feel that their hands are tied and they have to accept suppliers' conditions/demands. In addition, if suppliers of a particular good and service are engaged in bid rigging, they may very well take advantage of the problems caused by the delays to raise prices even higher.

This recommendation is one approach outlined in Section 3 of the Design Checklist, defining tender specifications clearly.

CHAPTER 6: CONCLUDING REMARKS

The recommendations outlined in Chapter 4 and Chapter 5 of this Analytical Report are designed to help ISSSTE in its fight against bid rigging and other collusive activity. The recommendations, which are many and varied, will also aid ISSSTE's various procurement groups in becoming more effective in their procurement procedures and help to promote competition for the extremely large number of ISSSTE contracts.

The OECD suggests that the next step in the process should be the preparation of an implementation and prioritisation plan. Such a plan should take into account which of the recommendations of this Analytical Report are capable of being implemented more quickly and easily and which recommendations are more complicated in nature and will require longer timelines. The implementation plan should also reflect the provisions of the recently enacted federal Anticorruption Act (see footnote 63) that address corruption activities of public officials relating to procurement.

The State of Mexico, when the GEM Report was released on October 30, 2012, announced that it was adopting this approach to ensure that the OECD's many recommendations would be implemented in a careful and considered fashion. ISSSTE could, like the State of Mexico, establish an implementation committee to work with the OECD and the CFC to develop an appropriate implementation plan. Such a committee should be comprised of key ISSSTE procurement officials and have the support of the Director General's office. ISSSTE might also wish to consider whether its procurement groups would benefit from the OECD conducting an information session regarding this Report and its recommendations. The State of Mexico took advantage of such a session after the OECD submitted its report at the conclusion of that procurement study.

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

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

17 July 2012 - C(2012)115)

THE COUNCIL,

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

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

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

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

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

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

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

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

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

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

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

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

On the proposal of the Competition Committee:

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

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

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

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

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

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

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

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

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

4. Adopt selection criteria designed i) to improve the intensity and effectiveness of competition in the tender process, and ii) to ensure that there is always a sufficient number of potential credible bidders with a continuing

interest in bidding on future projects. Qualitative selection and award criteria should be chosen in such a way that credible bidders, including small and medium-sized enterprises, are not deterred unnecessarily from participating in public tenders.

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

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

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

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

In particular, Members should encourage competition authorities to:

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

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

3. Establish a continuing relationship with procurement agencies such that, should preventive mechanisms fail to protect public funds from third-party collusion, those agencies will report the suspected collusion to competition authorities (in addition to any other competent authority) and have the confidence that competition authorities will help investigate and prosecute any potential anti-competitive conduct.

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

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

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

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

VI. INVITES non-Members to adhere to this Recommendation and to implement it.

VII. INSTRUCTS the Competition Committee to:

i) serve as a forum for sharing experience under this Recommendation for Members and those non-Members adhering to this Recommendation;

ii) promote this Recommendation with other relevant committees and bodies of the OECD; and

iii) monitor the implementation of this Recommendation and to report to the Council no later than three years following its adoption and, as appropriate, thereafter.

OECD GUIDELINES FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT

1. Introduction

Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process. Public and private organizations often rely upon a competitive bidding process to achieve better value for money. Low prices and/or better products are desirable because they result in resources either being saved or freed up for use on other goods and services. The competitive process can achieve lower prices or better quality and innovation only when companies genuinely compete (i.e., set their terms and conditions honestly and independently). Bid rigging can be particularly harmful if it affects public procurement.¹ Such conspiracies take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.

Bid rigging is an illegal practice in all OECD member countries and can be investigated and sanctioned under the competition law and rules. In a number of OECD countries, bid rigging is also a criminal offence.

2. Common forms of bid rigging

Bid-rigging conspiracies can take many forms, all of which impede the efforts of purchasers - frequently national and local governments - to obtain goods and services at the lowest possible price. Often, competitors agree in advance who will submit the winning bid on a contract to be awarded through a competitive bidding process. A common objective of a bid-rigging conspiracy is

¹ In OECD countries, public procurement accounts for approximately 15% of GDP. In many non-OECD countries that figure is even higher. See OECD, *Bribery in Procurement, Methods, Actors and Counter-Measures*, 2007.

to increase the amount of the winning bid and thus the amount that the winning bidders will gain.

Bid-rigging schemes often include mechanisms to apportion and distribute the additional profits obtained as a result of the higher final contracted price among the conspirators. For example, competitors who agree not to bid or to submit a losing bid may receive subcontracts or supply contracts from the designated winning bidder in order to divide the proceeds from the illegally obtained higher priced bid among them. However, long-standing bid-rigging arrangements may employ much more elaborate methods of assigning contract winners, monitoring and apportioning bid-rigging gains over a period of months or years. Bid rigging may also include monetary payments by the designated winning bidder to one or more of the conspirators. This so-called compensation payment is sometimes also associated with firms submitting “cover” (higher) bids.²

Although individuals and firms may agree to implement bid-rigging schemes in a variety of ways, they typically implement one or more of several common strategies. These techniques are not mutually exclusive. For instance, cover bidding may be used in conjunction with a bid-rotation scheme. These strategies in turn may result in patterns that procurement officials can detect and which can then help uncover bid-rigging schemes.

- *Cover bidding.* Cover (also called complementary, courtesy, token, or symbolic) bidding is the most frequent way in which bid-rigging schemes are implemented. It occurs when individuals or firms agree to submit bids that involve at least one of the following: (1) a competitor agrees to submit a bid that is higher than the bid of the designated winner, (2) a competitor submits a bid that is known to be too high to be accepted, or (3) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Cover bidding is designed to give the appearance of genuine competition.
- *Bid suppression.* Bid-suppression schemes involve agreements among competitors in which one or more companies agree to refrain from

² In most instances the compensation payment will be facilitated by the use of a fraudulent invoice for works. In fact, no such work takes place and the invoice is false. The use of fraudulent consulting contracts can also be used for this purpose.

bidding or to withdraw a previously submitted bid so that the designated winner's bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration.

- *Bid rotation.* In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning (*i.e.*, lowest qualifying) bidder. The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company.
- *Market allocation.* Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm. In return, that competitor will not competitively bid to a designated group of customers allocated to other firms in the agreement.

3. **Industry, product and service characteristics that help support collusion**

In order for firms to implement a successful collusive agreement, they must agree on a common course of action for implementing the agreement, monitor whether other firms are abiding by the agreement, and establish a way to punish firms that cheat on the agreement. Although bid rigging can occur in any economic sector, there are some sectors in which it is more likely to occur due to particular features of the industry or of the product involved. Such characteristics tend to support the efforts of firms to rig bids. Indicators of bid rigging, which are discussed further below, may be more meaningful when certain supporting factors are also present. In such instances, procurement agents should be especially vigilant. Although various industry or product characteristics have been found to help collusion, they need not all be present in order for companies to successfully rig bids.

- *Small number of companies.* Bid rigging is more likely to occur when a small number of companies supply the good or service. The fewer

the number of sellers, the easier it is for them to reach an agreement on how to rig bids.

- *Little or no entry.* When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support bid-rigging efforts.
- *Market conditions.* Significant changes in demand or supply conditions tend to destabilize ongoing bid-rigging agreements. A constant, predictable flow of demand from the public sector tends to increase the risk of collusion. At the same time, during periods of economic upheaval or uncertainty, incentives for competitors to rig bids increase as they seek to replace lost business with collusive gains.
- *Industry associations.* Industry associations³ can be used as legitimate, pro-competitive mechanisms for members of a business or service sector to promote standards, innovation and competition. Conversely, when subverted to illegal, anticompetitive purposes, these associations have been used by company officials to meet and conceal their discussions about ways and means to reach and implement a bid rigging agreement.
- *Repetitive bidding.* Repetitive purchases increase the chances of collusion. The bidding frequency helps members of a bid-rigging agreement allocate contracts among themselves. In addition, the members of the cartel can punish a cheater by targeting the bids originally allocated to him. Thus, contracts for goods or services that are regular and recurring may require special tools and vigilance to discourage collusive tendering.
- *Identical or simple products or services.* When the products or services that individuals or companies sell are identical or very similar, it is easier for firms to reach an agreement on a common price structure.

³ Industry or trade associations consist of individuals and firms with common commercial interests, joining together to further their commercial or professional goals.

- *Few if any substitutes.* When there are few, if any, good alternative products or services that can be substituted for the product or service that is being purchased, individuals or firms wishing to rig bids are more secure knowing that the purchaser has few, if any, good alternatives and thus their efforts to raise prices are more likely to be successful.
- *Little or no technological change.* Little or no innovation in the product or service helps firms reach an agreement and maintain that agreement over time.

CHECKLIST FOR DESIGNING THE PROCUREMENT PROCESS TO REDUCE RISKS OF BID RIGGING

There are many steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging. Procurement agencies should consider adopting the following measures:

1. Be informed before designing the tender process

Collecting information on the range of products and/or services available in the market that would suit the requirements of the purchaser as well as information on the potential suppliers of these products is the best way for procurement officials to design the procurement process to achieve the best “value for money”. Develop in-house expertise as early as possible.

- Be aware of the characteristics of the market from which you will purchase and recent industry activities or trends that may affect competition for the tender.

- Determine whether the market in which you will purchase has characteristics that make collusion more likely⁴.
- Collect information on potential suppliers, their products, their prices and their costs. If possible, compare prices offered in B2B⁵ procurement.
- Collect information about recent price changes. Inform yourself about prices in neighbouring geographic areas and about prices of possible alternative products.
- Collect information about past tenders for the same or similar products.
- Coordinate with other public sector procurers and clients who have recently purchased similar products or services to improve your understanding of the market and its participants.
- If you use external consultants to help you estimate prices or costs ensure that they have signed confidentiality agreements.

2. Design the tender process to maximise the potential participation of genuinely competing bidders

Effective competition can be enhanced if a sufficient number of credible bidders are able to respond to the invitation to tender and have an incentive to compete for the contract. For example, participation in the tender can be facilitated if procurement officials reduce the costs of bidding, establish participation requirements that do not unreasonably limit competition, allow firms from other regions or countries to participate, or devise ways of incentivising smaller firms to participate even if they cannot bid for the entire contract.

- Avoid unnecessary restrictions that may reduce the number of qualified bidders. Specify minimum requirements that are proportional

⁴ See “Industry, product and service characteristics that help support collusion” above.

⁵ Business-to-Business (B2B) is a term commonly used to describe electronic commerce transactions between businesses.

to the size and content of the procurement contract. Do not specify minimum requirements that create an obstacle to participation, such as controls on the size, composition, or nature of firms that may submit a bid.

- Note that requiring large monetary guarantees from bidders as a condition for bidding may prevent otherwise qualified small bidders from entering the tender process. If possible, ensure amounts are set only so high as to achieve the desired goal of requiring a guarantee.
- Reduce constraints on foreign participation in procurement whenever possible.
- To the extent possible, qualify bidders during the procurement process in order to avoid collusive practices among a pre-qualified group and to increase the amount of uncertainty among firms as to the number and identity of bidders. Avoid a very long period of time between qualification and award, as this may facilitate collusion.
- Reduce the preparation costs of the bid. This can be accomplished in a number of ways:
 - By streamlining tendering procedures across time and products (e.g. use the same application forms, ask for the same type of information, etc.).⁶
 - By packaging tenders (i.e. different procurement projects) to spread the fixed costs of preparing a bid.
 - By keeping official lists of approved contractors or certification by official certification bodies.
 - By allowing adequate time for firms to prepare and submit a bid. For example, consider publishing details of pipeline projects well in advance using trade and professional journals, websites or magazines.

⁶ Streamlining the preparation of the bid nevertheless should not prevent procurement officials from seeking continuous improvements of the procurement process (procedure chosen, quantities bought, timing, etc.).

- By using an electronic bidding system, if available.
- Whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof, rather than bids on the whole contract only.⁷ For example, in larger contracts look for areas in the tender that would be attractive and appropriate for small and medium sized enterprises.
- Do not disqualify bidders from future competitions or immediately remove them from a bidding list if they fail to submit a bid on a recent tender.
- Be flexible in regard to the number of firms from whom you require a bid. For example, if you start with a requirement for 5 bidders but receive bids from only 3 firms, consider whether it is possible to obtain a competitive outcome from the 3 firms, rather than insisting on a re-tendering exercise, which is likely to make it all the more clear that competition is scarce.

3. Define your requirements clearly and avoid predictability

Drafting the specifications and the terms of reference (TOR) is a stage of the public procurement cycle which is vulnerable to bias, fraud and corruption. Specifications/TOR should be designed in a way to avoid bias and should be clear and comprehensive but not discriminatory. They should, as a general rule, focus on functional performance, namely on what is to be achieved rather than how it is to be done. This will encourage innovative solutions and value for money. How tender requirements are written affects the number and type of suppliers that are attracted to the tender and, therefore, affects the success of the selection process. The clearer the requirements, the easier it will be for potential suppliers to understand them, and the more confidence they will have when preparing and submitting bids. Clarity should not be confused with predictability. More predictable procurement schedules and unchanging quantities sold or bought can facilitate collusion. On the other hand, higher value and less frequent procurement opportunities increase the bidders' incentives to compete.

⁷ Procurement officials should also be aware that, if wrongly implemented (e.g. in an easily predictable manner), the 'splitting contracts' technique could provide an opportunity to conspirators to better allocate contracts.

- Define your requirements as clearly as possible in the tender offer. Specifications should be independently checked before final issue to ensure they can be clearly understood. Try not to leave room for suppliers to define key terms after the tender is awarded.
- Use performance specifications and state what is actually required, rather than providing a product description.
- Avoid going to tender while a contract is still in the early stages of specification: a comprehensive definition of the need is a key to good procurement. In rare circumstances where this is unavoidable, require bidders to quote per unit. This rate can then be applied once quantities are known.
- Define your specifications allowing for substitute products or in terms of functional performance and requirements whenever possible. Alternative or innovative sources of supply make collusive practices more difficult.
- Avoid predictability in your contract requirements: consider aggregating or disaggregating contracts so as to vary the size and timing of tenders.
- Work together with other public sector procurers and run joint procurement.
- Avoid presenting contracts with identical values that can be easily shared among competitors.

4. Design the tender process to effectively reduce communication among bidders

When designing the tender process, procurement officials should be aware of the various factors that can facilitate collusion. The efficiency of the procurement process will depend upon the bidding model adopted but also on how the tender is designed and carried out. Transparency requirements are indispensable for a sound procurement procedure to aid in the fight against corruption. They should be complied with in a balanced manner, in order not to facilitate collusion by disseminating information beyond legal requirements. Unfortunately, there is no single rule about the design of an auction or

procurement tender. Tenders need to be designed to fit the situation. Where possible, consider the following:

- Invite interested suppliers to dialogue with the procuring agency on the technical and administrative specifications of the procurement opportunity. However, avoid bringing potential suppliers together by holding regularly scheduled pre-bid meetings.
- Limit as much as possible communications between bidders during the tender process.⁸ Open tenders enable communication and signalling between bidders. A requirement that bids must be submitted in person provides an opportunity for last minute communication and deal-making among firms. This could be prevented, for example, by using electronic bidding.
- Carefully consider what information is disclosed to bidders at the time of the public bid opening.
- When publishing the results of a tender, carefully consider which information is published and avoid disclosing competitively sensitive information as this can facilitate the formation of bid-rigging schemes, going forward.
- Where there are concerns about collusion due to the characteristics of the market or product, if possible, use a first-price sealed bid auction rather than a reverse auction.
- Consider if procurement methods other than single stage tenders based primarily on price can yield a more efficient outcome. Other types of procurement may include negotiated tenders⁹ and framework agreements.¹⁰

⁸ For example, if the bidders need to do a site inspection, avoid gathering the bidders in the same facility at the same time.

⁹ In negotiated tenders the procurer sets out a broad plan and the tenderer(s) then work out the details with the procurer, thereby arriving at a price.

¹⁰ In framework agreements, the procurer asks a large number of firms, say 20, to submit details of their ability in terms of qualitative factors such as experience, safety qualifications, etc., and then chooses a small number, say 5

- Use a maximum reserve price only if it is based on thorough market research and officials are convinced it is very competitive. Do not publish the reserve price, but keep it confidential in the file or deposit it with another public authority.
- Beware of using industry consultants to conduct the tendering process, as they may have established working relationships with individual bidders. Instead, use the consultant’s expertise to clearly describe the criteria/specification, and conduct the procurement process in-house.
- Whenever possible, request that bids be filed anonymously (e.g. consider identifying bidders with numbers or symbols) and allow bids to be submitted by telephone or mail.
- Do not disclose or unnecessarily limit the number of bidders in the bidding process.
- Require bidders to disclose all communications with competitors. Consider requiring bidders to sign a Certificate of Independent Bid Determination.¹¹
- Require bidders to disclose upfront if they intend to use subcontractors, which can be a way to split the profits among bid riggers.

tenderers, to be in a framework - subsequent jobs are then allocated primarily according to ability or may be the subject of further ‘mini’ tenders with each of the tenderers submitting a price for the job.

11

A Certificate of Independent Bid Determination requires bidders to disclose all material facts about any communications that they have had with competitors pertaining to the invitation to tender. In order to discourage non-genuine, fraudulent or collusive bids, and thereby eliminate the inefficiency and extra cost to procurement, procurement officials may wish to require a statement or attestation by each bidder that the bid it has submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded. Consideration may be given to requiring the signature of an individual with the authority to represent the firm and adding separate penalties for statements that are fraudulently or inaccurately made.

- Because joint bids can be a way to split profits among bid riggers, be particularly vigilant about joint bids by firms that have been convicted or fined by the competition authorities for collusion. Be cautious even if collusion occurred in other markets and even if the firms involved do not have the capacity to present separate bids.
- Include in the tender offer a warning regarding the sanctions in your country for bid rigging, e.g. suspension from participating in public tenders for a certain period, any sanctions if the conspirators signed a Certificate of Independent Bid Determination, the possibility for the procuring agency to seek damages, and any sanctions under the competition law.
- Indicate to bidders that any claims of increased input costs that cause the budget to be exceeded will be thoroughly investigated.¹²
- If, during the procurement process, you are assisted by external consultants, ensure that they are properly trained, that they sign confidentiality agreements, and that they are subject to a reporting requirement if they become aware of improper competitor behaviour or any potential conflict of interest.

5. Carefully choose your criteria for evaluating and awarding the tender

All selection criteria affect the intensity and effectiveness of competition in the tender process. The decision on what selection criteria to use is not only important for the current project, but also in maintaining a pool of potential credible bidders with a continuing interest in bidding on future projects. It is therefore important to ensure that qualitative selection and awarding criteria are chosen in such a way that credible bidders, including small and medium enterprises, are not deterred unnecessarily.

- When designing the tender offer, think of the impact that your choice of criteria will have on future competition.

¹² Cost increases during the execution phase of a contract should be carefully monitored as they may be a front for corruption and bribery.

- Whenever evaluating bidders on criteria other than price (e.g., product quality, post-sale services, etc.) such criteria need to be described and weighted adequately in advance in order to avoid post-award challenges. When properly used, such criteria can reward innovation and cost-cutting measures, along with promoting competitive pricing. The extent to which the weighting criteria are disclosed in advance of the tender closing can affect the ability of the bidders to coordinate their bid.
- Avoid any kind of preferential treatment for a certain class, or type, of suppliers.
- Do not favour incumbents.¹³ Tools that ensure as much anonymity as possible throughout the procurement process may counteract incumbent advantages.
- Do not over-emphasise the importance of performance records. Whenever possible, consider other relevant experience.
- Avoid splitting contracts between suppliers with identical bids. Investigate the reasons for the identical bids and, if necessary, consider re-issuing the invitation to tender or award the contract to one supplier only.
- Make inquiries if prices or bids do not make sense, but never discuss these issues with the bidders collectively.
- Whenever possible under the legal requirements governing the award notices, keep the terms and conditions of each firm's bid confidential. Educate those who are involved in the contract process (e.g., preparation, estimates, etc.) about strict confidentiality.
- Reserve the right not to award the contract if it is suspected that the bidding outcome is not competitive.

¹³ The incumbent is the company currently supplying the goods or services to the public administration and whose contract is coming to an end.

6. Raise awareness among your staff about the risks of bid rigging in procurement

Professional training is important to strengthen procurement officials' awareness of competition issues in public procurement. Efforts to fight bid rigging more effectively can be supported by collecting historical information on bidding behaviour, by constantly monitoring bidding activities, and by performing analyses on bid data. This helps procurement agencies (and competition authorities) to identify problematic situations. It should be noted that bid rigging may not be evident from the results of a single tender. Often a collusive scheme is only revealed when one examines the results from a number of tenders over a period of time.

- Implement a regular training program on bid rigging and cartel detection for your staff, with the help of the competition agency or external legal consultants.
- Store information about the characteristics of past tenders (e.g., store information such as the product purchased, each participant's bid, and the identity of the winner).
- Periodically review the history of tenders for particular products or services and try to discern suspicious patterns, especially in industries susceptible to collusion.¹⁴
- Adopt a policy to review selected tenders periodically.
- Undertake comparison checks between lists of companies that have submitted an expression of interest and companies that have submitted bids to identify possible trends such as bid withdrawals and use of sub-contractors.
- Conduct interviews with vendors who no longer bid on tenders and unsuccessful vendors.
- Establish a complaint mechanism for firms to convey competition concerns. For example, clearly identify the person or the office to

¹⁴ See “Industry, product and service characteristics that help support collusion” above.

which complaints must be submitted (and provide their contact details) and ensure an appropriate level of confidentiality.

- Make use of mechanisms, such as a whistleblower system, to collect information on bid rigging from companies and their employees. Consider launching requests in the media to invite companies to provide the authorities with information on potential collusion.
- Inform yourself about your country's leniency policy,¹⁵ if applicable, and review your policy on suspension from qualification to bid, where there has been a finding of collusive activity, to determine whether it is harmonious with your country's leniency policy.
- Establish internal procedures that encourage or require officials to report suspicious statements or behaviour to the competition authorities in addition to the procurement agency's internal audit group and comptroller, and consider setting up incentives to encourage officials to do so.
- Establish cooperative relationships with the competition authority (e.g. set up a mechanism for communication, listing information to be provided when procurement officials contact competition agencies, etc.).

¹⁵

Such policies generally provide for immunity from antitrust legal proceedings to the first party to apply under the policy who admits its involvement in particular cartel activities, including bid rigging schemes, and agrees to cooperate with the competition authority's investigation.

CHECKLIST FOR DETECTING BID RIGGING IN PUBLIC PROCUREMENT

Bid-rigging agreements can be very difficult to detect as they are typically negotiated in secret. In industries where collusion is common, however, suppliers and purchasers may be aware of long-standing bid-rigging conspiracies. In most industries, it is necessary to look for clues such as unusual bidding or pricing patterns, or something that the vendor says or does. Be on guard throughout the entire procurement process, as well as during your preliminary market research.

1. Look for warning signs and patterns when businesses are submitting bids

Certain bidding patterns and practices seem at odds with a competitive market and suggest the possibility of bid rigging. Search for odd patterns in the ways that firms bid and the frequency with which they win or lose tender offers. Sub-contracting and undisclosed joint venture practices can also raise suspicions.

- The same supplier is often the lowest bidder.
- There is a geographic allocation of winning tenders. Some firms submit tenders that win in only certain geographic areas.
- Regular suppliers fail to bid on a tender they would normally be expected to bid for, but have continued to bid for other tenders.
- Some suppliers unexpectedly withdraw from bidding.
- Certain companies always submit bids but never win.
- Each company seems to take a turn being the winning bidder.

- Two or more businesses submit a joint bid even though at least one of them could have bid on its own.
- The winning bidder repeatedly subcontracts work to unsuccessful bidders.
- The winning bidder does not accept the contract and is later found to be a subcontractor.
- Competitors regularly socialise or hold meetings shortly before the tender deadline.

2. Look for warning signs in all documents submitted

Telltale signs of a bid-rigging conspiracy can be found in the various documents that companies submit. Although companies that are part of the bid-rigging agreement will try to keep it secret, carelessness, or boastfulness or guilt on the part of the conspirators, may result in clues that ultimately lead to its discovery. Carefully compare all documents for evidence that suggests that the bids were prepared by the same person or were prepared jointly.

- Identical mistakes in the bid documents or letters submitted by different companies, such as spelling errors.
- Bids from different companies contain similar handwriting or typeface or use identical forms or stationery.
- Bid documents from one company make express reference to competitors' bids or use another bidder's letterhead or fax number.
- Bids from different companies contain identical miscalculations.
- Bids from different companies contain a significant number of identical estimates of the cost of certain items.
- The packaging from different companies has similar postmarks or post metering machine marks.

- Bid documents from different companies indicate numerous last minute adjustments, such as the use of erasures or other physical alterations.
- Bid documents submitted by different companies contain less detail than would be necessary or expected, or give other indications of not being genuine.
- Competitors submit identical tenders or the prices submitted by bidders increase in regular increments.

3. Look for warning signs and patterns related to pricing

Bid prices can be used to help uncover collusion. Look for patterns that suggest that companies may be coordinating their efforts such as price increases that cannot be explained by cost increases. When losing bids are much higher than the winner's bid, conspirators may be using a cover bidding scheme. A common practice in cover pricing schemes is for the provider of the cover price to add 10% or more to the lowest bid. Bid prices that are higher than the engineering cost estimates or higher than prior bids for similar tenders may also indicate collusion. The following may be suspicious:

- Sudden and identical increases in price or price ranges by bidders that cannot be explained by cost increases.
- Anticipated discounts or rebates disappear unexpectedly.
- Identical pricing can raise concerns especially when one of the following is true:
 - Suppliers' prices were the same for a long period of time,
 - Suppliers' prices were previously different from one another,
 - Suppliers increased price and it is not justified by increased costs, or
 - Suppliers eliminated discounts, especially in a market where discounts were historically given.

- A large difference between the price of a winning bid and other bids.
- A certain supplier's bid is much higher for a particular contract than that supplier's bid for another similar contract.
- There are significant reductions from past price levels after a bid from a new or infrequent supplier, e.g. the new supplier may have disrupted an existing bidding cartel.
- Local suppliers are bidding higher prices for local delivery than for delivery to destinations farther away.
- Similar transportation costs are specified by local and non-local companies.
- Only one bidder contacts wholesalers for pricing information prior to a bid submission.
- Unexpected features of public bids in an auction, electronic or otherwise -- such as offers including unusual numbers where one would expect a rounded number of hundreds or thousands -- may indicate that bidders are using the bids themselves as a vehicle to collude by communicating information or signalling preferences.

4. Look for suspicious statements at all times

When working with vendors watch carefully for suspicious statements that suggest that companies may have reached an agreement or coordinated their prices or selling practices.

- Spoken or written references to an agreement among bidders.
- Statements that bidders justify their prices by looking at “industry suggested prices”, “standard market prices” or “industry price schedules”.
- Statements indicating that certain firms do not sell in a particular area or to particular customers.

- Statements indicating that an area or customer “belongs to” another supplier.
- Statements indicating advance non-public knowledge of competitors’ pricing or bid details or foreknowledge of a firm’s success or failure in a competition for which the results have yet to be published.
- Statements indicating that a supplier submitted a courtesy, complementary, token, symbolic or cover bid.
- Use of the same terminology by various suppliers when explaining price increases.
- Questions or concerns expressed about Certificates of Independent Bid Determination, or indications that, although signed (or even submitted unsigned), they are not taken seriously.
- Cover letters from bidders refusing to observe certain tender conditions or referring to discussions, perhaps within a trade association.

5. Look for suspicious behaviour at all times

Look for references to meetings or events at which suppliers may have an opportunity to discuss prices, or behaviour that suggests a company is taking certain actions that only benefit other firms. Forms of suspicious behaviour could include the following:

- Suppliers meet privately before submitting bids, sometimes in the vicinity of the location where bids are to be submitted.
- Suppliers regularly socialize together or appear to hold regular meetings.
- A company requests a bid package for itself and a competitor.
- A company submits both its own and a competitor’s bid and bidding documents.

- A bid is submitted by a company that is incapable of successfully completing the contract.
- A company brings multiple bids to a bid opening and chooses which bid to submit after determining (or trying to determine) who else is bidding.
- Several bidders make similar enquiries to the procurement agency or submit similar requests or materials.

6. A caution about indicators of bid rigging

The indicators of possible bid rigging described above identify numerous suspicious bid and pricing patterns as well as suspicious statements and behaviours. They should not however be taken as proof that firms are engaging in bid rigging. For example, a firm may have not bid on a particular tender offer because it was too busy to handle the work. High bids may simply reflect a different assessment of the cost of a project. Nevertheless, when suspicious patterns in bids and pricing are detected or when procurement agents hear odd statements or observe peculiar behaviour, further investigation of bid rigging is required. A regular pattern of suspicious behaviour over a period of time is often a better indicator of possible bid rigging than evidence from a single bid. Carefully record all information so that a pattern of behaviour can be established over time.

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

If you suspect that bid rigging is occurring, there are a number of steps you should take in order to help uncover it and stop it.

- Have a working understanding of the law on bid rigging in your jurisdiction.
- Do not discuss your concerns with suspected participants.
- Keep all documents, including bid documents, correspondence, envelopes, etc.
- Keep a detailed record of all suspicious behaviour and statements including dates, who was involved, and who else was present and

what precisely occurred or was said. Notes should be made during the event or while they are fresh in the official's memory so as to provide an accurate description of what transpired.

- Contact the relevant competition authority in your jurisdiction.
- After consulting with your internal legal staff, consider whether it is appropriate to proceed with the tender offer.

ANNEX 2: FEDERAL THRESHOLD VALUES

Annex 17 of the Federal Budget for 2012 specified the following threshold values when utilising direct awards and invitations to at least three suppliers.

Authorised Budget for purchasing goods and services		Maximum amount for contracts under direct awards (thousands of pesos, excluding VAT)	Maximum amount for contracts under invitations to at least three suppliers (thousands of pesos, excluding VAT)
Above	Below		
0	15,000	147	504
15,000	30,000	168	725
30,000	50,000	189	945
100,000	150,000	231	1,391
150,000	250,000	263	1,680
250,000	350,000	284	1,890
350,000	450,000	305	2,006
450,000	600,000	326	2,226
600,000	750,000	336	2,562
1,000,000		389	2,678

Authorised Budget for contracting public works and related services		Maximum amount for a public works contract under a direct award procedure (thousands of pesos, excluding VAT)	Maximum amount for a related services contract under a direct award procedure (thousands of pesos, excluding VAT)	Maximum amount for a public works contract under an invitation to at least three suppliers procedure (thousands of pesos, excluding VAT)	Maximum amount for a related services contract under an invitation to at least three suppliers procedure (thousands of pesos, excluding VAT)
Above	Below				
0	15,000	226	111	2,006	1,559
15,000	30,000	278	142	2,226	1,670
30,000	50,000	336	168	2,562	2,006
50,000	100,000	389	194	3,119	2,336
100,000	150,000	446	226	3,675	2,783
150,000	250,000	504	252	4,232	3,339
250,000	350,000	614	305	4,904	3,675
350,000	450,000	667	336	5,345	4,006
450,000	600,000	782	389	6,353	4,788
600,000	750,000	893	446	7,235	5,460
750,000	1,000,000	998	504	8,127	6,122
1,000,000		1,061	557	9,125	6,899

**ANNEX 3:
CERTIFICATE OF INDEPENDENT BID DETERMINATION
(CANADA)**

I, the undersigned, in submitting the accompanying bid or tender (hereinafter “bid”) to:

for:

in response to the call or request (hereinafter “call”) for bids made by:

do hereby make the following statements that I certify to be true and complete in every respect:

I certify, on behalf of: that:

1. I have read and I understand the contents of this Certificate;
2. I understand that the accompanying bid will be disqualified if this Certificate is found not to be true and complete in every respect;

3. I am authorized by the Bidder to sign this Certificate, and to submit the accompanying bid, on behalf of the Bidder;
4. each person whose signature appears on the accompanying bid has been authorized by the Bidder to determine the terms of, and to sign, the bid, on behalf of the Bidder;
5. for the purposes of this Certificate and the accompanying bid, I understand that the word “competitor” shall include any individual or organization, other than the Bidder, whether or not affiliated with the Bidder, who:
 - a. has been requested to submit a bid in response to this call for bids;
 - b. could potentially submit a bid in response to this call for bids, based on their qualifications, abilities or experience;
6. the Bidder discloses that (check one of the following, as applicable):
 - c. the Bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with, any competitor;
 - d. the Bidder has entered into consultations, communications, agreements or arrangements with one or more competitors regarding this call for bids, and the Bidder discloses, in the attached document(s), complete details thereof, including the names of the competitors and the nature of, and reasons for, such consultations, communications, agreements or arrangements;
7. in particular, without limiting the generality of paragraphs (6)(a) or (6)(b) above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:
 - e. prices;
 - f. methods, factors or formulas used to calculate prices;
 - g. the intention or decision to submit, or not to submit, a bid; or
 - h. the submission of a bid which does not meet the specifications of the call for bids; except as specifically disclosed pursuant to paragraph (6)(b) above;

8. in addition, there has been no consultation, communication, agreement or arrangement with any competitor regarding the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates, except as specifically authorized by the Tendering Authority or as specifically disclosed pursuant to paragraph (6)(b) above;
9. the terms of the accompanying bid have not been, and will not be, knowingly disclosed by the Bidder, directly or indirectly, to any competitor, prior to the date and time of the official bid opening, or of the awarding of the contract, whichever comes first, unless otherwise required by law or as specifically disclosed pursuant to paragraph (6)(b) above.

(Printed Name and Signature of Authorized Agent of Bidder)

(Position Title)

(Date)

**ANNEX 4:
CERTIFICATE OF INDEPENDENT PRICE DETERMINATION
(UNITED STATES, APRIL 1985)**

(a) The offeror certifies that—

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to—

- (i) Those prices;
- (ii) The intention to submit an offer; or
- (iii) The methods 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.

**ANNEX 5:
LIST OF AREAS FOR IMPROVEMENT IN THE PROCUREMENT
LAWS AND REGULATIONS**

1. Remove preferential treatment in laws and procedures

Current federal procurement rules regarding who can participate in procurement procedures and those granting preferential treatment in certain circumstances can be discriminatory towards foreign bidders and sometimes even national bidders, thus limiting their ability to sell goods and services to ISSSTE and other public procurement agencies. Current restrictions on participation should be abolished so that all qualified bidders are treated equally, irrespective of their nationality and of the origin of the goods and services they intend to provide.

ISSSTE should work with the SFP's successor organisation and other interested procurement agencies to propose changes to a number of restrictions in the federal procurement statutes.

The CFC, the SFP's successor organisation or the Mexican Institute for Competitiveness (*Instituto Mexicano para la Competitividad*, IMCO) should conduct an evaluation of the impact that opening up tenders more fully to foreign participation will have on national suppliers and, in particular, on small- and medium-sized enterprises, which would provide the federal government with sound advice on the best way to proceed with legislative changes.

In the future, the CFC, IMCO or the SFP's successor organisation should assess the financial and qualitative benefits that have been achieved by ISSSTE and other public procurement agencies from having had access to additional market participants.

2. Limit the use of the exceptions to public tenders

ISSSTE and other public agencies should limit their use of the exceptions to public tenders that are permitted under the federal Procurement Act and the Public Works Act as the use of these exceptions results in fewer bidders and lessens the likelihood that “value for money” is being achieved in many purchases.

SFP’s successor organisation should undertake an initial review and periodic reviews of the incidence of use of these exceptions by ISSSTE and other public agencies in Mexico.

The reviews should determine whether flexibility requirements and restrictions to competition are appropriately balanced in practice and whether the upper threshold of 30 percent of a contracting authority’s annual procurement budget is appropriate (and, if not, propose the necessary modifications to the procurement laws).

The initial study of this issue by the SFP’s successor organisation should include an assessment of whether federal and state procurement groups are actually taking advantage of these exceptions by creating multiple contracts out of larger contracts.

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

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

If the Procurement Act is not amended to abolish the need to establish a convenient price, it is recommended that in the alternative public agencies should be permitted to utilise a larger discount factor than 40 percent when establishing a convenient price and be permitted to award a contract below the convenient price, if certain safeguards and guarantees are met such as higher performance bond guarantees (multiples of the normal guarantees), greater monitoring of performance, adjustments to progress payment requirements, etc.

4. Change a number of requirements relating to clarification meetings

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

Articles 65 and 83 of the federal Procurement Act and the Public Works Act, respectively, likely encourage bidders to participate in clarification meetings by establishing, as one requirement for filing a review application, the need to have attended a clarification meeting. This requirement should be removed from both statutes.

In the short term, whenever feasible, clarification meetings should be held “virtually”, i.e. by using “remote” technology to eliminate face-to-face meetings of competitors.

Any material released by procurement groups (such as the minutes of clarification meetings) should not list nor identify the participants in a procurement process.

Site visits should only be held when they are absolutely necessary and not as a routine procedure. Alternatively, if not prohibitive cost-wise, there can be multiple site visits to divide up competitors or site visits can be done on a virtual basis.

5. Eliminate several problematic disclosure requirements

Some current disclosure requirements (e.g. relating to reference prices, the identities of bidders and the value of the bids they submit) can facilitate bid rigging and should be eliminated or substantially circumscribed.

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

Information about contracts won and fulfilled by individual suppliers should be made available either to procurement officials only or, if that is not possible, to

the general public but again with some appropriate time delay.

6. Enact legislative changes to deal with joint bids

Currently, procurement officials at ISSSTE and other federal purchasing groups must accept joint bids unless they justify why they are not prepared to allow joint bids. Federal legislation should be amended so that joint bids are permitted only when tender documents expressly mention that they will be accepted.

ISSSTE and other federal procurement groups should have the legislative right to reject one or more joint bids submitted in a response to a call for tenders that allowed for joint bids.

Amendments to the federal Public-Private Partnerships Act should be enacted to make reference to: a requirement that bidders must comply with Mexico's competition laws; and, to the possibility of joint bidders seeking advisory opinions from the CFC.

The three federal procurement laws should be amended to require bidders, when joint bids are allowed by a procurement group, to specify the rationale and benefits of their joint bid in their bid submission.

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

Splitting a contract among multiple suppliers may facilitate collusion. As a result, a study should be undertaken with all or a reasonable sample of public buyers in Mexico to assess how often split contracts are used, the justifications for employing split contracts, the reasonableness of the justifications, the relative merits of awarding split contracts and the need for any legislative changes regarding this subject. Such a study should be conducted by the SFP's successor organisation in cooperation with the CFC.

Based on the results of the study, the SFP's successor organisation should recommend appropriate changes to the law or regulations or procedures and produce guidance for federal and state contracting authorities regarding how to best construct split contracts to maximise the incentives for competition and minimise the incentives for collusion.

8. Institute disclosure requirements regarding sub-contracting

Disclosure requirements should be imposed by law on bidders to make it more difficult for them to use sub-contracting as a mechanism to implement a collusive agreement.

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

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

The provision in the Procurement Act that prohibits micro-, small- and medium-sized companies from participating on their own in reverse auctions should be abolished.

10. Amend the three federal procurement statutes to require Certificates of Independent Bid Determination

The federal procurement statutes should be amended to require bidders to submit a “Certificate of Independent Bid Determination” as part of their bid submissions.

The federal Public-Private Procurement Act should be amended to make it mandatory for bidders to submit an Integrity Statement in tenders covered by that statute.

11. Enhance the participation of social witnesses

The role of social witnesses in tendering procedures should be enhanced by having them focus on competition issues in addition to transparency concerns and adherence to laws and procedures. ISSSTE and the SFP's successor organisation should ensure that they hire individuals and firms with the background and experience that will enable them to provide expert procurement advice to the benefit of public procurement officials.

SFP's successor organisation (with the advice of the CFC and the assistance of one or more educational institutions) should design training courses for social witnesses which include a focus on bid rigging and competition issues and the current legal framework for procurement.

12. Revise penalties, penalties and rescissions of contracts

The current procurement laws and regulations provide a weak framework for penalties related to the partial or non-fulfilment of contracts awarded via public tender. The SFP's successor organisation should study the incidence of contract problems of all sorts and recommend changes to the various types of penalties set forth in the three federal public procurement statutes, including whether there should be guarantees in direct award contracts and in contracts awarded through invitations to at least three suppliers.

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

Bidders should be required to provide specific information in their bid submissions concerning their cost structure in supplying the most remote and underserved locations and the least profitable goods and services, which would enable procurement groups to establish better convenient and non-acceptable prices and to set performance bonds at levels appropriate to the risks of partial or non-performance.

ISSSTE and other procurement groups at the federal and state levels should adopt the practice of consistently sharing their lists of problematic and sanctioned suppliers and contractors with the SFP's successor organisation and the SFP's successor organisation should ensure that all Mexican procurement agencies have knowledge of, and easy access to, this information.

13. Sanction suppliers convicted of bid rigging in Mexico

Provisions in the Procurement Act and the Public Works Act enable the SFP to prohibit suppliers from participating in public procurement for various reasons. These laws should be amended to prevent firms and individuals convicted of bid rigging by the CFC from participating in public procurement for a specified period of time provided that, before the SFP's successor organisation makes such a determination, it must seek an opinion from the CFC regarding the competitive consequences of such a prohibition and abide by the CFC's opinion. Views should also be sought from public procurement agencies which depend on the goods and services provided by the convicted companies and individuals.

**ANNEX 6:
LIST OF AREAS FOR IMPROVEMENT IN ISSSTE'S PROCUREMENT
PRACTICES**

1. Establish a coordination and oversight body for effective procurement

ISSSTE should establish a new group within its organisation to ensure that its various pro-competitive procurement initiatives and the recommendations of this Analytical Report are implemented in a consistent, effective and timely manner.

This new ISSSTE Procurement Coordination Unit (PCU) should be responsible for the following activities:

- ensuring that the documentation and procedures for the various types of procurement procedures undertaken by ISSSTE are appropriately standardised across ISSSTE's directorates, hospitals, clinics and other operating units such as SuperISSSTE, TURISSSTE, etc.;
- overseeing the Market Studies Unit and ensuring that it plays a key role in future ISSSTE procurement procedures;
- coordinating future consolidations of purchases across ISSSTE's numerous purchasing units and the use of reverse auctions;
- standardising ISSSTE tender documents and procedures, taking into account the SFP manuals and ISSSTE's POBALINES, and removing unnecessary duplication in the various guidelines;
- studying and reporting on a number of important procurement matters such as: the use of joint bids, split awards and sub-contracting; analyses of the rationales for their use; the degree of non-fulfilment of contracts; and the reasons that bidders cease pursuing some ISSSTE's contracts;
- communicating with non-ISSSTE public procurement groups

regarding matters of common interest;

- being the repository for suspicious bidding behaviour reported anonymously or otherwise by ISSSTE procurement staff and working with the CFC, as appropriate, to deal with these staff reports;
- coordinating training with the CFC and the SFP's successor organisation;
- assessing whether ISSSTE's budget processes, approvals and timelines are resulting in adverse consequences for competitive procurement and possibly supporting collusive activity; and,
- interfacing with the SFP's successor organisation and the CFC regarding procurement issues with competitive consequences such as the identification of best practices, the preparation and dissemination of market studies, the use of social witnesses, framework agreements, reverse auctions, and public-private procurements, etc.

The Procurement Coordination Unit should be an independent unit within ISSSTE's organisation, possibly within the Director General's office, with sufficient resources and autonomy to ensure that ISSSTE achieves the twin objectives of realising more competition in its procurement procedures and detecting and avoiding bid rigging in those same procedures.

2. Optimise the use of ISSSTE's newly-formed Market Studies Unit

ISSSTE's Market Studies Unit (MSU) should be responsible for the following activities:

- establishing the minimum content of an acceptable market study through the creation of a checklist, which takes into account best practices and can be used by ISSSTE procurement groups when they undertake their own market studies (this function should be conducted in cooperation with the CFC and the SFP's successor organisation in order to obtain additional insight and so that other Mexican procurement agencies can also benefit);
- collecting a sufficient amount of information from a variety of reliable and knowledgeable sources (including international data and

comparisons) to make an informed choice of the tender procedure to use, to establish meaningful reference prices and to assess the desirability of allowing foreign bids;

- in conjunction with the Procurement Coordination Unit, preparing ex-post assessments of procurement procedures in order to: 1) assess the efficacy of specific procurements and the groups conducting them; and, 2) identify possible instances of collusion; and,
- sharing all or a sample of the ex-post assessments with the CFC and the SFP's successor organisation to help to achieve more competition and efficiency in Mexican procurement.

As soon as operationally possible, the MSU should be responsible for the preparation of all market studies required by ISSSTE's procurement groups.

ISSSTE's Market Studies Unit should be comprised of individuals with procurement and/or research expertise, and be staffed with a sufficient number of personnel. ISSSTE should consider whether this unit should be a component of the Procurement Coordination Unit.

For public-private partnership contracts, specialised procurements and emergency situations or, in times of limited available resources within the Market Studies Unit, ISSSTE should initially consider outsourcing the preparation of the relevant market studies to an external body (e.g. a specialised private sector agency).

ISSSTE should consider changes to its planning procedures to ensure that there is adequate time to carry out informative market studies.

The Market Studies Unit should ensure that its future market studies are shared among ISSSTE purchasing groups and, working with the SFP's successor organisation, that sharing occurs with other federal agencies.

ISSSTE should explore the merits of combining the research resources of its MSU with those of IMSS' newly-established unit and other health sector organisations to save time and resources and to broaden the knowledge base.

ISSSTE's Procurement Coordination Unit and its Market Studies Unit should discuss with the SFP's successor organisation whether the latter should

include a course in its training programs regarding the subject of how to carry out market studies.

The Market Studies Unit should constantly remind ISSSTE procurement officials not to disclose any type of information contained in the market studies to bidders before or during the tender process.

3. Expand ISSSTE's efforts to consolidate purchases

ISSSTE should, through its Procurement Coordination Unit, continue to explore additional opportunities to consolidate purchases across its many procurement units and look to increase its participation in consolidated purchases with the secretariats and agencies of the federal government and states. The coordination unit should also look for appropriate situations in which to utilise multi-year tenders.

4. Take better advantage of framework agreements

ISSSTE should work with the SFP's successor organisation to initiate and take advantage of appropriate "framework agreements" undertaken pursuant to the provisions of the federal Procurement Act.

5. Adopt practices to increase the number of bidders

ISSSTE should always ensure that participation in its procurement procedures is as extensive as possible. In that regard, whenever a national tender is declared void, ISSSTE should open the tender to foreign suppliers/contractors rather than use one of the exceptions to a public tender.

ISSSTE's new Market Studies Unit should make the sourcing and identification of additional potential bidders a top priority.

Utilising its Marketing Studies Unit and or its Procurement Coordination Unit, ISSSTE should regularly and proactively monitor the number of bidders for each major category of expenditure and check that the numbers do not fall below acceptable levels. If the numbers reach unacceptable limits for certain categories of goods and services, the units should investigate whether it is possible to replace exiting bidders with other potential entrants (including from outside Mexico).

One or both of these new ISSSTE units should proactively investigate why

bidders decide to no longer bid for ISSSTE's business and recommend remedial actions (e.g. lowering participation costs, aggregating purchases, removing any unnecessary bureaucratic procedures), take appropriate actions to remove obstacles to participation or report suspected bid-rigging behaviour to the CFC.

6. Implement a strict approach to deal with joint bids

ISSSTE's procurement policies should make it clear that joint bids will only be accepted when there are pro-competitive justifications such as:

- two or more suppliers are 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 are providing a single integrated service which none of them could supply independently; or
- two or more suppliers active in different geographic areas are submitting a single bid for all of Mexico or for multiple states that include areas that no single supplier can accommodate on its own.

ISSSTE's procurement groups should not allow joint bids, if bidders had previously submitted individual quotations during the market study, or, if it is clear that the bidders could satisfy the contract requirements individually.

If, as a result of the findings of a market study, an ISSSTE procurement group is prepared to accept one or more joint bids, they should include a requirement in the call for tenders that bidders must submit an explanation in their bid submissions outlining the pro-competitive aspects of the joint bid, if such a requirement is not mandated by law as a result of the recommendation in section 6 of Annex 5.

7. Limit the use of split awards

ISSSTE should only split a single contract among multiple suppliers in exceptional circumstances. In cases where there is a concern regarding the security of supply, ISSSTE should consider either issuing multiple tenders involving smaller amounts (and awarding each of them to a single supplier, which can be feasible for smaller players) or consolidating purchases in order to attract additional large bidders.

8. Deter the use of sub-contracting as an anti-competitive practice

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

ISSSTE's contracting authorities should be required to submit records relating to sub-contractors participating in their contracts to the Procurement Coordination Unit for possible study and investigation.

9. Utilise remote procurement procedures more often

ISSSTE should adopt remote and electronic tender procedures for as much of its purchases as possible and at all stages of the procurement process.

10. Commence using reverse auctions

ISSSTE's new Procurement Coordination Unit should spearhead an initiative to have ISSSTE begin to utilise reverse auctions.

11. Cease disclosing the "maximum" reference price in public tenders

ISSSTE and other procurement groups should not disclose maximum reference prices in any tender documents as this type of information may assist suppliers involved in bid rigging to set inflated bid prices.

12. Require Certificates of Independent Bid Determination

ISSSTE should require that a Certificate of Independent Bid Determination accompany all bid submissions.

ISSSTE should make it mandatory that CIBDs be signed by senior corporate officials in order to increase the likelihood of collusive activity being investigated, terminated or avoided by those usually in positions to affect collusive conduct.

13. Retain records from procurement procedures

ISSSTE's various procurement organisations should be instructed to retain all of their hard copy and electronic records relating to all of their procurement procedures for a period of at least five (5) years to enable the procurement groups, the Procurement Coordination Unit and the CFC to more easily analyse, identify and investigate any suspicious bidding activities and patterns.

The Procurement Coordination Unit should be responsible for ensuring that this recommendation is implemented as the PCU would benefit from the information collected when undertaking its study and analysis of various procurement issues.

The PCU should regularly remind ISSSTE procurement officials to take notes of suspicious events and conversations, sign and date the notes and place them in the relevant procurement file.

14. Foster a closer relationship with the CFC

ISSSTE should continue to develop the relationship it recently commenced with the CFC and should make it more formal by entering into a protocol of cooperation.

15. Expand internal and external information-sharing

ISSSTE, through its Procurement Coordination Unit, should proactively engage in a systematic dialogue with other public agencies in order to share best practices, market intelligence (e.g. price information, identity and performance of suppliers) and experiences with suspicious bidding behaviour.

16. Enhance the functioning of the Coordinating Commission for Negotiating the Price of Medicines and Other Health Inputs (CCNPMIS)

ISSSTE and its federal partner agencies in the CCNPMIS should address the current shortcomings in the way that the CCNPMIS operates.

ISSSTE and the other members of the CCNPMIS should immediately establish a working committee to examine the extent of the problems in the structure and operations of the CCNPMIS and to suggest changes that will make that organisation more efficient and effective.

17. Upgrade training and education opportunities

ISSSTE should implement a permanent training program for its procurement staff focusing on how to detect and avoid bid rigging and how to increase the level of competition in the different types of procurement procedures permissible in Mexico.

ISSSTE, in cooperation with the CFC, should regularly organise this type of training for its staff as part of its ongoing commitment to fight bid rigging in its procurement, to improve the quality of its purchasing practices and to enhance competition in its purchasing processes.

ISSSTE should consistently sponsor some of its procurement officials to attend the education programs announced by the SFP and the *Instituto Tecnológico de Estudios Superiores de Monterrey*.

Members of ISSSTE's Internal Control Unit should be specifically included in any training relating to the detection of bid rigging in public procurement.

ISSSTE's new Procurement Coordination Unit should ensure that the enhanced training program addresses the lack of knowledge of some ISSSTE procurement officials regarding the products they purchase.

18. Institute procedures for staff to raise concerns relating to bid rigging in their procurement procedures

ISSSTE should set up clear procedures and reporting lines for its procurement staff to report any suspicious instances of collusion during tenders. Reporting procedures should take into consideration the possible need to keep the identities of procurement officials confidential. Consideration should also be given to establishing a formal whistleblower program as the work of ISSSTE's Internal Control Unit has already demonstrated that ISSSTE officials are periodically involved in bid rigging activity, knowingly or not.

19. Establish a recognition/reward program

A reward and or recognition program should be set up at ISSSTE to encourage procurement officials at ISSSTE to identify and report instances of suspicious or unusual behaviour by bidders.

20. Adopt a policy of seeking damages in bid-rigging cases

ISSSTE should proactively seek opportunities to obtain compensation for damages under the Ley Federal de Competencia Económica whenever ISSSTE has been a victim of any collusive conduct investigated and successfully prosecuted by the CFC.

21. Improve the process and timing for the approval of annual procurement plans

It is recommended that the heads of ISSSTE's key purchasing units work with the Procurement Coordination Unit to assess whether the internal budget processes and timelines and the approval process at the centralised level are undermining the ability of ISSSTE and other public procurement groups and officials to effectively undertake their procurement procedures and obtain the best value for money. If the various officials do come to such a conclusion, they should bring this issue to the attention of the appropriate ISSSTE and federal officials to have the matter rectified.