



Fighting Bid Rigging in Public Procurement in Mexico

**A Secretariat Analytical Report on Procurement
Legislation, Regulations, and Practices
in the State of Mexico**

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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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FOREWORD

In October 2011 the OECD executed an Inter-Institutional Agreement with the Mexican competition authority (*Comisión Federal de Competencia, CFC*) and the Government of the State of Mexico (*Gobierno del Estado de Mexico, GEM*). The purpose of the Agreement was to assist GEM 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, with the aim of reducing the risk of bid rigging in public tenders.

Since October 2011, the OECD Secretariat, GEM and CFC officials have worked closely to understand the legal framework and practices governing public procurement at GEM and to identify areas for possible improvement. An interim report was presented to GEM officials for discussion and feedback. This final Analytical Report contains more than 30 recommendations to GEM on how to improve its procurement procedures to avoid collusion among suppliers. It also identifies over 30 recommendations to address limitations and drawbacks in the current legal framework.

The implementation of the OECD recommendations, together with the increased awareness among GEM procurement officials of the costs and risks of collusion, will help GEM to increase the effectiveness of its procurement strategy to the benefit of the State of Mexico's taxpayers. The savings generated can then be used by GEM to fund additional and better services. Fighting bid rigging helps to improve the competitiveness and economic growth of countries and states over the long term.

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LIST OF ACRONYMS

CFC	Federal Competition Commission (<i>Comisión Federal de Competencia</i>)
CIBD	Certificate of Independent Bid Determination
COMPRANET	Federal Electronic Data Base for Tenders (<i>Sistema Electrónico de Información Pública Gubernamental</i>)
DGRM	General Directorate for Material Resources (<i>Dirección General de Recursos Materiales</i>)
GDP	Gross Domestic Product
GEM	Government of the State of Mexico (<i>Gobierno del Estado de México</i>)
IHAEM	State of Mexico Municipal Institute for Fiscal Coordination (<i>Instituto Hacendario del Estado de México</i>)
IMCO	Mexican Institute for Competitiveness (<i>Instituto Mexicano para la Competitividad</i>)
IMSS	Mexican Institute for Social Security (<i>Instituto Mexicano del Seguro Social</i>)
INAP	National Institute for Public Administration (<i>Instituto Nacional de Administración Pública A.C.</i>)
ISEM	Institute of Health for the State of Mexico (<i>Instituto de Salud del Estado de México</i>)

ISSEYM	Institute for Social Security for the State of Mexico (<i>Instituto de Seguridad Social del Estado de México y Municipios</i>)
LAASSP	Law on Acquisitions, Leases and Services in the Public Sector- Procurement Act (<i>Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público</i>)
LOPSRM	Public Works Act (<i>Ley de Obras Públicas y Servicios Relacionados con las Mismas</i>)
OECD	Organisation for Economic Co-operation and Development
PPPA	Public-Private Partnerships Act (<i>Ley Federal de Asociaciones Público Privadas</i>)
SAOP	Secretariat of Water and Public Works for the State of Mexico (<i>Secretaría de Agua y Obra Pública del Estado de México</i>)
SEITS	Electronic System for Information and Services (<i>Sistema Electrónico de Información, Trámites y Servicios</i>)
SFP	Mexican Secretariat of Public Administration (<i>Secretaría de la Función Pública</i>)

EXECUTIVE SUMMARY

The State of Mexico is the largest of Mexico's 31 states in terms of the annual volume of goods and services purchased and one of the largest public buyer of goods and services in Mexico, after groups such as the state-owned oil and electricity companies (PEMEX and CFE, respectively) the Federal District (*Distrito Federal*) and the Mexican Institute of Social Security (*Instituto Mexicano del Seguro Social*, IMSS in Spanish). The State of Mexico spends approximately 23 percent of its annual budget on public procurement.

After his election in September 2011 the Governor of the State of Mexico, Eruviel Avila Villegas, decided to seek the assistance of the OECD to improve the State's procurement practices and to step up its fight against bid rigging. On October 26, 2011, an Inter-Institutional Agreement was signed by and between the Government of the State of Mexico (*Gobierno del Estado de México*, GEM in Spanish), the OECD and the Mexican competition authority (*Comisión Federal de Competencia*, CFC in Spanish). With that Agreement GEM became the first state in Mexico to formally commit to a process to implement the OECD Competition Committee's Guidelines for Fighting Bid Rigging in Public Procurement in its procurement processes. As well, GEM committed to adopt and implement in its institutional policy the recommendations noted in point c) below that are deemed applicable.

The OECD committed to support the process of the implementation of the Guidelines by GEM through:

- a) providing capacity building for GEM officials regarding the design of public procurement to reduce the risks of bid rigging and enhance the identification of bid rigging practices;
- b) preparing an Analytical Report assessing to the extent to which current public procurement legislation, regulation and practices governing GEM procurement are consistent with the Guidelines; and,

- c) determining whether there are areas of opportunity for improvement in procurement legislation and regulation and in the practices at GEM in accordance with the Guidelines.

In respect of point a), in December 2011 the OECD Secretariat – together with staff from the CFC – organised a training course for over 120 procurement officials from GEM and some of its 125 municipalities.

This report fulfils the remaining points b) and c) listed above. Specifically, Chapter 3 of the report provides an overview of the existing legal framework governing public procurement in the State of Mexico, while Chapter 4 is a detailed summary of the laws and regulations applicable to the State when it procures goods and services, commissions public works and undertakes procurement via public-private partnerships.

Chapter 5 of the Analytical Report lists areas in the current federal and state procurement laws and regulations which the OECD considers restrict the scope for action by GEM and other public agencies and undermine their ability to obtain the best value from their purchases. Among other areas, that Chapter examines: 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, provisions which may also facilitate collusion such as mandatory clarification meetings, joint bids and split awards. Chapter 5 also presents possible remedies for each area.

Chapter 6 contains recommendations specific to GEM on how to improve its procurement procedures and systems. These recommendations address issues in the following broad thematic areas:

- taking advantage of opportunities for GEM to exercise its buying power;
- adopting best practices in coordination with the CFC and the Secretariat of Public Administration (*Secretaría de la Función Pública*, SFP in Spanish);
- fighting practices which may facilitate collusion;
- increasing the use of competitive mechanisms;
- improving the quality and use of market studies;
- upgrading monitoring and information-sharing activities;

- examining whether budget processes and timelines are undermining effective procurement procedures;
- enhancing training activities; and,
- establishing a coordination and oversight body for more effective procurement.

Each of the recommendations in Chapter 5 and Chapter 6 is linked to one or more sections of the Design Checklist and the Detection Checklist, which are found in the OECD's Guidelines for Fighting Bid Rigging.

Fighting bid rigging is a key priority for GEM in Mexico as it is for public agencies and buyers around the world. Reducing the risk of collusion saves money which can be used to satisfy other needs, fosters innovation and enhances a country's competitiveness. GEM is to be commended for its initiatives and efforts in this area. The OECD is confident that this Analytical Report will promote more competition in GEM's procurement and will allow GEM to obtain better "value for money" from its purchases, to the benefit of its residents and taxpayers.

CHAPTER 1: INTRODUCTION

1.1 Background

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 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 GEM’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). Pursuant to the Agreement, GEM committed to adopt and implement in its institutional policy the recommendations of the Analytical Report deemed to be applicable.

The OECD, in turn, committed to support the process of the implementation of the OECD Guidelines by GEM through:

- a) providing capacity building for GEM officials regarding the design of public procurement to reduce the risks of bid rigging and enhance the identification of bid rigging practices;
- b) preparing an Analytical Report assessing the extent to which current public procurement legislation, regulation and practices governing GEM procurement are consistent with the OECD Guidelines; and,
- c) determining whether there are areas of opportunity for improvement in procurement legislation and regulation and in the practices at GEM in accordance with the OECD Guidelines.

The Agreement with GEM was the second similar agreement signed 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' goals were to obtain OECD support for the adoption of international best practices for fighting bid rigging and to have the OECD conduct a broad review of the integrity of IMSS' procurement processes. The OECD's report to IMSS was completed in December 2011.¹ The GEM and IMSS agreements are two initiatives in support of 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 2010.²

In December 2011 the OECD Secretariat – together with staff from the CFC – organised a training course for over 120 procurement officials from the State of Mexico and from some of the 125 municipalities within the State. The training was conducted by officials from the CFC and the OECD and by international experts. 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 actual bid rigging cases from Mexico and around the world and with the opportunity to put the concepts and knowledge into practice with hypothetical cases.

This Analytical Report has been prepared by the Competition Division of the OECD Secretariat and is based on an in-depth review of the legal framework for public procurement in the State of Mexico as well as on information gathered during a large number of meetings with State of Mexico procurement officials, the CFC, the federal Secretariat of Public Administration (*Secretaría de la Función Pública*, SFP in Spanish) and the State of Mexico Municipal Institute for Fiscal Coordination (*Instituto Hacendario del Estado de México*, IHAEM in Spanish).

¹ Fighting Bid Rigging in Public Procurement in Mexico, A Secretariat report on IMSS' procurement regulations and practices, 2011 (hereinafter the IMSS Report).

² 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.

In fulfilment of points b) and c) of the list above, this Analytical Report includes a review of the current public procurement legislation and regulations in Mexico, at both the State and federal levels, as well as 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 GEM to be more effective in preventing and fighting collusion. The Report also includes a set of recommendations to GEM regarding improvements that could be made to its 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 the State of Mexico and outlines how much and how it buys. Chapter 3 then sets out the current legal framework governing public procurement in the State of Mexico. Chapter 4 describes the key legal provisions, at the federal and State levels, and the policies and guidelines which are applicable to GEM's procurement activities.

The areas for improvement in the current procurement laws and regulations and the OECD's recommendations regarding GEM's procurement policies and procedures are presented in Chapters 5 and 6, respectively.

1.2 The OECD Competition Committee's Guidelines for Fighting Bid Rigging in Public Procurement

Approved by the OECD's Competition Committee in 2009, the OECD Guidelines for Fighting Bid Rigging in Public Procurement³ are non-binding guidance which reflects international best practices in respect of fighting bid rigging in public procurement.

In particular, 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.

³ Available at: <http://www.oecd.org/dataoecd/27/19/42851044.pdf> - see Annex 7.

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

- being informed before starting a tender procedure (e.g. 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 and 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);
- 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).

This 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 discussing concerns about bid rigging 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, who else was present and what precisely occurred or was said;
- contact the local competition authority; and,
- after consulting with internal legal staff, consider whether it is appropriate to proceed with the tender process.

1.3 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 bought 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.

Bid rigging can take various forms. For example, bidders can agree to submit courtesy or phony bids which are higher than the bid of the designated winner (or bids which do not meet all the technical requirements), thereby creating 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 letting the designated winner take the contract.

In addition, 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, thus dividing or allocating the market amongst themselves.

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 of the mechanisms have in common, however, is that buyers end up paying higher prices for their purchases or buying goods of lower quality than when bid rigging does not occur. Table 1, which summarises six economic surveys about cartel overcharges, suggests that the presence of a collusive agreement can increase prices by over 30 percent, compared to a competitive benchmark with no collusion.

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 at p. 1113.

No country is immune from these illegal practices. Apart from taking resources away from procurers (and ultimately taxpayers in the case of public procurement), these practices can discourage entry by rivals, diminish public confidence in competitive procurement processes and undermine the benefits of a competitive marketplace.

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). Even before criminal penalties for bid rigging were introduced in Mexico, the CFC was investigating and punishing this offence. As summarised in Box 1 below, the CFC has tackled bid-rigging practices in four different cases, with the most recent fine being imposed in 2010 in the pharmaceutical case. The fines against two of the companies in that case were recently upheld by the Federal Judicial Power (*Poder Judicial de la Federación*, PJF in Spanish) in December 2011.⁴

⁴ See opinion R.A 253/2011 of the Fourth Tribunal of the First Circuit on Administrative Matters.

Box 1: Collusion in public procurement in Mexico punished by the CFC

In 2006, the CFC initiated an investigation into possible bid-rigging practices which might have been occurring in tenders organised by IMSS. In particular, the CFC focused on tenders between 2003 and 2006 to procure two pharmaceutical products, humane insulin and saline solutions.

The CFC's investigation revealed that a number of firms coordinated their behaviour at the time of bidding for contracts put out to tender by IMSS by submitting identical bids and allocating contracts among themselves. These practices effectively removed rivalry among the bidders and resulted in higher prices for IMSS, to the detriment of IMSS' beneficiaries and taxpayers in general. IMSS cooperated with the CFC during the investigation by providing access to its database of tenders as well as other assistance.

As a result of the CFC's investigation, six pharmaceutical companies (as well as several individuals who had acted on behalf of the companies) were fined in January 2010 for a total of MXN 151.7m, the maximum amount allowed by the competition law applicable at the time in Mexico. The various parties appealed to the Federal Judicial Power. On 8 December 2011 the PJF upheld the fines levied against two of the companies and one individual.⁵ Decisions involving the remaining parties are expected later in 2012.

The CFC had also tackled collusion in tenders conducted by IMSS and other public-sector entities in previous years. In particular, the CFC imposed fines in the following sectors (in parentheses the year in which the fine was imposed and the total amount of the fine):

- Surgical sutures (2000; MXN 400,072);
- Radiographic material (2001; MXN 15,959,000); and,
- Chemicals to process X-ray films (2002; MXN 8,430,000).

IMSS also assisted the CFC in these cases by providing relevant information.

Given the amendments in May 2011 that provided the CFC with the power to conduct surprise on-site searches, and the positive PJF decision in December 2011, the CFC is likely to step up its investigations of collusive activity in Mexico.

Prior to the signing of the Inter-Institutional Agreement with the OECD and the CFC in October 2011, GEM had already begun to undertake initiatives

⁵ See footnote 4.

in order to purchase more effectively. As noted in the Inter-Institutional Agreement, GEM's efforts have had a special emphasis on the implementation of a transparent procurement system.⁶ As well, GEM has achieved cost savings by centralising its purchases of many goods and services rather than having individual secretariats and agencies buying separately.⁷ Furthermore, following changes to the procurement law in the State of Mexico in September 2010, the State of Mexico intends to implement the use of innovative auction formats (e.g. reverse auctions) in order to achieve better tender results.

GEM made a decision to increase its efforts to improve its procurement practices and to detect and combat bid rigging in its procurement activities. With the Inter-Institutional Agreement of October 2011, GEM committed to adopt and implement in its institutional policy applicable recommendations emanating from this Analytical Report (those outlined in Chapter 6) and to coordinate the logistics associated with training sessions for its procurement officials. As noted above, those training sessions occurred in December 2011.

These steps – together with the areas for improvement in the procurement laws and regulations presented in Chapter 5 – will promote competition in public procurement and enable GEM to obtain better “value for money” from its purchases, to the benefit of the State's procurement groups and ultimately the taxpayers of the State of Mexico.

The goal of public procurement groups 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. As well, procurement officials need to be 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 and

⁶ Book XIII of GEM's Administrative Code (Title X of Book I) was amended in September 2010 to regulate the participation of “Social Witnesses” in public tenders as a mechanism for improving social participation and increasing transparency – see also footnote 56.

⁷ GEM's Administrative Code establishes an Annual Plan for Consolidated Purchases for all of the public entities within the Central Sector of the State of Mexico.

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 public procurement groups and their governments in putting in place appropriate legal frameworks and suitable and effective procurement policies and practices, and providing the necessary training to professional and honest procurement officials. In this way, public procurement authorities will achieve value for money to the benefit of the jurisdiction's taxpayers.

This Analytical Report is the OECD Secretariat's contribution to help make the State of Mexico a more efficient, effective and informed organisation with respect to an extremely important facet of public endeavour, procurement.

CHAPTER 2: THE STATE OF MEXICO

The State of Mexico (GEM) is one of 31 states that, along with the Federal District (*Distrito Federal*), comprise the United Mexican States (Mexico). Although it is only the twenty-fifth largest state area-wise, it is the most populated Mexican state with a population in 2010 of just over 15 million or about 13 percent of the country's total population.⁸ The State surrounds the Federal District and is bordered by seven states. The State of Mexico is divided into 125 municipalities, which are grouped into seven fiscal regions. The State's capital city is Toluca de Lerdo and its largest city is Ecatepec de Morelos.

The State of Mexico's GDP in 2010 was 1,172.5 billion pesos⁹, which represented 9.2 percent of the country's Gross National Product. GEM's industrial output is the second largest among the Mexican states. Its most important industries are chemicals, food products, metal works, paper products, textiles and vehicle manufacturing. Agriculture, financial services and tourism are also important sectors of the State's economy.

As described in Chapters 3 and 4, public procurement in GEM is governed by both federal and state laws and regulations. As well, the municipalities in the State have additional practices and procedures in place. There are 21 Secretariats in GEM that engage in public procurement activities and beneath these Secretariats are 94 auxiliary organisations (*organismos auxiliares*) also involved in procurement. This makes for a complex procurement environment.

GEM is the largest of Mexico's 31 states in terms of the volume of goods and services purchased¹⁰ and is one of the largest public-sector purchasers of goods and services in the entire country, surpassed by such organisations as the

⁸ "Estrategias de financiamiento en los Estados y Municipios"- *Experiencia del Estado de México*, Latin Finance, 7^a Cumbre Financiera Mexicana, February 2012.

⁹ *Plan de Desarrollo 2011-2017*.

¹⁰ *Competencia en las compras públicas: Evaluación de la calidad de la normatividad estatal en México*, 2011, www.imco.org.

state-owned oil and electricity companies (PEMEX and CFE, respectively), IMSS and the Federal District.¹¹ In 2010, GEM purchased goods and services and public works valued at just over MXN 49,326 millions (49.3 billion pesos), which constitutes approximately 23 per cent of the State's public spending.¹² The largest State procurement groups are the Secretariat of Water and Public Works (*Secretaria Agua y Obra Publica*, SAOP, in Spanish), CAEM (*Comisión del Agua del Estado de México*) and the institutes for health (*Instituto de Salud del Estado de México*- ISEM, in Spanish) and for social security (*Instituto de Seguridad Social del Estado de México y Municipios*- ISSEMYM, in Spanish) although ISEM's purchases are almost exclusively made with federal funds for which they are subject to federal laws and regulations. The Secretariat of Social Development (*Secretaría de Desarrollo Social*) is another large GEM procurement group but its largest yearly purchase, almost 300 million pesos spent in 2011 on food baskets for the needy, was sourced from a federal government company known as Diconsa.¹³

Table 2 below outlines the value of goods and services, in pesos, purchased by GEM over the period from 2004 to 2010 while Table 3 does the same for the commissioning of public works.

Table 2

	Goods and Services	% of Public Spending
2004	6,277,140,000	6.4
2005	7,818,612,000	7.1
2006	6,982,719,000	5.3
2007	8,123,380,000	5.7
2008	9,364,141,000	5.1
2009	11,632,907,000	6.2
2010	15,539,114,000	7.0

Sources: *Cuenta Pública del Gobierno y Organismos Auxiliares del Estado de México*, for the years 2004 to 2010.

¹¹ *Perspectivas OCDE: México Reformas para el Cambio, OCDE 2012.*

¹² *Cuenta Pública del Gobierno y Organismos Auxiliares del Estado de México 2010.*

¹³ Information provided by the Secretariat of Social Development in the State of México in March 2012. Diconsa is the parastatal food corporation which is part of the federal Secretariat of Social Development.

Table 3

	Public Works	% of Public Spending
2004	5,810,817,000	5.9
2005	8,278,745,000	7.5
2006	12,400,969,000	9.4
2007	16,807,879,000	11.8
2008	34,179,123,000	18.4
2009	29,312,883,000	15.7
2010	33,786,712,000	15.3

Sources: *Cuenta Pública del Gobierno y Organismos Auxiliares del Estado de México*, for the years 2004 to 2010.

Tables 4 and 5 summarise 2011 data regarding the types of procurement procedures undertaken and the number and value of the contracts for the General Directorate of Material Resources (*Dirección General de Recursos Materiales*, DGRM in Spanish, which is responsible for undertaking all of the consolidated purchases on behalf of GEM's secretariats and auxiliary organisations) and the Secretary of Social Development, respectively.

Table 4

National Public Tenders	Invitations to at least three suppliers	Direct Awards
42	41	83
Mxn	Mxn	Mxn
1,555,413,064.68	335,545,704.16	504,307,437.63

Table 5

National Public Tenders	Invitations to at least three suppliers	Direct Awards
1	7	12
MXN	MXN	Mxn
1,385,618.80	11,202,106.76	17,128,606.15

Each year GEM makes requests to the federal government for funds in support of State and municipal projects involving sixteen (16) sectors such as agriculture, culture, education, communications and transportation. The federal government approves a portion of the requests in its annual budget (*Presupuesto de Egresos Federal*), which is ratified in late December. For the 2012 budget year, GEM requested 32,631.4 million pesos in federal funding but only 9,873.5

million pesos was approved. This is a 12.2 percent increase over the approved level of federal funding for 2011.¹⁴

Evaluation of the Procurement Laws in Mexico by the Mexican Institute For Competitiveness

In September 2011, the Mexican Institute for Competitiveness (*Instituto Mexicano para la Competitividad*, IMCO in Spanish) released a report concerning the results of its evaluation of the procurement laws of Mexico's 31 states and the Federal District with regard to the promotion of competition in the public procurement of goods and services.¹⁵ The methodology for the study was established in collaboration with the CFC and the OECD. Forty-one (41) indicators were examined with respect to three categories: the pre-tender process (barriers to entry); during the tender process; and, after the tender process (control system and audit). Values were assigned for each state for each indicator: 100, if the legislation satisfied the indicator; 50, if the legislation partially satisfied the indicator; and, 0, if the legislation did not satisfy the indicator. GEM received the fourth highest score along with the states of Hidalgo and Oaxaca. Only the Federal District and the states of Sinaloa and Baja California recorded higher scores. However, it should be noted that GEM's score was only 54.9 out of 100.

GEM is fortunate to have established an organisation which assists its municipalities in many areas related to fiscal responsibility, including the subject of public procurement. The organisation, the Municipal Institute for Fiscal Coordination (*Instituto Hacendario del Estado de México- IHAEM* in Spanish), has been in existence in several forms since 1980. It receives 50 percent of its funding from GEM and 50 percent from the State's 125 municipalities. The funding from the municipalities is based on population and budget size. Part of IHAEM's work relates to training and capacity building. IHAEM assisted GEM and the OECD in organising and hosting the bid rigging and procurement training sessions described in Chapter 1. IHAEM trains approximately 10,000 municipal employees each year with respect to 37 subjects, including procurement, fiscal coordination, public services, municipal regulations, etc.

¹⁴ "Presupuesto de Egresos de la Federación y su impacto en el Estado de México", Secretaría de Finanzas, Estado de México, Enero 2012.

¹⁵ *Competencia en las compras públicas: Evaluación de la calidad normativa estatal en México*, September 2011- see at: [http://imco.org.mx/images/pdf/COMPRAS_PUBLICAS_Prensa_\(final\).pdf](http://imco.org.mx/images/pdf/COMPRAS_PUBLICAS_Prensa_(final).pdf)

As will be seen in Chapter 6, the OECD is recommending an enhanced role for IHAEM with respect to training and information sharing regarding effective procurement practices and the fight against bid rigging in public procurement undertaken by the State of Mexico and its municipalities.

**CHAPTER 3:
OVERVIEW OF THE EXISTING LEGAL FRAMEWORK
GOVERNING PUBLIC PROCUREMENT IN THE STATE OF MEXICO**

Depending upon the circumstances, public procurement undertaken in the State of Mexico can be subject to federal legislation and regulations or state legislation and regulations or a combination thereof. In any analysis of the legal framework of public procurement in the State of Mexico, it is essential to take into account that, by virtue of the “*supremacy clause*” of the Political Constitution of the United Mexican States, Article 133, the Constitution is the highest level in Mexico’s legal hierarchy followed by the laws in pursuance thereof and any international treaties entered into by the country. The “supremacy clause” assures that the Constitution and federal laws and treaties take precedence over state laws and requires that the judiciary adhere to that principle in the courts.

3.1 Federal regulation of public procurement

Article 134 of the Political Constitution of the United Mexican States establishes the framework for administering public resources and sets out the general requirements for public procurement. In general, Article 134 establishes 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.

Public procurement in the State of Mexico is regulated by federal, state and local laws but federal law applies whenever state or municipal secretariats or agencies finance projects using federal resources from, among other sources, SUBSEMUM (Subsidy for Public Security), PIBAI (Program for the Improvement of the Basic Infrastructure in Indigenous Communities), INEA (Program for the Support of Adult Education) and PRONABES (Program for the Support of Scholarships).¹⁶ In such cases, one of the following federal

¹⁶ In Spanish: *Otorgamiento de Subsidios en Materia de Seguridad Pública a Entidades Federativas, Municipios y el Distrito Federal* (SUBSEMUM);

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.¹⁷ The Procurement Act and the Public Works Act have been amended a number of times, the latest revisions occurring in January 2012.

The Secretariat of Public Administration (SFP) is responsible for issuing detailed provisions to implement the Procurement Act and the Public Works Act.¹⁸ In that regard, during the period from September 2010 to July 2011, the SFP issued five Decrees¹⁹ regarding the following public procurement matters: 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

Programa de Infraestructura Básica para la Atención de los Pueblos Indígenas (PIBAI); Atención a la Demanda de Educación para Adultos (INEA); and, Programa Nacional de Becas y Financiamiento (PRONABES). The complete list of programs available to the State of Mexico was provided to the OECD Secretariat by the section within SFP responsible for improving Federal and State government relationships.

¹⁷ The full titles of these acts 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 Federal de Asociaciones Público Privadas (PPPA).*

¹⁸ See the penultimate paragraph of Article 1 of both LAASSP and LOPSRM, Article 7 of LAASSP and Article 8 of LOPSRM.

¹⁹ 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.*

public works; and, the rules for the utilisation of the electronic system of government procurement information known as COMPRANET²⁰.

The provisions in these Decrees provide additional guidance/requirements to public procurement groups regarding:

- **the issuance of the policies and guidelines**²¹ - when funding state projects with federal resources, State of Mexico procurement groups must observe the procurement policies, bases and guidelines (POBALINES) of the federal agency providing the financial resources to the state agency. 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.

²⁰ COMPRANET is the electronic system for disseminating information regarding government procurement activity in Mexico for the different stages of the procurement processes. The SFP is 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.

²¹ 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.

- **the application of the evaluation criteria for awarding a contract-** the Procurement Act allows for two methods of evaluation: the points-based criterion or cost benefit; and, the binary criterion. The Public Works Act only considers 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. It considers factors in addition to price and assigns a value to every factor to determine the most qualified bid (tenders are graded higher the more they satisfy the technical/innovative requirements in the call for tender). The binary criterion awards the contract to the supplier that 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 in the market.
- **reductions in the amount of the financial guarantee-** suppliers must guarantee the satisfactory performance of their contracts.²² Public agencies can reduce the amount of the financial guarantee based on the track record of the supplier's performance.²³
- **the use of reverse auctions-** the use of reverse auctions²⁴ 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.²⁵

²² Article 48 of both the Procurement Act and the Public Works Act.

²³ Third Provision of SFP's Guidelines on the reduction of financial guarantees by suppliers, September 9, 2010.

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

²⁴ 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 subsections 4.1.9 and 4.1.10.

²⁵ Third Provision of the Guidelines for the use of reverse auctions, September 9, 2010.

- **prompt payments to suppliers**- public agencies are required to pay suppliers no later than 30 calendar days after receiving the goods and services.²⁶

3.2 Free-trade agreements

In addition to the federal laws governing procurement, Mexico has signed a number of free-trade agreements with other countries which affect public procurement in the State of Mexico. 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.²⁷

Article 2.10 of the Rules for carrying out international public tenders under free-trade agreements, lists the following free-trade agreements signed by the Government of Mexico, which contain a chapter specifically related to public procurement:

- North America Free Trade Agreement, NAFTA, Chapter X;
- Mexico-Colombia Free Trade Agreement, Chapter XV;
- Mexico-Costa Rica Free Trade Agreement, Chapter XII;
- Mexico-Nicaragua Free Trade Agreement, Chapter X;
- Mexico-Israel Free Trade Agreement, Chapter VI;
- Mexico-European Community, Economic Association and Cooperation Agreement, Title III;
- Mexico-European Association Free Trade Agreement, Chapter V;
- Mexico-Japan Free Trade Promotion Agreement, Chapter 11; and,

²⁶ Article 51 of the Procurement Act and the Third Provision of the Guidelines on the Promptness of Payments to Suppliers – in Spanish, *Lineamientos para Promover la Agilización del Pago a Proveedores*, September 9, 2010.

²⁷ 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.

i) Mexico-Chile Free Trade Agreement, Chapter 15 Bis.

One goal of these free-trade agreements was to open up Mexican public procurement at all levels to imports by reducing trade barriers. The chapters regarding government procurement within the free-trade agreements do not specifically mention Mexico's 31 states and the Federal District. However, the agreements contain provisions for further negotiations in which the Parties were to seek to expand the coverage of the government procurement chapters by adding other governmental agencies.

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.²⁸ Consequently, states are required to observe free-trade agreements when funding projects with federal resources.²⁹

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 really can comply with the conditions of participation and is capable of fulfilling the terms of the contract.³⁰

²⁸ 2ª. LXXXIII/2007, Amparo en Revisión 120/2002, McCain Mexico, S.A de C.V.

²⁹ When carrying out public tenders state and municipal governments have to consider the threshold values for public procurement set forth in the free-trade agreements.

³⁰ In subsection 4.3.1, it is noted that, under the federal Procurement Act, if a public procurement agency receives a tender submission that is lower than the "convenient price", the tender should not be accepted.

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

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.³¹

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 State regulation of public procurement

Article 129 of the Political Constitution of the State of Mexico mandates that the public procurement of goods and services, as well the commissioning of public work, shall be carried out by public tenders in which interested suppliers shall submit sealed-bid offers that will be opened publicly. Article 129 also states that contracting authorities shall reward the use of information technologies and ensure the best terms regarding price, quality and financial conditions to the State of Mexico and its municipalities. As well, this Article declares that State and municipal officials shall observe the principles of efficiency, honesty and integrity in managing public resources. Finally, Article 129 stipulates that the implementing regulations shall establish the specific conditions for considering alternative procedures to public tenders.

The State laws covering public procurement in the State of Mexico are:

³¹ 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.

1. Book XII of the Administrative Code, and its implementing regulations, covering the commissioning of public works;
2. Book XIII of the Administrative Code, and its implementing regulations, covering the procurement of goods and services; and,
3. Book XVI of the Administrative Code, and its implementing regulations, covering procurement by public-private partnerships.

There are other administrative rules and regulations that public agencies and autonomous organisations in the State of Mexico have to observe, which are described in some detail below.

3.3.1 Rules and regulations regarding the procurement of goods and services

In August 2011, GEM's Secretariat of Finance (*Secretaría de Finanzas*) issued its General Manual³² that provides a description of the organisation and functions of each directorate within the Secretariat. The Secretariat of Finance through the Procurement Division, underneath the General Directorate for Material Resources (*Dirección General de Recursos Materiales*, DGRM in Spanish)³³ is in charge of administering and executing the plans for consolidated purchases for all of the public agencies and auxiliary organizations in the Central Sector Government of the State of Mexico.³⁴ The Procurement Division is supported by the Central Committee, a market analysis unit, a tenders unit and a surveillance of contracts unit. The General Manual describes the functions of these units at each stage of the procurement process.

³² In Spanish, *Manual General de Organización de la Secretaría de Finanzas*, dated August 29, 2011.

³³ Pursuant to Article 32, Subparts VII and XIV of the Internal Regulations of the Secretariat of Finance, dated July 5, 2006, the functions of the General Directorate for Material Resources include:

- a) providing advice in procurement matters, when required, to public agencies, auxiliary organisations, administrative tribunals, municipalities, and the judicial and legislative branches (these last two entities are not part of the Central Sector Government); and,
- b) signing coordination agreements with public agencies, auxiliary organisations, administrative tribunals, municipalities, decentralised organisations, and the judicial and legislative branches in order to include their purchases in the annual plan of consolidated purchases.

³⁴ Part 20342200 of the General Manual.

Article 13.19 of Book XIII of the Administrative Code defines consolidated purchases as the joint procedure for the procurement of goods and services, which are highly demanded and commonly used by several agencies,³⁵ with the purpose of obtaining the best terms in respect of price, quality and financial opportunities. Every state agency belonging to the Central Sector Government is required to submit its request for goods and services to the DGRM so that it can be included in the Annual Plan of Procurement. The DGRM is assisted by the Central Committee during the consolidated purchases plan process- Article 13.22 of Book XIII of the Administrative Code. The Central Committee's other functions include: the approval of the alternate procedures to public tenders (such as invitations to at least three suppliers and direct awards); the evaluation of bid proposals submitted during tender processes; the implementation of actions tending to improve the consolidated purchases system; requests for technical information made to trade associations; and, the approval of subcontracting in the provision of goods and services.³⁶

Each state agency and administrative tribunal is also responsible for preparing an annual procurement plan for the purchase of goods and services that are not part of the consolidated purchases plan³⁷ and for establishing a procurement committee in charge of, among other matters:

- approving any alternate procedures to public tenders;
- dealing with procurement procedures; and,
- issuing the awarding resolution.³⁸

The procurement committees establish operational manuals to be followed by their respective state procurement group. The procurement committees are comprised of one representative from each of the following units: the

³⁵ Article 14 of the implementing regulations to Book XIII of the Administrative Code refers to the following goods and services: cleaning; security; photocopying; transportation; insurance; telephone and radio communication services; gasoline; motor oils; vehicles; event materials; aircraft; computer equipment; and, construction materials.

³⁶ Article 54 of the implementing regulations to Book XIII of the Administrative Code and Article 3 of the Acquisitions Central Committee Operational Manual for the Central Sector of the Government of the State of Mexico, May 18, 2006.

³⁷ Article 13.10, Subpart V of Book XIII of the Administrative Code.

³⁸ Article 13.13 of Book XIII of the Administrative Code.

procurement group; legal; finance; and the Secretariat of the Comptroller. The decentralized organisations in the State of Mexico³⁹ usually issue bylaws for the organisation of their procurement committees in place of manuals, but they essentially cover the same matters.

There are also procedural manuals for the procurement departments of the Local Assembly⁴⁰ and the Judicial Branch.⁴¹ These organisations are two of the three branches of power in the State of Mexico with the Executive Branch representing the third branch.

In planning and executing their procurement plans, GEM's public agencies, auxiliary organisations and administrative tribunals are also required to observe administrative rules for the use and assignment of goods and services, which describe the internal procedures that every agency has to follow with respect to the consolidated purchases plan or purchases made directly by the agency.⁴² For example, the Administrative Rules state, among other things, that: the value of all contracts issued by direct award shall not exceed 30 percent of the maximum authorised budget; suppliers have to be registered in the catalogue of suppliers administered by the DGRM; and, the State procurement group must obtain at least three quotations in order to determine the best conditions in terms of price and quality.⁴³

Article 42 of the State Budget Plan for 2012 sets out the current threshold values for the procurement of goods and services utilising direct awards and invitations to at least three suppliers- see Annex 1.

³⁹ For instance, the State Commission for the Protection of Human Rights, electoral institutions and some universities.

⁴⁰ In Spanish, *Manual de Procedimientos del Departamento de Adquisiciones*, Gazette of the Government of the State of Mexico, February 12, 2008. Its annual budget for 2011 was .88 percent of the total State of Mexico Budget.

⁴¹ *Manual General de Organización y Procedimientos Administrativos del Poder Judicial del Estado de México*, issued by the Judicial Council on August 2, 2006. Its annual budget for 2011 was 1.62 percent of the total State of Mexico Budget.

⁴² Administrative rules for the use and assignment of goods and services for public agencies and auxiliary organizations in the State of Mexico, in Spanish, *Normas Administrativas para la Asignación y uso de bienes y servicios de las dependencias y organismos auxiliares del Poder Ejecutivo Estatal*, dated February 24, 2005 (hereinafter GEM's Administrative Rules).

⁴³ Part ACP088-ACP096 of GEM's Administrative Rules.

3.3.2 Commissioning of public works

The Secretariat of Water and Public Works (*Secretaría de Agua y Obra Pública*, in Spanish, SAOP) is in charge of administering the commissioning of public works for the public agencies within the government's Central Sector, as well as for municipalities in the State of Mexico. SAOP has an Organisational Manual⁴⁴ which outlines the rules and procedures regarding the commissioning of public works. Some Secretariats have autonomous and decentralized organisations— for instance ISEM, CAEM and IMIFE⁴⁵ under the Secretariat of Health, the Secretariat of Water and Public Works and the Secretariat of Education, respectively— so that in the planning and administration of their public works they observe their own rules.

GEM's public agencies and municipalities can undertake public works in two ways- by direct administration (when the agency is directly involved with the administration of the project) or indirect administration (when the project is administered by SAOP). The direct administration of public works occurs when the agency or municipality has the machinery, equipment and staff for planning, programming and carrying out the tenders as well as for the supervision and execution of the public works. The direct administration mode of public works projects has to, however, be approved by SAOP. To that end, SAOP issued Guidelines regarding the authorisation of the execution of public works by public agencies under the direct administration mode.⁴⁶

When financing public works with State resources, GEM secretariats, agencies and municipalities must develop an annual program of public works and submit the program to SAOP, which are then registered in the Public Works Register.⁴⁷ In order to enter into contracts for public works, secretariats, agencies and municipalities must receive authorisation from the Secretariat of

⁴⁴ In Spanish, *Manual General de Organización de la Secretaría del Agua y Obra Pública*, dated July 31, 2008.

⁴⁵ In Spanish, *Instituto de Salud del Estado de México (ISEM)*, *Comisión del Agua del Estado de México (CAEM)* and *Instituto Mexiquense de la Infraestructura Física Educativa (IMIFE)*.

⁴⁶ In Spanish, *Lineamientos para la aplicación del artículo 12.8 del Código Administrativo del Estado de México, relativo al Libro Décimo Segundo de la Obra Pública, referentes a la autorización del ejecución de obra públicas por contrato o por administración directa*, Gazette of the Government of the State of Mexico, February 25, 2011.

⁴⁷ Articles 11 and 12 of the implementing regulations to Book XII of the Administrative Code.

Finance for the budget to be spent on the project.⁴⁸ Depending on the value of a public works project, the contracting group may need to establish an Internal Committee for Public Works, which will be in charge of reviewing the public works program, approving any alternative procedures to public tenders and approving the procedural manual.⁴⁹

Contractors wishing to participate in direct awards and invitations to at least three suppliers must be registered in the official register managed by SAOP.⁵⁰ Guidelines under Book XII of the Administrative Code outline the requirements and documentation for being approved in the official register: general information of the incorporation; documentation proving experience in the particular field; documentation proving technical and financial capacity; and, a copy of certification issued by the construction industry association in the State of Mexico.⁵¹

3.3.3 Use of “social witnesses”

GEM’s various procurement groups are required, in certain circumstances, to use a social witness (*testigo social*, in Spanish) in a procurement procedure.⁵² Article 1.42 of the State of Mexico’s Administrative Code notes that utilising 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.

⁴⁸ Article 12.18 of the Book XII of the Administrative Code.

⁴⁹ Article 12.19 of the Book XII of the Administrative Code and Article 23 of the implementing regulations to the Book XII of the Administrative Code.

⁵⁰ Article 71 of the implementing regulations to Book XII of the Administrative Code.

⁵¹ In Spanish, *Lineamientos para la aplicación del artículo 73 del Reglamento del Libro Décimo Segundo del Código Administrativo del Estado de México, referente a los requisitos necesarios para ingresar al registro del catálogo de contratistas, con respecto a las fracciones VIII y IX*, Gazette of the Government of the State of Mexico, March 19, 2004.

⁵² The Executive Power issued a decree regarding the participation of social witnesses in procurement procedures for the Central Sector Government of the State of Mexico (*Acuerdo del Ejecutivo del Estado que Establece la Participación de Testigos Sociales en las Contrataciones que realicen las Dependencias y Organismos Auxiliares de la Administración Pública Estatal*), April 21, 2008.

Any individual and legal entity may apply to become a social witness for any procurement procedure carried out by the State's secretariats, agencies, municipalities, auxiliary organisations and administrative tribunals.⁵³ Social witnesses participate in all stages of the procurement process and issue a written report to the Secretariat of the Comptroller at the conclusion of the process.⁵⁴ The written statements are published on the website of the agency involved in the tender. A social witness is required to inform the Secretariat of the Comptroller about any irregularity seen during a procurement procedure.⁵⁵ In general, the Administrative Code provides for active participation of social witnesses in the procurement process in the sense that they are allowed to propose recommendations to: improve transparency and fairness; obtain better quality and prices; and, promote efficiency and efficacy in the procurement procedures.⁵⁶

The Autonomous University of the State of Mexico, together with the Freedom of Information and Transparency Institute for the State and Municipalities⁵⁷, act as the Social Witness Register Committee and administer the registry of social witnesses. The requirements for being a social witness include: official identification; a résumé and documentation proving professional and academic experience; an affidavit stating that the participant does not have any criminal record, is not an active public servant and that, if a conflict of interest should arise, the participant will not participate as social witness in the process; and, certification of attendance at a training session given by the Social Witness Register Committee.⁵⁸ The Committee evaluates the applications submitted by interested parties and decides whether to select an applicant to be a social witness. The Committee is also in charge of setting the salaries for social witnesses.

⁵³ On May 2008, the State of Mexico, through the Secretariat of Finance, signed an agreement with *Transparencia Mexicana* to enable that firm to provide social witnesses for State of Mexico tender procedures.

⁵⁴ Article 1.47 of the Administrative Code.

⁵⁵ At the municipal level social witnesses are to submit an irregularity report to the Internal Control Unit.

⁵⁶ Articles 1.56 and 1.58 of the Administrative Code.

⁵⁷ In Spanish, *Universidad Autónoma del Estado de México* and *el Instituto de Transparencia y Acceso a la Información Pública del Estado de México y Municipios*.

⁵⁸ Article 1.50 of the Administrative Code.

3.4 Municipal regulation of public procurement

Based on Article 115 of the Federal Constitution, the Organisational Municipal Act (*Ley Orgánica Municipal*) states that the procurement of goods and services and the commissioning of public works by municipal governments are subject to state law.⁵⁹

According to Article 13.10 of GEM's Administrative Code, each municipality shall establish its annual procurement plan based on its municipal development plan. Since municipalities must observe State law in planning, programming and executing their procurement plans, municipalities have procurement committees.⁶⁰ At the present time, the State of Mexico's municipalities do not participate in the program of consolidated purchases for the Central Sector Government because of their autonomy- see, however, recommendation 6.1.

As noted earlier in this Chapter, municipalities that execute public works with State financial resources have to obtain authorisation from SAOP. They must also submit their plans for executing public works to SAOP, regardless of the source of the funding.⁶¹ Furthermore, Article 87 of the Organisational Municipal Act states that each municipal government (*ayuntamiento*) must have within their administrative organisation a Division of Public Works in charge of programming, coordinating and executing the municipal public works plan.

The Organisational Municipal Act allows municipalities to engage with other municipalities or even with State and federal agencies to contract for the execution of public works. Prior authorisation of the Local Assembly is required when the construction period is to last more than three years.⁶²

The Internal Control Unit is in charge of auditing the public accounts of municipalities and monitoring the contract fulfilment.⁶³ The State Secretariat of

⁵⁹ Article 38 of the Organisational Municipal Act. The Federal Constitution, however, grants autonomy to municipalities in the administration of their budgets.

⁶⁰ The municipal procurement committees have essentially the same functions as the state procurement committees.

⁶¹ Article 12.8 of the Book XII of the Administrative Code.

⁶² Articles 5 and 31, Subpart VII of the Organisational Municipal Act.

⁶³ Article 112, Subpart VII of the Organisational Municipal Act.

the Comptroller audits and reviews the municipal accounts, if federal and state resources are involved.

Article 31 of the Organisational Municipal Act gives municipalities the authority to issue administrative rules/municipal ordinances (*Bandos Municipales*) for the internal organisation of the municipality and for the provision of public services (water, sewerage, street lighting, public safety, the supervision of slaughterhouses and cemeteries, and the maintenance of public parks). The *Bandos Municipales* describe the administrative functions of the *ayuntamientos* with regard to public procurement issues such as: the execution and supervision of public works previously approved by SAOP; carrying out technical and environmental studies; drafting contracts; assessing the level of fulfilment of contracts; and, improving the level of social participation (use of social witnesses) in procurement procedures.

Finally, some municipalities in the State of Mexico have passed specific bylaws regarding public procurement, which usually describe the functions of the units that are involved with the procurement of goods and services and the commissioning of public works: the organisation of the municipal procurement and public works committees; the functions of the trustees, i.e. the approval of the request for goods and services; and, the functions of the Directorate for Urban Planning and Public Works- the execution of public works in accordance with the annual municipal development plan, the promotion of social witness participation in public tender procedures, and the supervision of the public works.⁶⁴

⁶⁴ For example, Article 3.28 of the Municipality of Toluca bylaws, Municipal Gazette, June 8, 2011.

CHAPTER 4: DESCRIPTION OF THE PROCUREMENT PROCESS APPLICABLE TO THE STATE OF MEXICO

This Chapter describes in detail the main provisions of the state and federal laws that govern the processes by which the State of Mexico procures goods and services, contracts for public works and conducts procurement under public-private partnerships. As noted in Chapter 2, in 2010 the procurement of goods and services in the State of Mexico amounted to 7 percent of the State's public spending while expenditures on public works represented 15.3 percent.⁶⁵

The information in this Chapter is organised in four sections: 1) the pre-tender evaluation and tender design phase; 2) the tender process; 3) the bid opening, 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 the procurement process in order to minimise the risk of collusion and to effectively detect collusion.

4.1 Pre-tender phase

This phase involves the formulation of the procurement strategy which entails a number of decisions regarding the procurement.

4.1.1 *Type of procurement procedure- federal law*

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.

⁶⁵ Source: *Cuenta Pública del Gobierno y Organismos Auxiliares del Estado de México, 2010*.

As a result 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 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) it is impossible to organise a public tender due to unforeseeable circumstances or *force majeure*;
- e) 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; and,
- f) a framework agreement⁶⁶ 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 28 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 and levels of quality. Article 42 provides fourteen (14) justifications enabling procurement groups not to use public tenders which include:

⁶⁶ See subsection 4.1.7 and footnote 76.

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

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 procurement approach 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 of the CFC.

Public procurement agencies may use invitations to at least three suppliers or direct awards, if one or more of the six justifications outlined in Article 64 are applicable. These include:

- a) there is only one technology supplier in the market, or there is a patent right involved;

- b) when an open procedure would violate the country's essential security interest in the case of defence projects;
- c) 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; and,
- d) there is an agreement between a research association and a public agency for the application of new technology to public infrastructure.

4.1.2 *Type of procurement procedure- state law*

Articles 13.27 and 13.28 of GEM's Administrative Code permit three types of procurement procedures for goods and services: public tenders (as the rule) and, invitations to at least three suppliers and direct awards (as exceptions). Article 13.41 states that purchasing by the use of an invitation to at least three suppliers is justifiable when a previous public tender procedure has been declared void. Article 13.42 decrees that bidders shall be selected from the Catalogue of Suppliers administered by the Secretariat of Finance.⁶⁷

Article 13.45 outlines eleven (11) justifications for utilising a direct award procedure, which include:

- a) there are not substitute goods or services;
- b) in the case of services, particular technical experience is required;
- c) in the case of emergencies when public security is at stake;
- d) an awarded contract was rescinded, or a previous public tender procedure or invitation to at least three suppliers was declared void; and,
- e) the value of the contract does not exceed the maximum amount authorised in the annual budget for the State of Mexico- see Annex 1.

With regard to the commissioning of public works, Article 12.22 of the State's Administrative Code is consistent with the approach taken for goods and services- public tender procedures as the rule and invitations to at least three

⁶⁷ Article 20 of the regulations implementing Book XIII of the Administrative Code.

suppliers and direct awards as exceptions. Article 12.34 lists three (3) conditions for using one of the two exceptions:

- a) a previous public tender has been declared void;
- b) the value of the contracts does not exceed the maximum amounts, for each procedure, set forth in the State Budget- see Annex 1; and,
- c) the invited contractors are selected from the official Catalogue of Contractors administered by SAOP.

However, Article 12.37 lists an additional eleven (11) justifications to proceed under a direct award procedure for public works. These include:

- a) the remodelling of historical and archaeological monuments;
- b) a previous public tender procedure or invitation to at least three suppliers has been declared void; and,
- c) a supplier offers a public agency or municipality the opportunity to make deferred payments.

With regard to procurement by public-private partnerships, Article 16.46 of GEM's Administrative Code⁶⁸ states that as a rule, PPPs should be conducted by public tenders and, as exceptions, by invitations to at least three suppliers or direct awards. Article 16.59 describes six (6) justifications for not employing a public tender procedure. These include:

⁶⁸ Book XVI of the Administrative Code for the State of Mexico, dated August 21, 2006, was the first act in the country to regulate PPPs- the federal Act was only proclaimed on January 16, 2012, and its implementing regulations have not yet been approved by Congress. The participation of private companies in public projects has recently increased in Mexico. PPPs give public authorities the opportunity to rely on private know-how and financial resources so they are often used for large and cost-intensive infrastructure projects. Some examples in the State of Mexico are: *Hospital Regional de Tlalnepantla* and *Hospital Regional de Toluca*, both approved by the Local Assembly on January 19, 2010; a road construction and maintenance project (*Prolongación de la Avenida Solidaridad- las Torres, en sus extremos oriente y poniente, y modernización de la vialidad existente*), approved on February 24, 2011; and, a cultural centre (*Centro Cultural Mexiquense de Oriente*), approved on August 8, 2007.

- a) a previous public tender procedure was declared void or a previous contract had been rescinded;
- b) in the case of emergencies when public security is at stake; and,
- c) a particular technical expertise is required.

The following additional justifications to use direct awards are permissible:

- a) the approval of the project by the Local Assembly; and,
- b) a cost-benefit analysis has been done according to the guidelines issued by the Secretariat of Finance.⁶⁹

4.1.3 *Scope of the tender: deciding who can participate- federal law*

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 and whether there is a limited number of known suppliers.

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, the origin of the goods or services is not taken into account and only domestic suppliers can participate.⁷⁰
- b) **international in accordance with free-trade agreements:** 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 agreement and may be allowed to participate when a previous national

⁶⁹ Guidelines regarding the elaboration of cost-benefit analyses in public-private partnerships, June 19, 2007.

⁷⁰ National public tenders normally involve contract values below the threshold values set forth in the free-trade agreements signed by Mexico. If a contract value is above such thresholds, then the option in an agreement to reserve the contract to Mexican suppliers would need to be exercised.

public tender was declared void because no bid was submitted or no acceptable bid was received.

- c) **international open:** domestic and foreign suppliers are 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 condition of a procurement financed with external credit granted to the Mexican government.

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.

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 agreement⁷¹; 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 tenders if:

- a) they share any kind of interest with the contracting authorities;

⁷¹ For instance, 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, respectively.

- 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.

4.1.4 Scope of the tender: deciding who can participate- state law

Article 13.31 of GEM's Administrative Code outlines two types of public tenders for goods and services: a) national in which only domestic suppliers are allowed to participate; and, b) international in which both foreign and domestic suppliers are allowed to participate. Article 13.31 establishes two conditions for carrying out international tenders:

- a) when, based on market studies, it is determined that there is no supply of the required good or service in the domestic market and as long as the foreign suppliers submit the same conditions in terms of price, quality and financial opportunities; or,
- b) it is mandatory due to a free-trade agreement entered into by the Mexican Government.

For public works, Article 12.23 of the State's Administrative Code establishes the same two types of public tender procedures with essentially the same conditions. The only additional condition concerns international tenders and allows the contracting authority, at its discretion, to determine the percentage of domestic labour force and other resources to be used in the performance of the contract.

Article 16.48 of GEM's Administrative Code outlines the same types of tender procedures and conditions for PPPs. This Act also establishes that: when a national public tender is declared void, the procurement agency will proceed automatically to an international public tender; and, the participation of a foreign supplier may be denied when its country does not provide equal treatment of Mexican suppliers.

4.1.5 Market studies- federal law

In order to plan effective procurement strategies and design suitable tender documents and procedures, public procurement officials should 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 services to be procured and the prevailing

market prices. In that respect, Article 26 of the federal Procurement Act states that contracting authorities shall conduct a market study prior to commencing any tender procedure. Article 30 of the implementing regulations to the Act establishes that market studies are to be carried out sufficiently ahead of the procurement procedure.

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 COMPRANET⁷² 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 shall keep a record.

Article 29 of the regulations states that the purposes of market studies include:

- a) to consider whether to consolidate purchases;
- b) to consider the use of reverse auctions;
- c) to determine the type of procurement procedure; and,
- d) to determine non-acceptable and maximum prices- described in subsection 4.3.1.

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.

⁷² See footnote 20 for a detailed description of COMPRANET.

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 market studies.

4.1.6 *Market studies- state law*

None of the three GEM statutes dealing with procurement specifically refer to market studies or investigations. However, Provision ACP-069 of GEM's Administrative Rules states that contracting authorities shall consult both the DGRM's catalogue of goods and services and its catalogue of suppliers prior to undertaking any tender procedure. Article 13.20 of GEM's Administrative Code specifies that the Secretariat of Finance, through the DGRM and municipalities, shall administer the catalogue of goods and services. The catalogue contains information about technical specifications, quality and security standards as well as the prices of goods and services. Goods and services not included in the catalogue are to be updated by the DGRM with new information provided by State procurement groups.

In order for a GEM procurement group to establish the *market price* for a particular good or service (see subsection 4.3.2), it carries out a basic form of market study, which essentially consists of obtaining at least two quotations via written statement, fax or email. The market price is the average of the quotations. When it is not possible to get quotations due to the existence of patent rights or the lack of national distributors, then the contracting authority may use the prices from previous procedures involving similar goods or services.⁷³

Article 13.21 establishes the catalogue of suppliers, which contains information relating to the financial, legal and administrative capacity of suppliers. A supplier may, however, participate in a tender procedure even when it is not registered in the catalogue.

According to ACP-087, a "direct purchase" can occur informally when the value is greater than 8 times the minimum wage applicable in Mexican geographic zone C (59.08 pesos) but less than 150,000 pesos. ACP-090 states that in order to set the *market price* for direct purchases, it is necessary to obtain

⁷³ ACP-065 of GEM's Administrative Rules.

at least three quotations. In direct purchase procedures, registered suppliers shall be given preference.⁷⁴

Regarding state public works, SAOP administers a catalogue of construction materials and their prices. Using this catalogue, SAOP calculates the base budget for a public works project, which is basically a reference price to be compared with the offers submitted in a tender procedure (Article 33, Subpart VII of the implementing regulations of Book XII of the Administrative Code).

4.1.7 Consolidation of purchases- federal law

It is generally recognised that public procurement groups can benefit from consolidating purchases across a number of secretariats and 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.⁷⁵

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,

⁷⁴ ACP-091 of GEM's Administrative Rules.

⁷⁵ 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, 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.*

- 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.

A **framework agreement** is one mechanism to support and 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.⁷⁶ The SFP is in charge of coordinating the actions among contracting authorities who sign framework agreements.⁷⁷

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.

⁷⁶ Article 17, second paragraph of LAASSP- procurement groups at the state and municipal levels can also participate in framework agreements.

⁷⁷ In November 2010, the SFP approved a framework agreement for food stamps, which they estimate has resulted in cost savings of 42.8 million pesos. There are currently nine (9) 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 SFP is in the process of reviewing framework agreements for generic medicines and some office supplies-information provided by the SFP to the OECD in February and April 2012.

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.

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

4.1.8 Consolidation of purchases- state law

Article 13.19 of GEM's Administrative Code defines *consolidated purchases* as the joint purchase of goods and services of general use among contracting authorities, with the purpose of obtaining the best conditions in terms of price, financial options and quality. Article 13.12 states that the Secretariat of Finance, through the DGRM, is in charge of organising and executing the State's annual plan of consolidated purchases for the Central Sector of the Government in the State of México (includes Secretariats, administrative units and administrative tribunals).⁷⁸

In organising the Annual Consolidated Purchases Plan, the DGRM uses the Automatic System for Consolidated Purchases⁷⁹, which was implemented as an internal electronic system through which the contracting authorities can process their requests for goods and services subject to consolidated purchases. Every two weeks the DGRM receives the requests from the contracting authorities and begins to process the procurement procedures.

The Secretariat of Finance is required to administer the catalogue of goods and services subject to the consolidated purchases plan.⁸⁰ In addition, there is a

⁷⁸ Currently the DGRM has signed agreements with over 70 auxiliary organisations (decentralised organisations) and the Judicial Power in the State of Mexico, allowing those organisations to participate in the Annual Consolidated Purchases Plan- information provided by the DGRM to the OECD in March 2012.

⁷⁹ In Spanish, *Sistema Automático de Adquisiciones Consolidadas*, implemented in January 2009.

⁸⁰ Article 14 of the regulations implementing Book XIII of the Administrative Code.

catalogue of suppliers, also administered by the Secretariat of Finance, which helps contracting authorities to obtain information about the financial and technical capacities of suppliers.⁸¹

None of the State's three procurement statutes cover the subject of framework agreements.

4.1.9 Deciding whether to use a reverse auction- federal law

The reverse auction mechanism —*ofertas subsecuentes de descuento*, OSD, in Spanish — has now been included in the federal and GEM procurement statutes⁸² as a result of the economic advantages that other countries seem to have experienced by using OSDs.⁸³ 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 auctions⁸⁴, a contracting authority using the reverse auction mechanism must verify that:

⁸¹ Article 20 of the regulations implementing Book XIII of the Administrative Code.

⁸² On May 28, 2009 and September 3, 2010, respectively. Other states in Mexico such as Baja California and Nuevo Leon have also implemented this mechanism.

⁸³ 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. 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*.

⁸⁴ 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.

- 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.

However, when small- and medium-sized businesses participate in the tender procedure, the use of an OSD is not permitted (Article 38 of the implementing regulations).

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

4.1.10 Deciding whether to use a reverse auction- state law

Article 13.57 of GEM's Administrative Code states that contracting authorities (Secretariats, agencies, administrative tribunals and municipalities) shall use *reverse auction* procedures only for goods and services listed in the Catalogue of Goods and Services to be purchased through reverse auction procedure, which is administered and maintained by the Secretariat of Finance, through the General Directorate for the State System of Information.

Article 13.17 states that contracting authorities (including municipalities) shall process reverse auctions utilising the information and services electronic system (SEITS).⁸⁵

There are no provisions in the Books of the State's Administrative Code dealing with public works or public-private partnerships that relate to the use of reverse auctions.

⁸⁵ This electronic system was introduced into the Administrative Code by an amendment dated September 3, 2010. Pursuant to the second transitory article of the amendment decree, SEITS was to be implemented within eighteen months following the publication of the amendment to the Administrative Code, which would have been in March 2012. The Secretariat of Finance through the Directorate for the State System of Information is currently working on implementing SEITS so the reverse auction mechanism is not yet available for use by GEM procurement groups.

4.1.11 *Type of contracts- federal law*

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 continuously acquire goods/services 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.

The value of the financial guarantee in an open contract shall be calculated as a percentage —determined by the contracting authority— of the maximum value of the contract.

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 contract does not change.

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; and,
- c) *mixed contracts*.

LOPSRM does not contemplate open contracts.

Contracting authorities under justified circumstances, and considering the authorised budget, 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 amendments to lump sum contracts 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 in subsection 4.1.7 in the context of consolidated purchases, are another type of contract available to procurement groups. Their legal requirements are outlined in subsection 4.1.7. As was noted in subsection 4.1.8, GEM's three state procurement statutes do not currently make reference to framework agreements although they are available to State procurement secretariats and agencies engaged in procurement utilising state or federal funding- see footnote 76.

Relevant to the issue of the type of contract is the question of whether procurement officials will permit subcontracting in the performance of a contract. Subcontracting is not covered under the federal Procurement Act.

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

Article 101 of the federal PPPA allows for subcontracting as long as the contract contains specific provisions relating to the practice. The contracting authority must authorise the subcontract and the developer remains accountable for the project.

4.1.12 Types of contract- state law

Article 13.63 of the Administrative Code specifies that contracts for goods and services shall be *fixed price* contracts. However, Article 13.72 permits *open contracts* which are defined as contracts that allow the contracting authority to procure goods or contract for services with open conditions in terms of price and time. Article 13.73 states that open contracts shall contain provisions regarding the minimum and maximum quantities and the minimum and maximum contract duration, which may not exceed one year.

Article 13.63 states that the terms regarding the value and duration of the contract are not subject to changes, but contracting authorities may accept an increase or decrease in the value of the contract due to unforeseen economic circumstances.

Article 12.42 of the Administrative Code establishes the same three types of contracts as the federal Public Works Act: a) unit price contract; b) lump sum contract; and, c) mixed contract. The State's Code is silent with respect to amendments to unit price contracts, but it does state that lump sum contracts are not subject to changes regarding the value and duration of the original contract.

With regard to public-private partnerships, a contracting authority wishing to enter into such a partnership must submit a proposal to the Secretariat of Finance describing the project plan and outlining the expected benefits using an exhaustive cost-benefit analysis. The Secretariat, based on the cost-benefit analysis, shall approve the *model contract*, which is presented to the Local Assembly for final approval to carry out a public tender.

Pursuant to Article 16.31 of the Administrative Code, the model contract must include the following, among other things:

- a) the specific rights and obligations of the contractor and the services to be provided;
- b) the duration of the contract and the conditions regarding terms and prices; and,
- c) the circumstances that might generate changes in the contract prices and or the formula for making payments.

With regard to subcontracting in the State of Mexico, Article 13.60 of the Administrative Code establishes that public procurement contracts are considered *intuito personae* (the characteristics of the contractor are essential) and, therefore, the contractor is not allowed to subcontract to another supplier to partially or totally perform the contract unless prior authorisation is received from the contracting authority.

Article 12.39 of the Administrative Code states that contractors can only subcontract in public works contracts with the prior authorisation of the contracting authority. Article 34, Subpart XVIII of the implementing regulations, states that the tender documents must include specific information regarding subcontracts.

Article 16.35 states that contracting authorities may allow a developer to subcontract to another contractor in a PPP only if the tender documents specifically allowed for the use of subcontractors.

4.1.13 Consortia/joint bids- federal law

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. The joint bidders are not required to form a new company or joint venture for the specific tender as the 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.

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

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 states that a bid may be submitted by a number of economic operators, who shall formally establish a group, in case they are awarded the contract. The bid submission must specify the representative of the consortium.

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

4.1.14 Consortia/joint bids- state law

Article 110 of the implementing regulations to Book XIII of GEM's Administrative Code states that contracting authorities may allow for joint bids in their tender calls for goods and services provided that their tender documents include the following requirements, among others:

- a) the notarised agreement of the group;
- b) the authorisation for a representative to submit the joint bid; and,
- c) a statement wherein the members of the consortium acknowledge joint liability.

Article 105 of the implementing regulations to Book XII of GEM's Administrative Code states that when a bid is submitted by a group, the participants must all sign the submission and identify the parts of the public works for which they will be responsible. The members of the consortium shall be considered jointly/severally liable.

With regard to PPPs, Article 16.54 specifies that a joint bid may be submitted by two or more economic operators, without the requirement of

establishing a formal consortium, provided that the bid submission specifies the obligations of each party. The proposal must specify the representative of the consortium, who is required to sign the submission.

No reference is made in the State of Mexico laws to compliance with competition laws and suppliers seeking advisory opinions from the CFC.

4.2 Tender phase

At this point in the public procurement process, the contracting authority, having determined the project's key elements and taken a number of decisions regarding the award of the contract, is now ready to draw up the tender documents, which will be used to notify suppliers of its intention to award a contract and to invite them to submit bids. This phase is important as it determines the terms of the tender procedure, as well as the terms for the execution of the contract. The tender documents should give detailed and specific information about the nature of the procurement and the procurement procedure.

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

4.2.1 Preparation of tender documents- federal law

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) the request of 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) an indication whether the split award option (see below) will be considered and the percentages to be assigned to the selected suppliers;
- d) the award criteria for the evaluation of the offers; and,

- e) the circumstances for dismissing the bids (among others, 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 29 also states that contracting authorities may publish a draft call for tender in COMPRANET for at least 10 days in order to receive comments from bidders, which might be considered in the final version of the call for tenders.

Contracting authorities are allowed to award the contract to multiple suppliers (*split awards*), 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 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*.⁸⁶

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

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 4.2.5;

⁸⁶ These criteria are described in detail in section 3.1.

- 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 31 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.

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 given extra points in the bid evaluation.

Split awards are not regulated under this Act.

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 subcontracting;
- d) the date, place and time for the site visit;
- e) the contract award criteria; and,

- f) the circumstances for dismissing the bids.

Any tender requirement that lessens competition will be considered void.

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

Draft calls for tender and split awards are not covered under the PPPA.

4.2.2 *Preparation of tender documents- state law*

Article 74 of the implementing regulations to Book XIII of GEM's Administrative Code states that calls for tender shall contain, among other things, the following:

- a) a complete description of the goods and services being procured;
- b) an acknowledgment that under equal circumstances the contracting authority shall prefer companies from the State of Mexico provided that their prices do not exceed the lowest bid by more than 5 percent;
- c) the time, date and place for the clarification meeting(s) and site visits;
- d) the circumstances for dismissing a bid (among others, 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 their competitors);
- e) the contract award criteria; and,
- f) an indication whether the split award option will be considered and the percentages to be assigned to the selected suppliers.

Draft calls for tender for goods and services are not covered under Book XIII of the Administrative Code.

Article 74, Subpart XXII of the implementing regulations establishes that contracting authorities may award a contract to multiple suppliers. In order to do so, a contracting authority has to specify in the tender documents the number

of suppliers to be selected, the percentage to be assigned to each supplier and the allowable difference between the lowest and highest bids chosen.

Article 13.37 of Book XIII states that the contracting authority shall award the contract to the lowest bid, as long it is below the “*market price*” (see subsection 4.3.2) and meets the technical requirements set forth in the call for tender. When all of the submitted bids are above the market price, the contracting authority shall disclose the market price in the hope that the bidders will lower their bids.

A contracting authority shall award a contract to a small- or medium-sized business when all of the bidders submit similar bids.

Article 33 of the implementing regulations concerning public works states that calls for tender shall contain:

- a) the timeline of the tender process and the base budget;
- b) a general description of the project;
- c) the circumstances for dismissing bids;
- d) the date, time and place for the site visit; and,
- e) the contract award criteria.

Contracts for public works must be awarded to the contractor that meets all of the requirements set forth in the call for tender and guarantees the performance of the contract. The bid submission is expected to be below the base budget. By virtue of Article 61 of Book XII’s implementing regulations, Mexican contractors are to be given preference over foreign contractors, provided that the value of the contract does not exceed the threshold values set forth in any free-trade agreement.

Book XII of the State’s Administrative Code does not deal with draft calls for tender or split awards with respect to public works.

Article 57 of the implementing regulations to Book XVI states that calls for tender for PPPs shall contain, among other things, the following:

- a) the date, place and time for the different stages of the tender procedure;

- b) the circumstances for dismissing bids;
- c) the contract award criteria;
- d) any requirements related to professional experience;
- e) the conditions of the financial guarantees; and,
- f) a statement advising bidders that their bids will be dismissed if they participate in agreements with contracting authorities in order to manipulate the results of the procedure.

Article 70 of the implementing regulations to Book XVI specifies that a contract shall be awarded to the bidder that meets all of the requirements set forth in the call for tender and achieves the best result in terms of the bid evaluation.

Draft calls for tender and split awards are not covered by the provisions of Book XVI dealing with PPPs.

4.2.3 *Calls for tender- federal law*

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. Twenty (20) days after the publication of a call for tender bidders are to submit their bids (Article 32).

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.

Article 44 of the PPPA states that calls for tender 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.

4.2.4 Calls for tender- state law

Article 75 of the Book XIII's implementing regulations states that a call for tender for goods and services shall be published in the Gazette of the Government of the State of Mexico. Suppliers intending to participate in the public tender are required to purchase the document at a cost set by the contracting authority.

Article 12.25 of Book XII states that calls for tender for public works shall be published in at least one nationwide and one local newspaper or on the Internet, according to the instructions of the Secretariat of the Comptroller.

Article 16.49 of Book XVI stipulates that contracting authorities shall inform potential bidders for PPPs of the sources and costs of accessing calls for tender. The call for tender may be published on the Internet.

On December 5, 2001, the State of Mexico and the federal *Secretaría de la Contraloría y Desarrollo Administrativo* (now the SFP) signed a Coordination Agreement in which the State agreed to publish all calls for tender issued by its procurement agencies and municipalities on COMPRANET.⁸⁷

4.2.5 Clarification meetings- federal law

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

⁸⁷ Pursuant to a Federal Decree of June 28, 2011 setting out the guidelines for the use of COMPRANET, all Mexican states and municipalities must now publish their calls for public tenders on this electronic system.

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

4.2.6 Clarification meetings- state law

Article 13.35 states that calls for tender for goods and services shall indicate whether a clarification meeting is necessary. If deemed necessary, they are to be held three (3) days before bid submissions are due. Bidders are required to submit their questions in writing to the representative of the contracting authority, who will respond to them, issue minutes for the clarification meeting and then provide a copy of the minutes to all bidders (Article 82 of the implementing regulations to Book XIII).

The implementing regulations for public works (Article 42) and for PPPs (Articles 66 and 68) contain similar provisions for regulating clarification meetings as those for the procurement of goods and services.

4.2.7 Terms for submission of bids- federal law

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.

4.2.8 Terms for submission of bids- state law

Pursuant to Article 13.55, Subpart III of Book XIII of the State's Administrative Code, interested bidders in the State of Mexico are given 15 calendar days after the last publication of the call for tender to submit their bids.

Article 31 of the implementing regulations for public works states that: the period for carrying out the tender procedure is 15 days and begins with the publication of the call for tender; on the fourth day the call to tender documents are to be available for purchase; on the fifth day the clarification meeting is held; and on the sixth day the site visit may be held. Five (5) days after the clarification meeting or the site visit, interested bidders can submit their bids.

Article 69 of the implementing regulations governing PPPs provides for a period of 60 calendar days after the publication of the call for tender for the submission of bids.

4.3 Bid opening, bid evaluation and contract award phase

In this phase an agency evaluates the bids it has received by checking that bidders meet the technical specifications and rejects any bids that do not satisfy 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.

4.3.1 Reference prices and margins of preference- federal law

When a procurement group is using the binary criterion 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 footnote 21). In this regard, the State of Mexico uses the POBALINES of the federal public agency funding the State’s project. It should be noted that in 2011, GEM’s Secretariat of the Comptroller set the discount at only five (5) percent.
- 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).

Article 39 of the implementing regulations gives a contracting authority the discretion to decide whether or not to disclose the maximum price in the call for tenders. However, it must be disclosed if any bidder files an appeal against the procurement agency's award of contract decision.

The Procurement Act also sets out preferences relating to bid evaluations in specific cases. For example, in the case of international open tenders (where 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);
- in evaluating bids 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.

4.3.2 Reference prices and margins of preference- state law

Tenders run for goods and services may use the *binary criterion* to select the winning bid in which case the procurement agency needs to establish a "*market price*". Article 13.37 states that the market price is the upper bound above which no bid can be considered, which is similar to the non-acceptable price established under the federal Procurement Act. Contracting authorities are required to disclose the market price when all bids submitted in response to a call for tender are above this bound. If bidders subsequently do not submit lower bids, then the call for tender shall be declared void. When some or all of the bids submitted are below the market price, the contract must be awarded to the lowest bid.

For both public works and PPPs, the points-based criterion is used to evaluate bids so there is no need to calculate any reference prices.

4.3.3 Bid opening and award resolution- federal law

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 indicated 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;
- 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 was declared non-acceptable or not convenient;
- 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, the share and value of the contract for each winner.

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

4.3.4 Bid opening and award resolution- state law

Book XIII of the State's Administrative Code requires that calls for tender for goods and services must identify the date, time and place for the bid opening and award resolution sessions. Interested bidders may attend these sessions. The representative of the contracting authority shall mention the names of the bidders whose bids were not accepted, their bid prices and why their bids were

not accepted. When all of the bid prices are above the market price, the representative will disclose the market price in the hope/expectation that bidders will submit lower bids. The procurement group's evaluation committee shall review the new bids and issue a preliminary statement which will support the final award resolution. The contract shall be awarded to the bidder that meets all of the conditions in the tender call and offers the best options to the contracting authority.

Article 88 of the implementing regulations to Book XIII states that the award resolution shall contain the following, among other things:

- a) lists of the bidders whose bids were accepted and not accepted;
- b) the name of the bidder who was awarded the contract, identifying the items to be supplied and the value of each one; and,
- c) information related to the financial guarantee and any down payments.

For public works, Article 12.30 of Book XII stipulates that the contracting authority shall announce the award resolution at a public meeting. Any bidder may attend the meeting. At the end of the meeting all attendees have to sign the resolution and are given a hard copy of the resolution.

Article 69 of the implementing regulations governing PPPs states that the call for tender shall contain the date, time and place for the bid opening and award resolution sessions. The administrator of the PPP project shall issue the award resolution, which must contain:

- a) the list of the bidders whose bids were not accepted;
- b) the name of the bidder who was awarded the contract; and,
- c) pertinent information related to the terms of the contract.

4.4 Post-award phase

4.4.1 *Guarantees, penalties and rescission of contracts- federal law*

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.⁸⁸ 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.

Article 45, Subpart XIX of LAASSP states 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 calculated 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 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 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 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 are applicable when the progress of the public works 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:

⁸⁸ Contracting authorities shall consider the *Guidelines on the reduction of financial guarantees by suppliers*, referred to in footnote 23.

- 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.⁸⁹ After investigating, if the contracting authority is of the view that the contractor will not be able to perform the contract, then the contracting authority shall proceed with the rescission of the contract.

4.4.2 Guarantees, penalties and rescission of contracts- state law

Under Book XIII of GEM's Administrative Code, suppliers of goods and services shall provide a financial guarantee for the performance of a contract amounting to 10 percent of the total value of the contract.

A contracting authority may exempt a supplier from the payment of the guarantee when the value of the contract does not exceed 2000 times the minimum wage in the State of Mexico, and the supplier supplies the goods or services prior to or at the time of the signing of the contract (Article 13.69).

Article 115, Subpart VII of the implementing regulations to Book XIII stipulates that: the size of any penalty shall not exceed the value of the guarantee; and, the amount of a penalty shall be proportional to the degree of non-fulfilment.

Article 13.62 states that the contract shall set out the causes for the rescission of a contract.

Article 123 of the implementing regulations for public works establishes that the contracting authority shall determine the guarantee that it considers the most suitable for a project, based on the characteristics, magnitude and complexity of the project.

⁸⁹ For example, the cancellation or abandonment of the project or the suspension of public services for more than seven (7) calendar days (Article 122).

Article 104, Subpart IX indicates that: penalties shall be imposed when a public work is not being executed as per the terms of a contract, due to a contractor's negligence; penalties shall be proportional to the amount of unfinished work; and, the amount of the penalty shall not exceed the value of the guarantee.

When a contractor does not comply with the obligations set forth in the contract, a contracting authority can either rescind the contract or apply the penalty (Article 111 of the implementing regulations).

Book XVI, which covers public-private partnerships, allows for two kinds of guarantees:

- a) financial guarantees of suppliers for hidden defects (Article 16.34); and,
- b) financial guarantees of the contracting authority to the developer (Article 16.16).

Article 16.36 states that a contract shall contain a provision regarding penalties to be applicable when a developer does not provide the services in the contract.

Article 16.68 states that the contracting authority may rescind a contract, with the authorisation of the Secretariat of Finance, when a developer does not comply with the terms of the contract. When the contracting authority does not comply with its obligations, the developer may request rescission of the contract before the Administrative Tribunal.

4.4.3 *Infringement and fines- federal law*

Article 59 of LAASSP states 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 shall consider:

- a) the damages caused by the infringement;
- b) whether the infringement was committed intentionally or not; and,
- c) the financial conditions of the individual who committed 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 130) are similar to those found in the Procurement Act.

4.4.4 *Infringement and fines- state law*

Any supplier or bidder that infringes the provisions of Book XIII of the Administrative Code shall be sanctioned by the Secretariat of Finance or the Internal Control Unit of a state agency or municipality, with monetary sanctions ranging from 30 to 3000 times the minimum wage applicable in the Capital of the State of Mexico. In addition to the monetary sanctions, infringers shall pay the punitive damages set forth in the contracts (Article 13.78).

Article 13.67 of the Administrative Code instructs contracting authorities to send a list of sanctioned suppliers/bidders to the Secretariat of the Comptroller so it can inform other contracting authorities to refrain from contracting with those on the list.

With respect to public works (Article 285 of the implementing regulations to Book XII), any contractor/bidder that infringes either the provisions of the Book or of the implementing regulations, shall be sanctioned with monetary sanctions ranging from 30 to 3000 times the minimum wage applicable in the Capital at the time of the infringement. Infringers shall also pay any restitution damages.

The Secretariat of the Comptroller is in charge of sanctioning infringers of Book XII and is empowered to prohibit them from participating in public tenders when: they omit to sign an awarded contract with no justifiable reasons; they fall behind in the performance of the contract by 50 percent or more; and, they provide false information during the tender procedure. The prohibition period may range from 3 months to 5 years.

Article 288 of the implementing regulations to Book XII states that, when imposing sanctions, the Secretariat of the Comptroller shall consider the damages caused to the contracting authority, the magnitude of the damages and whether the infringement was intentional. The Secretariat of the Comptroller may share the list of sanctioned contractors with the federal government and other states (Article 287).

Suppliers and bidders that infringe the State's provisions governing procurements via PPPs shall be sanctioned by the Secretariat of the Comptroller with fines ranging from 50 to 1000 times the minimum wage applicable in the Capital of the State (Article 16.74).

Additionally, pursuant to Article 16.75, the Secretariat of the Comptroller shall prohibit bidders or suppliers from participating in tender procedures that:

- a) do not sign an awarded contract;
- b) submit false information at any stage of the procedure or during the formalisation of the contract; or,
- c) have a contract rescinded due to negligence.

**CHAPTER 5:
ALIGNMENT OF STATE AND FEDERAL PROCUREMENT
LEGISLATION AND REGULATION WITH THE OECD GUIDELINES**

As noted in section 1.1, in the Inter-Institutional Agreement signed by the OECD with GEM and the CFC in October 2011 the OECD committed to: a) preparing an Analytical Report regarding the extent to which current public procurement legislation, regulation and practices governing GEM procurement are consistent with the OECD Guidelines for Fighting Bid Rigging in Public Procurement; and, b) determining whether there are areas of opportunity for improvement in procurement legislation and regulation and in the practices at GEM in accordance with the OECD Guidelines.

As mentioned 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 both the State and federal levels 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, to name two novel features).

There are, however, a number of additional changes that could be made to the procurement laws and regulations, at both the State and federal levels, 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 areas for possible improvement in State and federal procurement laws and regulations are presented in this Chapter. The suggested changes are grouped in seven (7) thematic areas. As noted earlier, when the State of Mexico conducts a procurement process utilising federal funds that process is governed by federal laws. Consequently, changes to federal procurement laws and regulations could be beneficial to the State so the OECD recommends that State officials work with their federal counterparts (notably the SFP) to obtain support and approval for the changes recommended in this Chapter that relate to federal statutes.

Chapter 6 outlines the OECD recommendations to GEM on how to fight bid rigging in its procurement procedures, which is point b) of the OECD's commitments in the Inter-Institutional Agreement.

It should be pointed out that a number of the areas for possible improvement outlined in this Chapter were also recommended in the OECD Secretariat's IMSS report noted in footnote 1.

5.1 Removing preferential treatment in laws and procedures

- 1. *Current State and federal procurement rules regarding bidders' participation can be discriminatory towards foreign bidders and sometimes even national bidders, thus limiting their possibility of selling goods and services in the State of Mexico. 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 12.23, 13.31 and 16.48 of Books XII, XIII and XVI of the State of Mexico's Administrative Code, respectively, and 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 procurement procedures that are admissible exceptions.

Specifically, 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.

As well, State procurements by direct award or invitations to at least three suppliers almost assuredly restrict, or reduce possibility of, participation by national and or international companies.

The State of Mexico also imposes additional requirements on contractors of public works wishing to compete in invitations to least three suppliers or to be eligible for direct awards. Article 71 of the implementing regulations to Book XII states that contractors have to be registered in the "Catalogue of Contractors" for the State of Mexico. In order to be registered in this Catalogue it is mandatory to obtain a certification issued by the construction industry in the State.

Furthermore, Article 74 of the implementing regulations to Book XIII of the Administrative Code states that contracting authorities are allowed to give priority, under equal circumstances, to State of Mexico suppliers of goods and services, as long as the price margin is not more than 5 percent above the lowest bid.

Also, in the case of direct purchases, Provision ACP-091 states that registered suppliers in the “Catalogue of Suppliers” shall be given preference over other suppliers. According to Article 32, Subpart VIII of the implementing regulations to Book XIII of the Administrative Code, suppliers interested in being listed in the Catalogue shall present, among other requirements, a certification of a “State of Mexico business”.

Additionally, at the federal level 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- see subsection 4.3.1).

These various provisions effectively limit the pool of bidders willing and able to sell goods and services to public procurement agencies, including those in the State of Mexico. Increased requirements usually discourage some companies from bidding on tenders. With less competition, the result is likely that contracting authorities end up paying higher prices or they purchase goods or services of a lower quality, compared to the situation when there are no restrictions on bidders’ participation. Moreover, reducing the number of potential bidders may facilitate collusion because it is easier to agree and enforce a collusive scheme when there are relatively few bidders.

Without prejudice to the provisions included in the free-trade agreements signed by Mexico, contracting authorities would likely benefit if restrictions to bidders’ participation were removed, so that all interested qualified bidders – irrespective of their location or nationality – are allowed to participate in all tenders. *The OECD therefore recommends that the State of Mexico take the necessary steps to amend or abolish its current regulations restricting the participation of suppliers in procurement procedures and that it work with the SFP to deal with restrictions in the federal procurement statutes.* 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.

It would be valuable and advisable for a group such as the CFC, IMCO or the SFP to conduct an evaluation of the impact more fully opening up tenders to foreign participation will have on national suppliers and, in particular, on small- and medium-sized enterprises. As well, in the future, the

CFC, IMCO or the SFP should assess the financial and qualitative benefits that have been achieved by GEM and other public procurement agencies from having had access to more competitive markets.

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.

5.2 Changing certain procurement procedures

2. ***Excessive use by GEM and other public agencies of the “de minimis” exceptions under Article 13.41 of the State’s Administrative Code and Article 42 of the federal Procurement Act may result in competition being unnecessarily restricted and “value for money” not achieved for such purchases. Reviews should be undertaken, by the Secretariat of the Comptroller at the State level and the SFP at the federal level, of the incidence of use of these exceptions by GEM and other public agencies in Mexico.***

In addition to the exceptions to the use of public tenders listed in Articles 13.40 and 41 of the State’s Administrative Code and the federal Procurement Act, respectively, Articles 13.41 and 42 establish a “*de minimis*” exception to the use of public tenders. In particular, GEM (when using federal resources) and other public agencies can assign contracts either directly to a specific supplier or through an invitation to at least three (3) suppliers as long as:

- the value of each contract is below the maximum amount established each year in the State or federal Budget⁹⁰; 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).

Additionally, contracting authorities in the State of Mexico may carry out direct purchases out of the scope of open and restricted procedures, as long as the total value of contracts awarded each year is below 20 percent of the contracting authority’s annual procurement budget.⁹¹

⁹⁰ See Annex 1 for the State level and Annex 2 for the federal level.

⁹¹ Provision ACP-093 of GEM’s Administrative Rules- see footnote 42.

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 local purchases. The overall value of contracts covered by this exception can, however, be significant – up to 30 percent of a contracting authority’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, invitations to tender may save the contracting authority from being required to expend scarce resources to qualify bidders. Finally, where tenders are based upon invitations, there may be less incidence of non-performance, sub-standard performance or contract defaults.

On the other hand, avoiding sealed-bid tenders open to all potential bidders and utilising invitations to a small number of qualified bidders raises a number of potential anti-competitive concerns. Firstly, they limit the bidding pool and raise the potential for collusion. Invitation-only bids may also preclude invitations to new entrants or to 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 systemic bid rigging by the known participants and increase the opportunity for corruption. In addition, they can also preclude 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 a review be conducted by GEM’s Secretariat of the Comptroller and the SFP of the use by State of Mexico contracting authorities of these exceptions. Among other things, such a review 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. The review could also determine whether flexibility requirements and restrictions to competition are currently appropriately balanced in practice and whether the upper thresholds of 20 and 30 percent of a contracting authority’s annual procurement budget are appropriate (and, if not, propose the necessary modifications to the procurement laws). Finally, ***it is recommended that the review should examine whether 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 centralized procurement information becoming increasingly available through the COMPRANET portal would provide additional tools to more effectively evaluate whether the size and scope of the exceptions to the use of public tenders are achieving the greatest value for taxpayers.

This recommendation is in accordance with Section 2 of the Design Checklist- maximising the potential participation by genuinely competing bidders.

3. *The State of Mexico's procurement groups should utilise remote procurement procedures more extensively.*

Article 13.36 of GEM's Administrative Code (and Articles 49 and 69 of the implementing regulations to Books XII and XVI of the Administrative Code, respectively) only contemplate the traditional way to conduct tender procedures (i.e. where bids are submitted in person and bidders personally attend clarification meetings).

At the federal level, Article 26 Bis of the Procurement Act and Article 28 of the Public Works Act simply say that procurement procedures can be conducted remotely (i.e. through COMPRANET), in the traditional way or by using a mixture of these two methods. The federal Public-Private Partnerships Act mentions just the traditional way to conduct procurement processes.

GEM would likely benefit if the use of remote procedures were given priority and made the default choice relative to the traditional procurement procedure. In particular, such remote procedures may result in significant cost savings and efficiency gains for GEM and other public procurement agencies. In addition, by limiting the opportunities for bidders to meet (e.g. when attending a clarification meeting or site visit), they may also reduce the risk of bid rigging in public procurement. Site visits should be minimised as much as possible. Procurement officials should carefully consider whether a site visit is going to be valuable in the process or can be excluded- see recommendation 4 of this Chapter.

It is therefore recommended that the State of Mexico's various procurement groups use remote procedures as much as possible for their procurement procedures.

By adopting this recommendation GEM will be aligned with Section 4 of the Design Checklist, reducing communication among bidders.

5.3 Changes to public notice and publicity requirements

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

Fortunately, GEM's procurement rules do not make it mandatory for contracting authorities to hold clarification meetings. However, if a clarification meeting is held, the State procurement laws do not consider the use of remote technology for addressing bidders' questions and then sharing the answers with all bidders. 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 one or more 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.⁹²

As noted earlier, GEM procurement groups must follow federal procurement laws and regulations when they are undertaking purchases utilising federal funds so this recommendation directed at federal laws has implications for the State of Mexico.

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 verification of the bid price submitted by each bidder have all been identified by the OECD Guidelines as red flags in tendering situations.

⁹² The Mexican Supreme Court of Justice held 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).

The OECD Guidelines are based upon extensive international experience that such practices 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 disclosure of the identity of potential bidders. International experience confirms that statutorily mandated clarification meetings provide a natural forum where potentially colluding bidders can discuss or finalise an agreement or exchange competitively sensitive information.

These collusion concerns can be addressed in the short term by requiring that, whenever feasible, clarification meetings are held “virtually”, i.e. by using “remote” technology to eliminate on-site 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 also be possible to use alternative methods for contracting authorities to address bidders’ questions 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 material released by the State’s procurement groups (such as the minutes of clarification meetings) should not list nor identify the participants in a procurement process.⁹³ As well, site visits should only be held when they are absolutely necessary and not as a routine procedure.

These recommendations are consistent with Section 4 of the Design Checklist, reducing communication among bidders.

⁹³ As noted in subsection 4.2.6, State contracting authorities are required to issue minutes of clarification meetings that contain the identities of bidders and to forward these minutes to the bidders- Articles 82, 42 and 68 of the implementing regulations governing the procurement of goods and services, the commissioning of public works and procurement via PPPs, respectively.

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.*

Transparency is a key requirement of procurement procedures in Mexico. It is mandated to allow maximum participation in public tenders, to obtain greater competition and to deter corruption. It is a core principle which governs and guides Mexican procurement laws and procedures. Establishing the proper timing, scope and audience for the disclosure of information in order to achieve the twin policy goals of transparency and obtaining value for money in all procurement processes requires a delicate balancing of policy objectives and practices.

The procurement statutes at both the State and federal levels contain a number of mandatory disclosure requirements that create greater possibilities for collusion among competitors.

Article 13.37 of Book XIII of GEM's Administrative Code obliges State contracting authorities to publically disclose the reference price known as the *market price* (see subsection 4.3.2) when all of the bids submitted in a tender situation are above the market price. This is designed to encourage the bidders to submit lower bids. However, this requirement facilitates the opportunity for collusion as all participants then know the purchasing group's maximum price and they can arrange to bid very close to it. ***It is recommended that the State of Mexico remove this provision from its procurement regulations.***

At the federal level, in addition to the requirement of a clarification meeting, 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.

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.

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 it. *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.* In this regard, the OECD recommended in section 5.2 that the State of Mexico no longer require that the minutes of clarification meetings contain information related to the identity of bidders.

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.

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

5.4 Legislative changes to increase compliance with competition law

6. *Joint bidders should be reminded of their obligations to comply with competition laws and procurement officials should have the legislative right to reject 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) 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 implement a collusive scheme aimed at sharing the market among the participants.

On balance, it would not be appropriate to go as far as prohibiting (or significantly limiting) the use of joint bids. Attempts to collude in public procurement, however, could be made more difficult if bidders were required 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 particular, it would make it easier for public procurement officials to detect possible bid rigging.⁹⁴

As noted in subsection 4.1.13, 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.

Neither GEM's three procurement statutes nor the federal Public-Private Partnerships Act, make reference to compliance with Mexico's competition laws or seeking advisory opinions from the CFC when submitting joint bids. *Amendments to these laws should be enacted for consistency and with the goal of promoting competition.*

⁹⁴ 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.

The current wording of the various State and federal procurement statutes should be strengthened to explicitly give procurement officials the option of not allowing joint bids in a specific tender, as long as they duly justify their decision (e.g. because they suspect that joint bids might in some situations be facilitating collusion or undermining competition).

These recommendations are consistent with Section 3 of the Design Checklist- defining requirements clearly and avoiding predictability and, Section 6- raising awareness among public procurement officials. These recommendations are supplemented by recommendation 5 in Chapter 6.

7. *State and federal procurement statutes should be amended to require bidders to submit a “Certificate of Independent Bid Determination” in addition to the “Integrity Statement” mandated by Article 29, Subpart IX and Article 31, Subpart XXXI of the federal Procurement Act and Public Works Act, respectively. As well, the three GEM procurement statutes (and the federal Public-Private Procurement Act) should be amended to make it mandatory for bidders to submit an Integrity Statement in tenders covered by those statutes.*

As noted in subsection 4.2.1 (*preparation of tender documents*), 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 three GEM procurement acts and the federal PPPA be amended to make it mandatory for bidders to submit an Integrity Statement in tenders covered by those statutes.

The Integrity Statement is a useful tool to fight corruption of officials in public procurement.⁹⁵ In its current formulation, however, it does not address potential collusion among bidders and therefore may not be effective to prevent and fight bid rigging.

It would be highly beneficial for GEM and other public procurement agencies if the various state and federal procurement statutes were amended so

⁹⁵ The Federal Executive recently introduced the Anticorruption Bill, which was enacted on June 12, 2012. The Anticorruption Act addresses issues such as the sanctions for public officials and individuals involved in corruption practices related to procurement in Mexico.

that bidders were also required to submit a Certificate of Independent Bid Determination (“CIBD”) such as the two examples contained in Annex 1 and Annex 2. Such a requirement in State and federal law would be an excellent way to raise awareness with suppliers about the serious nature of bid rigging. Alternatively, GEM and other procurement agencies could institute the requirement for CIBDs in all of their tenders- see recommendation 12 in Chapter 6.

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. GEM 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 6.

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.⁹⁶

Recommendation 7 is consistent with Section 4 of the OECD’s Design Checklist, reducing communication among bidders.

8. ***Disclosure requirements imposed on bidders by law would make it more difficult to use sub-contracting as a mechanism to implement collusion.***

Currently, each of GEM’s three procurement statutes and the federal Public Works Act and Public-Private Partnerships Act regulate sub-

⁹⁶ Article 156 of the State of Mexico Criminal Code prohibits the making of a false statement- 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 two to six years. Similarly, 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).

contracting.⁹⁷ The federal Procurement Act is silent concerning this subject. 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 unsuccessful bidders to remunerate them for their participation in a bid-rigging scheme. 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.

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, GEM and other procurement agencies could institute these disclosure requirements in all of their tenders- see recommendation 7 in Chapter 6.

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.

5.5 Enhancing the participation of social witnesses

9. *The role of social witnesses in tendering procedures should be enhanced, at both the State and federal levels, by focusing not just on transparency but also on competition issues.*

At the federal level, the Procurement Act and the Public Works Act (Article 26 Ter and Article 27 Bis, respectively)⁹⁸ regulate the participation of

⁹⁷ See subsections 4.1.11 and 4.1.12.

⁹⁸ 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. However, these implementing regulations are not yet in

social witnesses (*testigos sociales*, in Spanish) in tender procedures- in the case of procurement procedures, 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. As noted in subsection 3.3.3, the State framework is very similar to that at the federal level. At both levels the main objective of utilising social witnesses is to enhance social participation and transparency in tendering procedures.

The OECD Secretariat was advised by GEM procurement officials that they often found social witnesses played a passive role and frequently did not offer useful input. As well, some social witnesses did not have a solid grasp of current procurement rules and procedures and, consequently, sometimes made recommendations that were inappropriate. Finally, the fees for social witnesses involved with federally-funded public works tenders were considered to be expensive.

The OECD recommends that GEM and the SFP 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 1.50 of GEM's Administrative Code requires social witnesses to attend training offered by the State's Social Witnesses Register Committee- conducted by both the *Universidad Autónoma del Estado de Mexico* and the *Instituto de Transparencia y Acceso a la Información Pública del Estado de México y sus Municipios*. 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 provided by the SFP. ***It is recommended that GEM and the federal government have IHAEM and the SFP (and with the advice of the CFC and GEM's Secretariat of the Comptroller) design a training course specifically for social witnesses which focuses on bid rigging and competition issues and***

effect. The PPPA was passed on January 16, 2012, and according to transitory Article 3, the Federal Executive has 12 months to present the Bill to the Congress.

the current legal framework for procurement. As they participate during all stages of a procurement procedure, social witnesses might then be 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- although social witnesses are not procurement officials they do participate in the tender process.

5.6 Amending some criteria used to award a contract

10. *The requirement, when using federal resources, that GEM and other 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.*

Article 36 Bis, Subpart II of the federal Procurement Act requires that the winning bid in a federally-funded tender must be above the convenient price. This requirement – by limiting price competition among bidders – undermines the ability of GEM and other public buyers 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 also facilitate collusion among bidders.⁹⁹ GEM’s three procurement statutes, the federal Public Works Act and the federal Public-Private Partnerships Act do not require procurement agencies to establish a minimum acceptable price (see subsections 4.3.1 and 4.3.2).

It would be best if establishing a convenient price was not a requirement. In the alternative, public agencies should 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

⁹⁹ Leakage of the convenient price to bidders following the 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.

normal guarantees), greater monitoring of performance, adjustments to progress payment requirements and other methods to assure performance.¹⁰⁰

When 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, they are better addressed by strengthening the framework for penalties and guarantees rather than by restricting price competition (see section 5.7). Contracting authorities should have a verification procedure for evaluating bids to protect bidders from arbitrary assessments on the part of the procurement officials. 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.

As noted in subsection 4.3.1, GEM has fixed the discount factor involved in calculating convenient prices for federal purchases at only five (5) percent. This is a very small discount which results in higher acceptable prices than is warranted for most purchases (IMSS' discount factor is 40 percent). *The OECD recommends that GEM increase its discount factor and adopt a practice of having different discount factors depending upon the goods and services to be purchased.*

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

11. *Splitting a contract among multiple suppliers may facilitate collusion.*

Article 74, Subpart XXII of the implementing regulations to Book XIII of the Administrative Code and Article 29 of the federal Procurement Act allow contracting authorities to split contracts among multiple suppliers (*abastecimiento simultáneo*, in Spanish). These provisions require public agencies to indicate in the tender documents whether the contract is to be awarded to a single supplier or it can be split among multiple suppliers and, if the latter, the total number of winning suppliers, the share of the contract

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Recently, the Mexican Supreme Court of Justice 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.

attributable to each and the admissible difference in bids (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. GEM has no similar rule for awarding a portion of the contract. *It is therefore recommended that the State of Mexico establish a maximum mark-up of 10 percent.*

Both joint bidding (discussed above in section 5.4) and split awards provide contracting authorities with the flexibility to award a contract where a 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 provisions 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. From a theoretical point of view, one would expect that a “winner-takes-all” procurement approach encourages aggressive bidding and is likely to provide the best price for procurement groups. This contrasts with the situation when bidders know with reasonable certainty that a public agency intends to split a contract among several of them, which may provide an incentive for several bidders to converge on a focal price and minimise 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 the procurement and monitor bid prices. If split awards are used on successive or recurring contracts, the procurement laws and regulations effectively allow the tender process to be used to set up a bid rotation/market sharing scheme where each member of the cartel gets a portion of an agency’s business. To dishonest bidders, such a situation may be far more attractive to them 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 competitive issues may be exacerbated for those products where the number of suppliers is very limited.

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. Creative methods need to be available to procurement officials, particularly with respect to procurements in remote areas of the State 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 issues, *it is recommended that a study be conducted of the current use and justifications for split contracts involving all or a reasonable sample of public buyers in Mexico.* Given the high level of procurement undertaken by GEM, it would make sense for the State to be a part of the study. The study should examine the results produced by split contracts in terms of performance, price and other policy goals. Whether the rationale for split contracts is sufficiently robust or may need to be more stringent should be studied across industries, with particular attention being paid to critical procurements. Specific emphasis should be placed on those split contracts where identical prices have been submitted by bidders, which could indicate that collusion is occurring. The study should also examine the reasons for, and the rates of, default and non-performance in split contracts.

Since there are many common policy and competition issues surrounding multiple-awards and joint bids, it would also seem prudent to conduct a study of both provisions at the same time in order to gain a complete picture. The results of the study might then be used to recommend suitable changes in the law or regulations. *Such a study could, for example, be conducted by the SFP in cooperation with the Secretariat of the Comptroller at the State level and the CFC.*

Subsequently, *based on the results of the study, the Secretariat of the Comptroller and the SFP should produce guidance for State and federal 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.

5.7 Revising penalties, guarantees and rescissions of contracts

12. *The current procurement laws and regulations provide a weak framework for penalties related to non-fulfilment of contracts.*

The current framework for penalties and guarantees relating to contract fulfilment is summarised in subsections 4.4.1 and 4.4.2, including the provisions that a penalty imposed by the contracting authority in case of delay in the delivery of goods and services cannot exceed the value of the guarantee provided (Article 86 of the implementing regulations to LAASSP and article 13.61 of Book XIII of GEM's Administrative Code). For public works, the penalties at both the State and federal levels are proportional to the amount of work not completed.

The rate of contract fulfilment in State of Mexico procurements is relatively high at 94 percent¹⁰¹, but this comes at a cost. Some GEM municipal procurement officials advised the OECD Secretariat that it is 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.

At the federal level, procurement officials from IMSS advised the OECD Secretariat that it is relatively common practice for some winners of contracts awarded by IMSS to only partially fulfil the contract- for example, some suppliers do not supply goods in areas of Mexico where delivery is too costly or complicated compared to the volumes required, e.g. because the supplier does not have a local base.¹⁰²

Given the current regulatory framework it is relatively inexpensive for suppliers to fulfil only part of the contract. When a selected supplier does not comply with its obligations regarding certain products or locations, public procurement agencies are often forced to buy the goods they require in a hurry and at a higher price (and often through an emergency procedure).

It should be noted that this regulatory weakness also has also an impact on other aspects of procurement legislation. As discussed earlier in this Chapter, federal and State procurement statutes mandate that admissible bids must be above a certain threshold and allow splitting a contract among multiple suppliers. Both provisions can be viewed as means to reduce the risk of

¹⁰¹ Information provided by the DGRM.

¹⁰² IMSS Report, page 68.

selective non-fulfilment of contracts by suppliers, but they can also facilitate collusion.

A more appropriate and less problematic way to address selective non-fulfilment might be through strengthening the penalty framework rather than by introducing distortions and limiting competition during the tendering stage.

Non-fulfilment or partial fulfilment of contracts suggests that the current framework for penalties is weak in the sense that suppliers are not appropriately punished to deter the activity. Accordingly, *it is recommended that the State of Mexico revise its current framework for penalties by removing the provision that the amount of the penalty cannot exceed the value of the guarantee and perhaps by setting higher penalties* while remaining within 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.¹⁰³

In addition, the structure of a typical contract might 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 specify full delivery to the most remote or costly locations first.

Another approach to tackling this problem might be to require bidders 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. This would better enable the agency to evaluate

¹⁰³ Article 1672 and Article 1873 of the State of Mexico’s Civil Code and the federal Civil Code, respectively.

its estimates of convenient and non-acceptable pricing and to set the performance bond at a level appropriate to the risks of partial or non-performance.

It is recommended that GEM's Secretariat of the Comptroller adopt the practice of sharing its list of sanctioned suppliers and contractors with the SFP (currently, Article 287 of the implementing regulations to Book XII of GEM's Administrative Code only makes this optional). This practice 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 in a coordinated fashion.

These recommendations would help GEM to comply with Section 1 of the OECD's Design Checklist- being informed about the market- and Section 3- defining tender specifications clearly.

**CHAPTER 6:
RECOMMENDATIONS TO GEM AIMED AT FIGHTING BID
RIGGING IN PROCUREMENT AND IMPROVING STATE
PROCUREMENT PRACTICES**

As noted earlier, GEM is the first state in Mexico to formally commit to implementing, in its own procurement processes, the OECD's Guidelines for Fighting Bid Rigging in Public Procurement. GEM did this through an Inter-Institutional Agreement signed with the OECD and the CFC in October 2011. This commendable and noteworthy commitment builds on several GEM initiatives designed to foster competition in its tendering processes and to obtain better value from its procurement practices. These initiatives include the consolidation of purchases across secretariats and some of its auxiliary organisations, the use of public-private partnerships and the early adoption and consistent use of COMPRANET to improve transparency and communications.

As mentioned in Chapter 1, effective public procurement requires clear and sensible procurement practices and procurement officials who are well trained and understand and follow the established laws, regulations and practices. The OECD's recommendations outlined below are designed to enable GEM to improve the State's procurement practices, to obtain additional cost savings, to minimise the opportunities for collusion and to implement a variety of measures to detect and avoid bid rigging and other collusive practices. As well, the recommendations are designed to deal with a lack of coordination and communications within the State, two issues which typically undermine a totally effective approach to procurement in large and decentralised organisations such as the State of Mexico. As with the previous Chapter, the OECD's recommendations are grouped by broad thematic areas and are linked to one or more sections in the two Checklists comprising the OECD's Guidelines.

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 and to explore new, more inventive and secretive ways to collude. To

combat collusion and obtain the best value for its purchases, GEM needs to be constantly vigilant and ready to nimbly “change the rules of the game”, if that appears to be necessary. Moreover, several of the recommendations listed below come with caveats, since, if implemented in the wrong circumstances, they might lead to adverse effects on competition.

6.1 Taking advantage of GEM’s buying power

1. GEM should explore additional opportunities to make the best use of its significant buying power by:

- ***further consolidating purchases among its various procurement groups;***
- ***using multi-year tenders where appropriate;***
- ***procuring goods and services jointly with municipalities, other states and even with federal contracting authorities; and,***
- ***attracting the interest, and encouraging the entry, of new suppliers.***

As noted in Chapter 2, the State of Mexico is the largest state in terms of the size of annual procurement budgets. This means GEM has both enormous buying power and clout with suppliers anxious to win some of the State’s business.

To its credit, GEM has been consolidating purchases of certain goods and services across its many secretariats for quite some time.¹⁰⁴ As well, in 2008 ISSEMYM commenced a targeted approach to consolidating purchases after concluding that it was paying too much for medicines purchased largely on a medicine-by-medicine basis and worrying that this approach might also be fostering bid-rigging activity. Consolidating purchases immediately resulted in considerable savings and ISSEMYM officials have some anecdotal evidence

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The State Procurement Act, enacted on February 2, 1982, instituted the regulation of consolidated purchases. This Act was subsequently abrogated on September 3, 2003. Currently, Book XIII of GEM’s Administrative Code governs the consolidation of purchases. Article 14 of Book XIII of GEM’s implementing regulations lists the goods and services subject to consolidation of purchases which include oil and gas, cleaning and security services, computer equipment, vehicles and construction materials.

suggesting that the consolidation may have contributed to the disruption of existing collusion.¹⁰⁵

The OECD recommends that GEM continue to explore additional opportunities to consolidate its purchases, among its many secretariats and autonomous organisations (see footnote 78 in Chapter 4) and in cooperation with the secretariats and agencies of the federal government and other states. GEM should also look for appropriate situations in which to utilise multi-year tenders.

There may be another benefit from consolidating purchases for GEM, in addition to disrupting and deterring collusion. Specifically, consolidation would give suppliers opportunities to exploit economies of scale (and therefore to bid more aggressively), where these are present.

It is recommended that ISEM and ISSEMYM, the biggest buyers of medicines and medical supplies in the State of Mexico, share relevant information and carry out multi-year, joint tenders to procure common medical supplies and medicines, to the extent that such joint procurement does not infringe the current legal framework.

GEM should look at the possibility of encouraging its 125 municipalities to commence consolidating purchases for selective categories of goods and services, such as those for which GEM provides state funding.

As well, ***GEM should consider working with the SFP regarding the use of “framework agreements” in line with the current provisions of the federal Procurement Act*** (see subsection 4.1.7 and footnote 76)- to date, no state has been part of a framework agreement. ***In doing so GEM should remain vigilant to ensure that such framework agreements do not limit bidders’ participation (e.g. by locking in a pre-determined number of suppliers for a long time) and that they allow for price reductions in line with prevailing market conditions.***

When increasing its purchase volumes GEM should, however, be careful that its consolidation efforts do not 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 GEM might be left with

¹⁰⁵ Information provided to the OECD Secretariat by ISSEMYM in March 2012.

a pool of suppliers which is smaller than the original one and possibly less competition.

One way to avoid this drawback – which has the additional advantage of reducing the predictability of GEM’s tender formats – is to periodically vary the volume of business put out for tender. For example, when consolidating purchases GEM could one year procure goods and service for most of its secretariats while another year split the purchases into three separate groups, the following one in two groups, and so on- see recommendation 10 in this Chapter.

GEM could also be more active in attracting the interest, and encouraging the entry, of new bidders. As noted above, GEM’s secretariats and autonomous organisations are major purchasers of a large number of goods and services, which represent a significant business opportunity for most suppliers. It would make sense then for GEM to adopt an aggressive marketing strategy aimed at domestic and foreign suppliers illustrating the types and volumes of goods and services it buys. The OECD is aware that this proactive marketing strategy is already adopted by some state-owned firms in Mexico (e.g. the CFE), which have been successful in attracting a larger number of bidders and suppliers.

This series of recommendations 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.

6.2 Working with the SFP and CFC regarding the adoption of best practices

2. *GEM should take advantage of the procurement expertise of the SFP not just at the stage of requesting social witnesses.*

The SFP, among other responsibilities, oversees the procurement activities of all public agencies in Mexico, including state contracting authorities when they receive federal funding for a particular procurement (the State of Mexico is to receive 9,873.5 million pesos of federal funding for procurement in 2012¹⁰⁶). In respect of tender procedures, in addition to publishing a significant amount of secondary legislation as required by the federal Procurement Act, the SFP is usually involved in procurement in two ways: a) at an early stage by providing advice on the tender format to use and by promoting cooperation among agencies with respect to the possible consolidation of purchases and to the

¹⁰⁶ See footnote 14.

utilisation of framework agreements; and b) at a later stage by appointing “social witnesses” (*testigos sociales*, in Spanish) who are meant to exert a control or oversight function.

At present GEM tends to only contact SFP to request social witnesses for procurements involving federal funding. ***It is recommended that GEM be more proactive and regularly seek the advice and expertise of the SFP regarding tender documentation and procurement procedures.*** This is more important now that GEM’s procurement groups have to comply with the September 3, 2010 amendments to the Administrative Code regarding the use of *reverse auctions*. They must decide what kinds of goods and services should be purchased through a *reverse auction* mechanism and utilise the *SEITS* electronic system when conducting a *reverse auction*.¹⁰⁷ As the SFP has been advising federal procurement groups on the use of this mechanism for some time, GEM should take advantage of the technical and practical expertise of the SFP in this and other areas (framework agreements noted in section 6.1). This could be coordinated through GEM’s Secretariat of the Comptroller (*Secretaría de la Contraloría*- see recommendation 24 below). Since the SFP oversees and has visibility across the entire Mexican public sector, possible benefits for GEM from this course of action include:

- dissemination and adoption of best practices in procurement (e.g. other procurement agencies may have recently pioneered new approaches to procurement or improved on existing practices); and,
- avoidance of duplicate efforts and coordination and promotion of joint initiatives with other agencies (e.g. when different agencies are dealing with the same issue or engaged in the procurement of the same good or service).

The OECD is aware from its study last year of IMSS’ procurement practices that IMSS has increasingly engaged in constructive dialogue with the SFP at a stage prior to requesting social witnesses. This was accomplished through the creation of high-level discussion groups for a significant number of tenders and by asking the SFP to provide prior advice on several tenders in 2010 and 2011.¹⁰⁸ It is also commendable that IMSS invited representatives of the CFC to these discussions with the SFP to provide specific advice on tender design, given the CFC’s expertise in fighting collusion and the new competition

¹⁰⁷ See footnote 85.

¹⁰⁸ See IMSS Report, page 74.

law enacted in May 2011 (see recommendation 4 below concerning a similar approach for GEM).

By adopting this recommendation GEM will be adhering to Section 1 of the OECD's Design Checklist- being informed about the market- Section 3- defining tender requirements clearly- and Section 5- carefully choosing criteria for evaluating and awarding tenders.

3. ***GEM should make more efforts to promote among its staff the adoption of best practices in procurement and the use of standardised tender documents and procedures as described in the SFP's procurement manuals.***

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.

In order to increase bidders' participation in tender procedures and lower their costs, GEM should adopt best practices in procurement and whenever feasible use standardised tender documents and procedures as described in the SFP's manuals, including for State procurement procedures.

It appears that across GEM's secretariats and autonomous organisations procurement procedures are not uniform- the contracting authorities do not buy in the same way, they do not share information with other procurement units, market studies are carried out in different ways, the use of SFP's procurement manuals is not widespread, and tender documents tend to differ depending on the good or service to be procured, the purchasing unit, or even the official in charge of the specific tender. Inconsistent adoption of procurement procedures and requirements may have adverse consequences for competition on tenders and may increase the possibility for collusion.

Ensuring that GEM's procurement documents and procedures are standardised and effective could be a major responsibility of GEM's Secretariat of the Comptroller (see recommendation 24 below). Best practices could be promoted through the "Catalogue of Goods and Services" managed by the DGRM by: a) the elaboration of the technical specifications of the goods and

services to be procured; and, b) increasing the degree of standardisation of procurement procedures, in conjunction with Secretariat of the Comptroller.

In respect of a) above, the elaboration of technical specifications is critical for the success of a procurement procedure. Lack of clarity in this area may lead to: conflicts within the contracting authority and between the contracting authority and bidders; the requirement for multiple and long clarification meetings; and, complaints and cancellations of tenders after a winner has been provisionally designated. As to b) above, greater standardisation of 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 of comparable historical information regarding procurement.

In this respect, a step in the right direction is the training provided by IHAEM for state and municipal procurement officials that covers the federal and state legal framework governing procurement of goods and services in the State of Mexico. *It is recommended that GEM ask IHAEM to also offer training and practical advice regarding the design of tenders and undertaking procurement procedures.* In this regard, IHAEM and GEM could work with the National Institute of Public Administration (*Instituto Nacional de Administración Pública*, INAP, in Spanish), who have assisted IMSS with similar training.

This recommendation is consistent with Section 3 of the Design Checklist of the OECD Guidelines, defining tender requirements clearly.

4. *GEM should develop a closer relationship with the CFC and preferably make it more formal by entering into a protocol of cooperation.*

The OECD has been advised that on one occasion a GEM procurement agency informally approached the CFC about a possible bid rigging situation. *It is recommended that such communications be expanded and possibly made more formal by signing an official protocol of cooperation.* These efforts could be spearheaded by the Secretariat of the Comptroller.

The protocol could include various initiatives such as: provision of advice by the CFC on tender design and tender mechanisms¹⁰⁹ (see also

¹⁰⁹ 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

recommendation 10 below); secondment of personnel; more frequent and comprehensive exchange of information (including through an anonymous hotline (see recommendation 21 below); assistance in the design of Certificates of Independent Bid Determination (see recommendation 12 below); and, ongoing training programs. GEM has already benefitted from the CFC's expertise during the training sessions conducted by the OECD and the CFC for GEM procurement staff in December 2011.¹¹⁰

Such a protocol should also be seen in the context of the CFC now having more effective investigative and sentencing powers, following the approval of the Mexican Competition Act in May 2011. Accordingly, an increase in the cooperation between the CFC and GEM is likely to result in even more benefits for GEM and its citizens/taxpayers than in the past.

This recommendation relates to Section 1 of the Design Checklist- being informed about the market- and to Section 6- raising awareness among public procurement officials- as well as to all of the Sections in the Detection Checklist and, in particular, to Section 7, steps to take when bid rigging is suspected.

6.3 Fighting practices which may facilitate collusion

5. *GEM's calls for tender should make it clear that joint bids will only be accepted when there are pro-competitive justifications such as:*

- *two or more suppliers active in different 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 the whole of the State of Mexico; or*
- *two or more suppliers are combining their capacity to fulfil a contract which is too large for any of them individually.*

6. *GEM should only split a single contract among multiple suppliers in exceptional circumstances. In cases where security of supply is a concern, rather than simply awarding the contract to multiple*

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.

¹¹⁰ See Chapter 2 for more details regarding these training sessions.

suppliers GEM should consider either repackaging the contract into smaller lots and assigning each of them to a single supplier (which can be feasible for smaller players) or consolidating purchases (in order to attract additional large bidders).

State of Mexico and federal procurement legislation allows: a) two or more competitors to submit a joint bid; and, b) public agencies to 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 recommends that GEM should limit the use of these options, within the constraints imposed by the current legislative framework and based on the information gathered through the market studies (see below). Where they are permitted, GEM should carefully scrutinise the use and effects of joint bidding and split awards in specific cases to ensure that they do not stifle competition or facilitate collusion and that the pro-competitive justifications for such practices clearly outweigh the prospective risks.

In respect of joint bids, there seems to be little plausible justification – apart from the intent to collude – for the case when two (or more) bidders first submit individual quotations to the public agency 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. *Except for specific circumstances (e.g. when there are genuine pro-competitive reasons as outlined in recommendation 5 above), it is recommended that GEM’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. When a GEM procurement group is prepared to accept one or more joint bids, it is recommended that they include a requirement in the call for tenders that bidders must submit an explanation in their bid submissions justifying the need for a joint bid.*

In respect of contract splitting, a “winner-take-all” approach encourages aggressive bidding and is likely to result in the best price. Conversely, 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 GEM 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 may well be that by not splitting a contract equally between several suppliers a procurement group may disrupt or prevent collusion because the balance of gains and risks of each colluding party is altered.

Recommendations 5 and 6 would assist GEM with respect to Section 3 of the Design Checklist- avoiding predictability in procurement practices- and Section 4- reducing communications among bidders.

7. ***In order to deter the use of sub-contracting as a means to implement collusion, GEM should require bidders to: i) disclose their intention to use sub-contractors in the bidding documentation submitted to GEM; 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.***

As noted earlier, the federal Procurement Act is absolutely silent regarding the issue of sub-contracting while the federal Public Works Act, the federal PPP Act and all three State procurement statutes allow for the possibility of subcontracting as long as contracting authorities indicate their intention to do so in tender documentation.¹¹¹ If the OECD's recommendation 8 in Chapter 5 is not acted upon, then the OECD recommends that GEM's procurement agencies should adopt a policy of only allowing sub-contracting when the disclosure requirements indicated above are imposed. Additionally, GEM could also require ex-post disclosure obligations (e.g. in the contract signed by the winner of the tender), which would make ex-post examination of collusive practices easier for GEM and or the CFC.

The OECD recommends that GEM's contracting authorities be required to keep records relating to sub-contractors participating in contracts. Such disclosure obligations and records would also make ex-post monitoring of collusive practices by public procurement officials or the CFC easier.

This recommendation is consistent with Section 3 of the OECD's Guidelines- defining tender requirements clearly, potentially Section 4-

¹¹¹ See subsections 4.1.11 and 4.1.12.

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.

6.4 Increasing the use of competitive mechanisms

8. *GEM should limit the use of the exceptions to public tenders permitted under each of its three procurement statutes.*

As noted in subsection 4.1.2, each of GEM's three procurement statutes allow for the use of three different procurement procedures- a procedure to be used as a general rule (public tenders) and two exceptions (invitations to at least 3 suppliers and direct awards). The two exceptions can be used (justified) in different circumstances outlined in the three statutes.

In addition, provision ACP-087 of GEM's Administrative Rules governing the procurement of goods and services allows contracting authorities to procure goods and services without using a public tender when the value of each contract is below 150,000 pesos. The total value of contracts awarded in each year under this provision is not to exceed 20 per cent of an agency's annual procurement budget.¹¹²

GEM's three procurement acts generally provide some discretion to public agencies as to the choice of tender procedure they wish to use. GEM's procurement agencies should make parsimonious use of this flexibility. Specifically, *it is recommended that GEM should instruct its procurement groups to use public tenders as often as possible.* As well, even when using an invitation to tender to at least 3 suppliers, GEM should remain vigilant that genuine competition is in place among the invited bidders.

This recommendation could be carried out by through the auspices of the State's Secretariat of the Comptroller pursuant to recommendation 24 below.

Adopting this recommendation will help GEM in its efforts to be in compliance with Section 2 of the OECD's Design Checklist, maximizing potential participation by genuinely competing bidders.

9. *GEM should ensure that participation in its procurement procedures is always as extensive as possible. Related to this, whenever a national tender is declared void, GEM should open the tender to*

¹¹² Provision ACP-093 of the GEM's Administrative Rules.

non-Mexican and or non-State suppliers/contractors rather than using one of the exceptions to a public tender.

As noted in section 5.1, recommendation 1, the State of Mexico has implemented a number of regulations that can limit participation in the procurement of goods and services and the commissioning of public works to only suppliers located within the State.

For federally funded 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 agreement¹¹³).

GEM 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 aid also aid in this regard.

It is recommended that GEM make strategic use of market studies in order to identify additional genuine potential bidders. The OECD understands that this already happens occasionally. GEM is encouraged to take further steps in this direction, especially by establishing a new Market Studies Unit and by improving the breadth and quality of its market studies (see sections 6.5 and 6.6).

Recommendation 9 is consistent with Section 2 of the OECD's Design Checklist, maximizing potential participation by genuinely competing bidders.

10. *GEM should change tender mechanisms, the timing of tenders and the degree of purchase consolidation in a way that makes collusion more difficult to emerge or to continue.*

As noted previously, potential colluders are likely to react to changes in procurement policies and procedures and to find new ways to reach a collusive agreement, if they intend to collude. This is the reason why no recommendation can be expected to remain effective over time.

¹¹³ See section 3.2.

Consequently, it is recommended that GEM should introduce a degree of unpredictability in respect of the choice of procurement procedures (e.g. whether to use *reverse auctions* or not), the timing of similar, multiple tenders, the extent of consolidation (whether to procure jointly among numerous secretariats or with other states or public agencies), and whether to divide a single contract into multiple awards.

These actions are likely to hinder the formation of collusive agreements and also to disrupt any existing collusion. The element of surprise can be introduced selectively (i.e. for the procurement of certain goods and services only) and gradually over time (taking into account the complexity of GEM's procurement systems (federally funded, state procurement by secretariats and autonomous organizations, and municipal purchasing), and possibly upon receiving expert advice and guidance from the CFC.

Recommendation 10 is an effective approach to meeting Section 3 of the OECD's Design Checklist, avoiding predictability in procurement practices.

11. *GEM should adopt remote and electronic tender procedures for all of its purchases 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.

In addition to the efficiency gains and cost savings which may accrue to GEM, the adoption of electronic procedures may lessen the risk of collusion by reducing the opportunity for bidders to meet in the same place to coordinate their bids or to participate in other collusive activity.

It appears that some GEM procurement agencies already open bids remotely. The OECD recommends that GEM adopt the use of remote and electronic bidding for all procurement tenders and at all stages. One obvious area in which GEM could adopt remote procedures is for clarification meetings (*juntas de aclaraciones*, in Spanish), where potential bidders ask GEM to provide clarifications regarding certain aspects of a tender. Apart from benefitting from efficiency gains, GEM 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 facilitate the creation of a database with information on bidders and their bids across a large number of tenders (see recommendation 19 below).

This recommendation would enable GEM to reduce communications among bidders in accordance with Section 4 of the OECD's Design Checklist.

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

One way to make it more costly and risky for dishonest bidders to collude is to require those bidding on GEM or municipal 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 1 and Annex 2.

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 bid riggers easier;
- they add additional penalties, including possibly criminal penalties, for the filing of false statements by the conspirators; and,
- they 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 GEM consider requiring CIBDs in all of its future tenders.¹¹⁴ As well, *it is recommended that GEM make it mandatory that CIBDs be signed by senior corporate officials in order to increase the likelihood of collusive activity being investigated, terminated or*

¹¹⁴ See recommendation number 7 in Chapter 5 for an alternative approach.

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 under recommendation 4 above. The SFP 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.

6.5 Improving the quality and use of market studies

- 13.** *GEM should consider changes to its planning procedures to ensure that there is adequate time to carry out informative market studies.*
- 14.** *GEM should consider making changes to the way its market studies are currently conducted so that a sufficient amount of information is collected from a variety of reliable and knowledgeable sources (possibly including international comparators) to make an informed choice of the tender procedure to use and to establish meaningful reference prices.*
- 15.** *GEM should not disclose information contained in its market studies to bidders before and during the tender process.*
- 16.** *GEM should consider the following options:*
 - *creating a Market Studies Unit possibly within the Secretariat of the Comptroller;*
 - *having the Market Studies Unit establish the minimum content of an acceptable market study, e.g. through the elaboration of a checklist, which can then be used as a template in all tenders taking into account best practices (this should be conducted in cooperation with the CFC and the SFP so other Mexican procurement agencies can also benefit);*
 - *having the Market Studies Unit (possibly in conjunction with IHAEM) consolidate certain information contained in market studies and make it available to all procurement units across GEM and its municipalities in order to avoid duplicating efforts;*

- *including among the responsibilities of the Market Studies Unit the preparation of 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,*
- *having the Market Studies Unit share all or a sample of the ex-post assessments with the CFC and the SFP to help to achieve more competition and efficiency in Mexican procurement.*

Recommendations 13, 14 and 16 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. Recommendation 15 would help to ensure that procurement groups adhere to Section 4 of the Design Checklist- reducing communications among bidders. Recommendation 16 also relates to Section 3 of the Design Checklist- defining tender requirements clearly- and to Section 6- raising awareness among procurement officials (studying of past tenders).

In the State of Mexico, as outlined in subsection 4.1.6, contracting authorities have to request quotations in order to establish market prices, but the law does explicitly require carrying out a market study. However, 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.

The requirement to conduct market studies is commendable and in line with the OECD Guidelines. Market studies are vitally important and a valuable preparatory tool. 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.

According to Article 29 of the implementing regulations to the federal Procurement Act, contracting authorities can use these studies for the following purposes, among other things:

- to support the decision to group several goods or services in a single lot;
- to determine non-acceptable and maximum reference prices;
- to establish whether it is appropriate to use reverse auctions;

- 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);
- to determine if it is appropriate to apply one of the reserves included in the public procurement provisions of free-trade agreements signed by Mexico;
- to determine if it is appropriate to organise an international open tender, when the public agency is not required to do so by free-trade agreements and there are no Mexican suppliers or, if they exist, they are unable to satisfy the agency's needs (e.g. in terms of volumes or quality) or their price is not acceptable; and,
- to determine if it is appropriate to organise an international open tender, when there are no suppliers in Mexico or in countries with which Mexico has signed a free-trade agreement or, if they exist, they are unable to satisfy the agency's needs (e.g. in terms of volumes or quality) or their price is not acceptable.

It appears that there is a large variance in respect of the quality of market studies which are currently undertaken by contracting authorities at both the state and municipal levels in the State of Mexico in terms of: the quality of sources used; the issues considered; the methods by which data are compiled; the time and attention devoted to market studies; and, the extent to which the data collected is shared within an agency and between agencies.

Given the importance of market studies (especially in large, costly procurements or infrequent types of procurement when pertinent information is not widely known), the OECD recommends GEM create an independent unit dedicated to undertaking market studies- the "Market Studies Unit".¹¹⁵ This specialised unit, which could be housed within the Secretariat of the Comptroller, should be comprised of individuals with procurement and/or research expertise. GEM may also wish to consider whether the Market Studies Unit should be given a stature of independence by locating it in a separate building and having it respond to the very senior management within the Secretariat of the Comptroller.

¹¹⁵ IMSS established such a unit in January 2011, in Spanish "*Division de Investigación de Mercados*".

The OECD recommends that this unit use as many sources as possible (including international data) to gather market intelligence. This intelligence is of key importance because, among other things, it is used to determine various reference prices, the type of tender to use and whether to allow foreign bidders to participate. To enhance its ability to provide the myriad of GEM and municipal procurement groups with valuable and timely information, the Market Studies Unit should also be responsible for addressing the following issues relating to market studies:

- it is acknowledged that there is a lack of coordination between the planning and budgetary functions and the procurement functions at GEM. This is likely to result in market studies often being done in a hurry and without sufficient information gathered. Streamlining internal procedures and reducing the number of tenders (e.g. with multi-year tenders) would improve the effectiveness of market studies. In this respect, GEM's Market Studies Unit might wish to establish a plan (with input from a cross-section of State procurement officials) setting out the chronology of events in State procurement procedures. Such a plan is currently under consideration by IMSS.¹¹⁶ Dealing with this issue would likely also help to address the problem identified in section 6.7, timing of budget approvals.
- it appears that there is little, if any, exchange of market studies among Mexican public procurement groups at all levels of government although the SFP is attempting to rectify that situation at the federal level. The Market Studies Unit should explore ways to ensure that market studies are collected and shared among GEM purchasing groups and, working with IHAEM, to ensure market studies are shared between GEM state and municipal procurement groups and, working with the SFP, that sharing occurs with federal agencies (see also recommendation number 20 below).
- during the December 2011 training sessions provided to GEM procurement officials, 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*). This is not advisable as it gives an unfair advantage to some bidders and also reduces the competitive tension among bidders. The Market Studies Unit should ascertain the frequency of

¹¹⁶ IMSS Report, pages 86 and 88.

such activity and advise GEM and municipal procurement officials to avoid such conduct.

The OECD recommends that GEM and IHAEM consider whether the latter should include a course in its training programs on the subject of how to carry out market studies.

For public-private partnership contracts, specialised procurements and emergency situations or, in times of limited available resources within the Market Studies Unit, outsourcing the preparation of the relevant market studies to an external body (e.g. a specialised private sector agency) should be considered. Such an approach would solve the immediate problem, provide GEM with additional examples of quality reports and possibly reduce the risk of information leakage.

6.6 Enhancing monitoring and information-sharing activities

- 17. *GEM, possibly through its Marketing Studies Unit, 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.***
- 18. *Related to this, GEM should proactively investigate why bidders decide not to bid any longer and take appropriate actions to remove obstacles to participation or to report suspected bid rigging behaviour to the CFC.***

It is recommended that GEM considering setting up a Monitoring Unit specialised in procurement, which could be an adjunct to the Marketing Studies Unit recommended above. Such a monitoring unit would be best housed within the Secretariat of the Comptroller and be given some measure of autonomy. One of the unit's responsibilities should be the proactive analysis of a variety of key procurement issues such as how often State procurement groups do not use open tenders, the percentage of tenders open to national and international bidders, the level of financial capacity required for participating in some tenders¹¹⁷ and the incidence of partial or complete non-fulfilment of contracts.

¹¹⁷ The OECD Secretariat has been advised that sometimes GEM procurement officials require suppliers/contractors to have large amounts of money in their bank accounts (which are not proportional to the value of the contract) to demonstrate their financial capacity. This may deter new suppliers or smaller suppliers from participating in tenders.

The Monitoring Unit should disseminate such worthwhile information to the various State procurement groups, the CFC, the SFP and IHAEM.

It is well known that the greater number of bidders participating in a tender procedure, the more difficult it is for some of them to collude. It is important therefore that GEM, through its Monitoring Unit, proactively check whether contracting authorities routinely publicise calls for tender on the Internet and through other communication sources.¹¹⁸ As well, it should ascertain the number of suppliers/contractors regularly bidding on GEM tenders and, if the numbers fall below acceptable limits for certain categories of goods and services, it should investigate a) whether it is possible to replace exiting bidders with other potential entrants (including from outside of the State and Mexico), and b) why bidders have decided to exit the market and recommend remedial actions (e.g. lowering participation costs, aggregating purchases, removing any unnecessary bureaucratic procedures or reporting suspicious activity to the CFC).

Recommendations 17 and 18 would help GEM comply with Section 1 of the Design Checklist- being informed about the market, with Section 2- maximizing potential participation by genuinely competing bidders and, possibly Section 5- carefully choosing criteria for evaluating and awarding the tender.

19. *GEM should maintain a comprehensive data base for all of its tenders and make it available to the CFC in a format which allows data to be easily analysed, so that any suspicious bidding pattern may be promptly investigated.*

During the training sessions that the OECD and the CFC held in December 2011 with GEM and municipal procurement officials, the OECD Secretariat was advised by many attendees about their inability to access a historical data base of previous tenders. At the municipal level, governments typically change every three years and it is common practice for outgoing governments to

¹¹⁸ COMPRANET does not contain all of the calls for tender in Mexico- for instance, those of PEMEX, projects funded with World Bank funds and those of some municipal and state governments (using state funds) which are not required by law. As noted earlier, the State of Mexico signed an agreement with the SFP requiring that all State calls for tender be published on COMPRANET regardless of the source of funding. There are currently some e-companies in Mexico, for example <http://www.licigob.com.mx> and <http://www.licitacion-es.com.mx>, which provide suppliers/contractors with any calls for tender that are relevant to their business activities.

destroy all records from their term in office. At the State level governments only change every six years but not all Secretariats are encouraged to keep more than a couple of years of old files and those that do have rarely taken the time to review and analyse the information contained in historical tender documents.

The OECD recommends that GEM should commence having the Secretariat of the Comptroller (or another State organisation) maintain a comprehensive data base for all of its tenders. The starting point for such a data base would be the information that GEM's procurement groups have been consistently putting on COMPRANET. In the case of electronic tenders, this information should include the IP addresses used by the various bidders. The responsibility for this function could be the Monitoring Unit recommended above, as it would benefit from the information collected when undertaking its study and analysis of certain procurement issues.

GEM should discuss with the CFC the best way to exchange tender data between the two organisations. The specific purpose of this data exchange would be to allow the CFC to carry out statistical analysis in order to detect suspicious bidding patterns and act promptly.

This recommendation would assist GEM in meeting Section 1 of the Design Checklist- being informed about the market- and would be helpful regarding Section 7 of the OECD's Detection Checklist- steps to take when bid rigging is suspected.

20. *GEM 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 views about suspicious bidding behaviour.*

In addition to exploring opportunities to consolidate purchases with agencies in other states and at the federal level, the OECD suggests that it would be worthwhile for GEM to proactively engage in a systematic dialogue with other federal and state procurement groups in order to share best practices, market intelligence and views about suspicious bidding behaviour. This dialogue could be coordinated by the State's Secretariat of the Comptroller (see recommendation 24 below), the SFP and the CFC, and should occur through a formal consultation forum/mechanism. 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 GEM is attracting similar and the same number of qualified bidders; and,
- to ensure that GEM 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.

21. *GEM 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 need, in certain circumstances, to keep confidential the identity of the procurement official.*

GEM should consider – in consultation with the CFC – whether an anonymous hotline is the most effective way for GEM procurement officials to report suspicious bidding behaviour. The Secretariat of the Comptroller could also be a vehicle through which such behaviour is reported. If so, the CFC and the Secretariat of the Comptroller could work in concert to deal with the information provided and to take any appropriate and necessary follow-up action.

In this respect, it would be important 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.

This recommendation would help GEM comply with Section 7 of the OECD's Detection Checklist, which covers steps to take when bid rigging is suspected.

6.7 Budget issues and annual procurement plans

22. *Timing of budget approvals*

GEM's state and municipal procurement officials advised the OECD Secretariat that the lack of certainty regarding the timing of the approval and or receipt of state and federal financial resources limits their ability to best prepare and execute their annual plans for purchasing goods and services. This uncertainty often results in purchasing goods and services at higher prices- for

example, some suppliers accept delayed payments in exchange of charging a higher price or, 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.

It is recommended that the SFP and GEM's Secretariat of the Comptroller assess whether the budget processes and timelines at both the federal and State levels are undermining the ability of public procurement groups and officials to effectively undertake their procurement procedures and obtain the best value for money. If the two organisations come to such a conclusion, it is recommended that they bring this issue to the attention of the appropriate State and federal officials to have the matter rectified.

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

6.8 Upgrading training and education

23. *GEM should implement a training program for its procurement staff focusing on how to detect and avoid bid rigging and how to increase the level of competition in tenders.*

As part of the Inter-Institutional Agreement signed by the OECD, the CFC and GEM in October 2011, approximately 120 procurement officials from many GEM Secretariats and some of its municipalities attended a two-day training session in December 2011 on ways to fight collusion in public procurement and measures to implement to improve public procurement practices.

The training involved the participation of staff from the OECD and the CFC and international competition experts. It included presentations describing the different forms of bid rigging, 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. Participants also had the opportunity to participate in hypothetical exercises to gain hands-on experience with these issues.

It is recommended that GEM, 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 tenders, to improve the quality of its purchasing practices and to enhance competition in its tendering processes. The training program should reflect lessons learned from previous initiatives and include case studies of actual GEM tenders. The training programs should include the participation of the SFP and GEM's Secretariat of the Comptroller because of the knowledge,

roles and responsibilities they have or will have with respect to public procurement.¹¹⁹

IHAEM played a key logistics role in the December 2011 training and should be relied upon in the future for similar support. ***It is recommended that IHAEM be called upon to coordinate the participation of municipal procurement officials.*** This would be in addition to the recommendations earlier in Chapter 5 and this Chapter regarding IHAEM offering training relating to social witnesses (section 5.4), the design of tenders and undertaking procurement procedures (recommendation 3 of this Chapter) and how to conduct market studies (section 6.5).

This recommendation will help GEM comply with Section 6 of the Design Checklist- raising awareness among public procurement officials- and all of the Sections of the Detection Checklist, which outline what procurement officials should know about bid-rigging activity.

6.9 Establishing a coordination and oversight body for effective procurement

24. *GEM should utilise the State Secretariat of the Comptroller 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.*

Many of the above recommendations have referenced the need for a coordination and oversight function at the State level, if GEM is to reap the benefits of changes that will foster competition and deter collusive activity. Given the existing mandate of the State's Secretariat of the Comptroller, ***the OECD recommends that this body be charged with the following responsibilities:***

- ***ensuring that tender documentation and procedures are appropriately standardised across the State's secretariats,***

¹¹⁹

In July 2012, the SFP will begin to offer professional programs in public 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. SFP officials, initially along with professors from the *Instituto Tecnológico Autónomo de México*, will teach the courses, which will have durations of 12, 18 and 24 months depending upon the type of certification/degree. Training will include Masters and Executive programs.

autonomous organisations and municipalities (see recommendation 3 in this Chapter);

- *collecting state-wide procurement statistics (total monetary amounts and volumes and the number and monetary amounts by type of tenders: public tenders; invitations to at least three bidders; and, direct awards);*
- *studying and reporting on the degree of non-fulfilment of contracts;*
- *maintaining a data base of pertinent and useful procurement information (see recommendation 19);*
- *monitoring the numbers of bidders responding to tenders and investigating the reasons bidders cease pursuing some State business (see recommendations 17 and 18);*
- *dealing with a number of matters related to market studies (see recommendation 16);*
- *assessing the incidence of the use of joint bids, split awards and sub-contracting and analysing the rationales for their use;*
- *communicating with public procurement groups outside of the State regarding matters of common interest (see recommendation 20);*
- *working with the CFC, as appropriate, to deal with suspicious bidding behaviour reported anonymously or otherwise by GEM procurement staff (see recommendations 4 and 21);*
- *coordinating training with IHAEM, the CFC and the SFP (see recommendations 3, 16 and 23); and,*
- *interfacing with the SFP and the CFC regarding procurement issues with competitive consequences- identification of best practices, market studies, social witnesses, framework agreements, reverse auctions, contract non-fulfilments, public-private procurements, etc. (see recommendations 2, 3, 4, 12, 16, 18, 19 and 20 of this Chapter).*

International experience has demonstrated that in order for an organisation to implement meaningful and timely changes to procurement laws, regulations and practices, there needs to be put in place a champion responsible for ensuring

that a diverse number of groups and individuals are stirred to action. This is very true in the case of a political entity the size, scope and complexity of the State of Mexico. The Secretariat of the Comptroller is accustomed to oversight functions and has the political might to be effective in carrying out the responsibilities listed above. ***It is recommended that GEM establish an independent unit within the Secretariat of the Comptroller with sufficient resources and autonomy to ensure that the State achieves the twin objectives of realising more competition in its procurement procedures and detecting and avoiding bid rigging in those same procedures.***

This final recommendation will enable GEM to be in a position to better comply with all of the Sections contained in both the OECD's Design Checklist and its Detection Checklist. GEM would have a body within its vast organisation responsible for data collection, study, analysis and recommendations. As well, the Secretariat of the Comptroller would ensure that meaningful and valuable communication occurs between GEM's various procurement groups, with its municipalities and with outside organisations like the CFC and the SFP, all of which have important roles to play with respect to effective and competitive procurement and the detection and avoidance of bid rigging.

The next step in the process should be the preparation of an implementation and prioritisation plan that takes into account which of the recommendations of this Analytical Report can perhaps be implemented more quickly and easily than other recommendations that 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 95) that address corruption practices of public officials relating to procurement.

**ANNEX 1:
STATE OF MEXICO THRESHOLD VALUES**

Article 42 of the State Budget Plan for 2012 (*Presupuesto de Egresos del Gobierno del Estado de Mexico para el Ejercicio Fiscal de 2012*) specified the following threshold values for procuring goods and services by direct award and invitations to at least three suppliers:

Authorized Budget to be spent on goods and services (thousands of pesos)		Maximum value of the contract under direct award procedure (thousands of pesos)	Maximum value of the contract under invitation to at least three suppliers procedure (thousands of pesos)
Up to	Below		
0	6,500	150	400
6,500	13,000	175	600
13,000	19,500	200	800
19,500	26,000	250	1,000
26,000		500	1,500

Article 45 of the State Budget Plan for 2012 established the following threshold values for the contracting of public works and related services by direct award and invitations to at least three suppliers:

Authorized Budget to be spent on public works (thousands of pesos)		Maximum value of a contract for public works under a direct award procedure (thousands of pesos)	Maximum value of a contract for public works under an invitation to at least three suppliers procedure (thousands of pesos)	Maximum value of a contract for related services under a direct award procedure (thousands of pesos)	Maximum value of a contract for related services under an invitation to at least three suppliers procedure (thousands of pesos)
Up to	Below				
0.0	15,000	226	2,006	110	1,559
15,000	30,000	278	2,226	142	1,670
30,000	50,000	336	2,562	168	2,006
50,000	100,000	389	3,119	194	2,336
100,000	150,000	446	3,675	226	2,783
150,000	250,000	504	4,232	252	3,339
250,000	350,000	614	4,904	305	3,675
350,000		667	5,345	336	4,006

**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 0	Below 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

Authorized 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 0	Below 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:

(Corporate Name of Recipient of this Submission)

for: _

(Name and Number of Bid and Project)

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

(Name of Tendering Authority)

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

I certify, on behalf of: that:

(Corporate Name of Bidder or Tenderer [hereinafter “Bidder”])

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**

Removing preferential treatment in laws and procedures

1. Current State and federal procurement rules regarding bidders' participation can be discriminatory towards foreign bidders and sometimes even national bidders, thus limiting their possibility of selling goods and services in the State of Mexico. The State of Mexico should take the necessary steps to amend or abolish its regulations currently restricting the participation of suppliers in procurement procedures so that all qualified bidders, irrespective of their location, can participate in GEM's procurement procedures.

The State of Mexico should work with the SFP to deal with restrictions in the federal procurement statutes.

It would be valuable and advisable for a group such as the CFC, IMCO or the SFP to conduct an evaluation of the impact more fully opening up tenders to foreign participation will have on national suppliers and, in particular, on small- and medium-sized enterprises.

In the future, the CFC, IMCO or the SFP should assess the financial and qualitative benefits that have been achieved by GEM and other public procurement agencies from having had access to more competitive markets.

Changing certain procurement procedures
<p>2. Excessive use by GEM's procurement groups and other public agencies of the "de minimis" exceptions under Article 13.41 of the State's Administrative Code and Article 42 of the federal Procurement Act may result in competition being unnecessarily restricted and "value for money" not achieved. Reviews should be undertaken, by the Secretariat of the Comptroller at the State level and the SFP at the federal level, of the incidence of use of these exceptions by State of Mexico contracting authorities and other public agencies in Mexico.</p> <p>The review should examine whether State procurement groups are actually taking advantage of these exceptions by creating multiple contracts out of larger contracts.</p>
<p>3. GEM's procurement groups should utilise remote procurement procedures more extensively.</p>
Changing public notice and publicity requirements
<p>4. The mandatory requirement at the federal level to hold a clarification meeting for each call for tender may provide bidders with an opportunity to exchange sensitive information or to reach a collusive agreement. In the short term, whenever feasible, clarification meetings should be held "virtually", i.e. by using "remote" technology to eliminate on-site meetings of competitors.</p> <p>Eventually, the mandatory requirement for a contracting authority to hold at least one clarification meeting during each tender should be eliminated.</p> <p>Any material released by GEM's procurement groups (such as the minutes of clarification meetings) should not list nor identify the participants in a procurement process.</p> <p>Site visits should only be held when they are absolutely necessary and not as a routine procedure.</p>

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.

The State of Mexico should abolish the requirement in Book XIII of its Administrative Code that the “market price” must be revealed to bidders when they have all submitted bids above that price.

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.

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.

Legislative changes to increase compliance with competition law
<p>6. Joint bidders should be reminded of their obligations to comply with competition laws and procurement officials should have the legislative right to reject joint bids.</p> <p>Amendments to GEM’s three procurement statutes (and 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, the possibility of joint bidders seeking advisory opinions from the CFC.</p> <p>The current wording of the various State and federal procurement statutes should be strengthened to explicitly give procurement officials the option of not allowing joint bids in a specific tender, as long as they justify their decision (e.g. because they suspect that joint bids might in some situations be facilitating collusion or undermining competition).</p>
<p>7. State and federal procurement statutes should be amended to require bidders to submit a “Certificate of Independent Bid Determination” in addition to the “Integrity Statement” already mandated by the federal Procurement Act and Public Works Acts.</p> <p>The three GEM procurement statutes (and the federal Public-Private Procurement Act) should be amended to make it mandatory for bidders to submit an Integrity Statement in tenders covered by those statutes.</p>
<p>8. Disclosure requirements imposed by law on bidders would make it more difficult to use sub-contracting as a mechanism to implement collusion, for example:</p> <ul style="list-style-type: none"> • advise the contracting authority of their intention to sub-contract; • clearly identify the firms to which they are sub-contracting; and, • explain why sub-contracting is necessary for the proper performance of the contract.

Enhancing the participation of social witnesses

9. The role of social witnesses in tendering procedures should be enhanced, at both the State and federal levels, by focusing not just on transparency but also on competition issues.

GEM and the SFP 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.

GEM and the federal government should have IHAEM and the SFP (and with the advice of the CFC and GEM's Secretariat of the Comptroller) design a training course specifically for social witnesses which focuses on bid rigging and competition issues and the current legal framework for procurement.

Amending some criteria to award a contract

10. The requirement, when using federal resources, that GEM and other 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 would be best if establishing a convenient price was not a requirement. In the alternative, public agencies should be permitted to award a contract below the convenient price, if certain safeguards and guarantees are met.

GEM should increase the discount factor it uses in calculating convenient prices from the current level of 5 percent and adopt a practice of having different discount factors depending upon the goods and services to be purchased.

11. Splitting a contract among multiple suppliers may facilitate collusion.

The State of Mexico should establish a maximum mark-up of 10 percent for any supplier awarded part of a contract in split award situations.

A study should be conducted of the current use and justifications for split contracts involving all or a reasonable sample of public buyers in Mexico, including some from the State of Mexico. The study should examine the results produced by split contracts in terms of performance, price and other policy goals. This study could be conducted by the SFP in cooperation with GEM's Secretariat of the Comptroller and the CFC.

Based on the results of the study, the Secretariat of the Comptroller and the SFP should produce guidance for State and federal contracting authorities regarding how to best construct split contracts to maximise the incentives for competition and minimise the incentives for collusion.

Revising penalties, guarantees and rescissions of contracts

12. The current procurement laws and regulations provide a weak framework for penalties related to non-fulfilment of contracts.

The State of Mexico should revise its current framework for penalties by removing the provision that the amount of the penalty cannot exceed the value of the guarantee and perhaps by setting higher penalties.

GEM's Secretariat of the Comptroller should adopt the practice of sharing its list of sanctioned suppliers and contractors with the SFP.

**ANNEX 6:
LIST OF AREAS FOR IMPROVEMENT IN GEM'S PROCUREMENT
PRACTICES**

Taking advantage of GEM's buying power

1. GEM should explore additional opportunities to make the best use of its significant buying power by:
 - further consolidating purchases among its various procurement groups;
 - using multi-year tenders where appropriate;
 - procuring goods and services jointly with municipalities, other states and even with federal contracting authorities; and,
 - attracting the interest, and encouraging the entry, of new suppliers.

ISEM and ISSEMYM, the biggest buyers of medicines and medical supplies in the State of Mexico, should share relevant information and carry out multi-year, joint tenders to procure common medical supplies and medicines, to the extent that such joint procurement does not infringe the current legal framework.

GEM should look at the possibility of encouraging its 125 municipalities to commence consolidating purchases for selective categories of goods and services, such as those for which GEM provides state funding.

GEM should consider working with the SFP regarding the use of "framework agreements" in line with the current provisions of the federal Procurement Act. In doing so, GEM should remain vigilant to ensure that such framework agreements do not limit bidders' participation (e.g. by locking in a pre-determined number of suppliers for a long time) and that they allow for price reductions in line with prevailing market conditions.

Working with the SFP and CFC regarding the adoption of best practices
<p>2. GEM should take advantage of the procurement expertise of the SFP not just at the stage of requesting social witnesses.</p> <p>GEM should be more proactive and regularly seek the advice and expertise of the SFP regarding tender documentation and procurement procedures.</p>
<p>3. GEM should make more efforts to promote among its staff the adoption of best practices in procurement and the use of standardised tender documents and procedures as described in the SFP's procurement manuals, including for State procurement procedures.</p> <p>GEM should ask IHAEM to offer training and practical advice regarding the design of tenders and undertaking procurement procedures.</p>
<p>4. GEM should develop a closer relationship with the CFC and preferably make it more formal by entering into a protocol of cooperation.</p>
Fighting practices which may facilitate collusion
<p>5. GEM's calls for tender should make it clear that joint bids will only be accepted when there are pro-competitive justifications such as:</p> <ul style="list-style-type: none"> • two or more suppliers active in different 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 the whole of the State of Mexico; or • two or more suppliers are combining their capacity to fulfil a contract which is too large for any of them individually. <p>GEM's procurement groups should not allow joint bids (except, for example, when there are genuine pro-competitive reasons as in recommendation 5 above), if the bidders had previously submitted individual quotations during the market study, or, if it is clear that the bidders could satisfy the contract requirements individually.</p>

<p>When a GEM 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 justifying the need for a joint bid.</p>
<p>6. GEM should only split a single contract among multiple suppliers in exceptional circumstances. In cases where security of supply is a concern, rather than simply awarding the contract to multiple suppliers GEM should consider either repackaging the contract into smaller lots and assigning each of them to a single supplier (which can be feasible for smaller players) or consolidating purchases (in order to attract additional large bidders).</p>
<p>7. In order to deter the use of sub-contracting as a means to implement collusion, GEM should require bidders to: i) disclose their intention to use sub-contractors in the bidding documentation submitted to GEM; 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.</p> <p>GEM's contracting authorities should be required to keep records relating to sub-contractors participating in contracts.</p>
<p>Increasing the use of competitive mechanisms</p>
<p>8. GEM should limit the use of the exceptions to public tenders permitted under each of its three procurement statutes. GEM should instruct its procurement groups to use public tenders as often as possible.</p>
<p>9. GEM should ensure that participation in its procurement procedures is always as extensive as possible. Whenever a national tender is declared void, GEM should open the tender to non-Mexican and or non-State suppliers/contractors rather than using one of the exceptions to a public tender.</p> <p>GEM should make strategic use of market studies in order to identify additional genuine potential bidders.</p>

<p>10. GEM should change tender mechanisms, the timing of tenders and the degree of purchase consolidation in a way which makes collusion more difficult to emerge or to continue.</p>
<p>11. GEM should adopt remote and electronic tender procedures for all of its purchases and at all stages of the procurement process.</p>
<p>12. GEM should require that a Certificate of Independent Bid Determination (CIBD) accompany all bid submissions.</p> <p>GEM should make it mandatory that CIBDs are 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.</p>
<p>Improving the quality and use of market studies</p>
<p>13. GEM should consider changes to its planning procedures to ensure that there is adequate time to carry out informative market studies.</p>
<p>14. GEM should consider making changes to the way its market studies are currently conducted so that a sufficient amount of information is collected from a variety of reliable and knowledgeable sources (possibly including international comparators) to make an informed choice of the tender procedure to use and to establish meaningful reference prices.</p>
<p>15. GEM should not disclose information contained in its market studies to bidders before and during the tender process.</p>

16. GEM should consider the following options:

- creating a Market Studies Unit possibly within the Secretariat of the Comptroller;
- having the Market Studies Unit establish the minimum content of an acceptable market study, e.g. through the elaboration of a checklist, which can then be used as a template in all tenders taking into account best practices (this should be conducted in cooperation with the CFC and the SFP so other Mexican procurement agencies can also benefit);
- having the Market Studies Unit (possibly in conjunction with IHAEM) consolidate certain information contained in market studies and make it available to all procurement units across GEM and its municipalities in order to avoid duplicating efforts;
- including among the responsibilities of the Market Studies Unit the preparation of 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,
- having the Market Studies Unit share all or a sample of the ex-post assessments with the CFC and the SFP to help to achieve more competition and efficiency in Mexican procurement.

GEM and IHAEM ought to consider whether IHAEM should include a course in its training programs on the subject of how to carry out market studies.

Enhancing monitoring and information-sharing activities

17. GEM, possibly through its Marketing Studies Unit, 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.

18. GEM should proactively investigate why bidders decide not to bid any longer and take appropriate actions to remove obstacles to participation or to report suspected bid rigging behaviour to the CFC.

19. GEM should maintain a comprehensive data base for all of its tenders and make it available to the CFC in a format which allows data to be easily analysed, so that any suspicious bidding pattern may be promptly investigated.

20. GEM 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 views about suspicious bidding behaviour.

21. GEM 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 need, in certain circumstances, to keep confidential the identity of the procurement official.

Budget issues and annual procurement plans

22. Timing of budget approvals- The SFP and GEM's Secretariat of the Comptroller should assess whether the budget processes and timelines at both the federal and State levels are undermining the ability of public procurement groups and officials to effectively undertake their procurement procedures and obtain the best value for money. If the two organisations come to such a conclusion, it is recommended that they bring this issue to the attention of the appropriate State and federal officials to have the matter rectified.

Upgrading training and education

23. GEM should implement a training program for its procurement staff focusing on how to detect and avoid bid rigging and how to increase the level of competition in tenders.

IHAEM should be called upon to coordinate the participation of municipal procurement officials.

Establishing a coordination and oversight body for effective procurement

24. GEM should utilise the State Secretariat of the Comptroller 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. An independent unit should be established within the Secretariat of the Comptroller with sufficient resources and autonomy to ensure that the State achieves the twin objectives of realising more competition in its procurement procedures and detecting and avoiding bid rigging in those same procedures. The Secretariat of the Comptroller should have the following responsibilities:

- ensuring that tender documentation and procedures are appropriately standardised across the State's secretariats, autonomous organisations and municipalities;
- collecting state-wide procurement statistics (total monetary amounts and volumes and the number and monetary amounts by type of tenders: public tenders; invitations to at least three bidders; and, direct awards);
- studying and reporting on the degree of non-fulfilment of contracts;
- maintaining a data base of pertinent and useful procurement information;
- monitoring the numbers of bidders responding to tenders and investigating the reasons bidders cease pursuing some State business;
- dealing with a number of matters related to market studies;
- assessing the incidence of the use of joint bids, split awards and subcontracting and analysing the rationales for their use;
- communicating with public procurement groups outside of the State regarding matters of common interest;
- working with the CFC, as appropriate, to deal with suspicious bidding behaviour reported anonymously or otherwise by GEM procurement staff;
- coordinating training with IHAEM, the CFC and the SFP; and,
- interfacing with the SFP and the CFC regarding procurement issues with competitive consequences- identification of best practices, market studies, social witnesses, framework agreements, reverse auctions, contract non-fulfilments, public-private procurements, etc.

**ANNEX 7:
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 to increase the amount of the winning bid and thus the amount that the winning bidders will gain.

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.

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 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.

² In most instances the compensation payment will be facilitated by the use of a fraudulent invoice for subcontracting 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.

- *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.
- *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.

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

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

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

1. Be informed before designing the tender process

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

- Be aware of the characteristics of the market from which you will purchase and recent industry activities or trends that may affect competition for the tender.
- Determine whether the market in which you will purchase has characteristics that make collusion more 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.

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.

- 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 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.
- 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.

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.).

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.

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.

- 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.

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

- 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
- 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

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 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

- Require bidders to disclose upfront if they intend to use subcontractors, which can be a way to split the profits among bid riggers.
- Because joint bids can be a way to split profits among bid riggers, be particularly vigilant about joint bids by firms that have been convicted or fined by the competition authorities for collusion. Be cautious even if collusion occurred in other markets and even if the firms involved do not have the capacity to present separate bids.
- Include in the tender offer a warning regarding the sanctions in your country for bid rigging, e.g. suspension from participating in public tenders for a certain period, any sanctions if the conspirators signed a Certificate of Independent Bid Determination, the possibility for the procuring agency to seek damages, and any sanctions under the competition law.
- Indicate to bidders that any claims of increased input costs that cause the budget to be exceeded will be thoroughly investigated.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

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.

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

therefore important to ensure that qualitative selection and awarding criteria are chosen in such a way that credible bidders, including small and medium enterprises, are not deterred unnecessarily.

- When designing the tender offer, think of the impact that your choice of criteria will have on future competition.
- Whenever evaluating bidders on criteria other than price (e.g., product quality, post-sale services, etc.) such criteria need to be described and weighted adequately in advance in order to avoid post-award challenges. When properly used, such criteria can reward innovation and cost-cutting measures, along with promoting competitive pricing. The extent to which the weighting criteria are disclosed in advance of the tender closing can affect the ability of the bidders to 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.

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

- Reserve the right not to award the contract if it is suspected that the bidding outcome is not competitive.

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

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

- Implement a regular training 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.

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

- Establish a complaint mechanism for firms to convey competition concerns. For example, clearly identify the person or the office to which complaints must be submitted (and provide their contact details) and ensure an appropriate level of confidentiality.
- Make use of mechanisms, such as a 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. Subcontracting 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.