



FIGHTING BID RIGGING IN MEXICO

A review of CFE procurement rules and practices



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Foreword

Robust public procurement policies aim at achieving value for money. Governments across the OECD are determined to design public procurement procedures that promote true competition on price and quality among bidders and reduce the risk of bid rigging. The OECD Recommendation of the Council on Fighting Bid Rigging in Public Procurement, and the Guidelines which this Recommendation includes, are pioneering instruments in the fight against bid rigging. The OECD has, for a long time now, helped countries, and public entities in them, to design public procurement processes that promote competition, and to set up methods to detect collusive agreements.

The OECD works closely with governments and public entities to encourage and facilitate the implementation of its Recommendation and Guidelines. Since 2011, Mexico has sought to improve its procurement practices and step up its fight against bid rigging in partnership with the OECD. In the framework of this partnership, the OECD has conducted reviews of the procurement regulations and practices of several public entities in Mexico, including the Federal Electricity Commission (Comisión Federal de Electricidad, CFE). This is the second time that the OECD has the opportunity to review CFE's public procurement practices. The first time dates back to 2015, when the OECD was requested to analyse the general procurement law applicable to CFE at that time and CFE's procurement practices. The 2015 OECD report provided recommendations for improving CFE's procurement procedures to prevent collusion and promote competition in the light of the OECD Guidelines on Fighting Bid Rigging in Public Procurement.

As a result of the 2013 Energy Reform, the CFE's new procurement regime entered into force on 28 July 2017. Against this background and in view of CFE's determination to fight bid rigging, the OECD was again requested to review CFE's new procurement regime. This follow-up report shows that CFE's new procurement regime takes into consideration bid rigging risks. However, further efforts need to be made in order to make CFE's procurements more competitive. The report contains recommendations to CFE on how to make procurement regulations and procedures more competitive. The implementation of the OECD recommendations, together with the awareness among CFE procurement officials -built through a training manual prepared by the OECD for CFE training instructors and several OECD-led workshops- on the nature, risks and costs of collusion should enable CFE to increase competition in its procurement activity and generate savings.

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Table of Contents

EXECUTIVE SUMMARY	9
CHAPTER 1. INTRODUCTION	11
1.1. The 2015 CFE Report	11
1.2. CFE and the 2013 Energy Reform	12
1.3. Project description	15
CHAPTER 2. PROCUREMENT AT CFE	17
2.1. The Annual Procurement Programme	17
2.2. Types of procurement procedures	17
2.3. Procurement mechanisms	18
2.4. Open tender and electronic procurement procedures	19
2.5. Exceptions to open-tender procedures	19
2.6. Opening of bids	19
2.7. Award Criteria	20
CHAPTER 3. ALIGNMENT OF CFE'S CURRENT PROCUREMENT REGIME WITH OECD RECOMMENDATIONS	21
3.1. Strategic Planning	21
3.2. Relying on appropriate information before designing a tender procedure	22
3.3. Maximising participation by genuinely competing bidders	32
3.4. Define tender terms clearly and avoid predictability	42
3.5. Transparency, disclosure and sharing of information	43
3.6. Carefully choosing the criteria for awarding contracts	47
3.7. Raise awareness among staff about the risks of bid rigging in procurement	47
3.8. Detection of collusive agreements	48
CHAPTER 4. RECOMMENDATIONS	51
ANNEXES	
ANNEX 1. RECOMMENDATIONS OF THE 2015 CFE REPORT	63
ANNEX 2. DECLARATION OF INTEGRITY AND ABSENCE OF LEGAL IMPAIRMENTS OF COMPETITORS	71
ANNEX 3. DECLARATION OF INTEGRITY AND NON-COLLUSION OF COFECE	73
NOTES	75

Tables

1. ICCI Methodology	28
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Boxes

1. Market investigations	25
2. IMSS case	30
3. Different types of investigations and information that may be used when determining if a tender is abnormally low	30
4. Modifications to public contracts under the 2014 EU Directive on Public Procurement	31
5. Framework agreements under Directive 2014/24/EU	38
6. Anticompetitive joint bidding for oil and gas leases in the United States	39
7. Guidance on joint bidding in OECD countries	40
8. OECD checklist for post-award risk assessments of contractors' financial vulnerability	41
9. Refusal of consolidation in waste-management services.....	43
10. Debarment of companies for involvement in bid-rigging activities.....	46
11. Korea's bid-rigging indicator analysis system	49

Figures

1. Hierarchy of Procurement Rules at CFE	15
2. Identification, assessment and potential rejection of ALTs	30
3. Use of international and national open tenders (in terms of volume), 2012-2016	33
4. Use of international and national open tenders (in terms of value), 2012-2016	33
5. Use of different types of contractual procedures (by volume), 2012-2016	36
6. Use of different types of contractual procedures (by value), 2012-2016	36

Executive Summary

On 21 December 2013, the Mexican Energy Sector's reform liberalised the activities of generation and sale of energy. To adapt to the new regulatory reality, CFE adopted a new procurement regime on 28 July 2017.

In 2015, the OECD released a report on fighting bid rigging in the procurement procedures of CFE. The report provided recommendations for improving CFE's procurement procedures to prevent collusion and promote competition and guide CFE in designing its new procurement regime within the context of the then upcoming Energy Reform.

Against this background, CFE invited again the OECD to review whether its new procurement regime was aligned with the recommendations of the 2015 CFE Report.

Some of the most salient findings of the report are that the criteria for choosing to conduct a full-fledged integral market investigation do not take into account bid rigging risks or the level of competition, CFE uses many exceptions to open tender procedures and the exceptions to the use of electronic procedures should be limited. The OECD recommendations address these and other issues related to CFE's procurement regime.

Key recommendations

Staying informed about the market

- Ensure the independence of the new CFE market investigation unit in order to allow this unit to define the scope of market research and produce better outcomes.
- Use full-fledged market investigations, in particular when the level of competition is low or past collusive behaviour has been observed.
- Issue a guide establishing the principles for conducting market investigations and obtaining information from the largest number of sources possible.

Maximising the potential participation of genuinely competing bidders

- Limit the use of exceptions to open tenders which currently can be excessive.
- Maximise the use of electronic procurement procedure.
- Encourage the use of international open tenders.
- Eliminate prequalification procedures which restrict participation to preselected bidders only.
- Conclude framework agreements following a competitive procurement procedure.
- Limit subcontracting and joint bids to cases that are justified by pro-competitive effects.

Defining requirements clearly and avoiding predictability

- Limit the use of split awards, and avoid disclosing the possibility of an award being split before the offers have been submitted.
- Involve experts from CFE technical units at the stage of the definition of tender terms, in particular when needs are complex or technical.

Reducing communication among bidders

- Adopt the necessary measures so that the electronic identification of bidders does not allow third parties to identify them.
- Enrich and develop CFE's declaration of integrity and lack of legal impediments (required of bidders as part of their bid) using the declaration of integrity and non-collusion proposed by COFECE.

Carefully choosing criteria for evaluating and awarding the tender

- Avoid using criteria that are not directly and objectively related to the subject matter of the procurement procedure.

Raising awareness among public procurement officials

- Set up regular training on collusion for procurement officials.
- Create a system to report suspicions of bid rigging.
- Create a database containing procurement information that allows analysis of the data; and grant access to this database to competition authorities.
- Consider the possibility of rejecting offers from bidders who have been convicted of bid rigging when the relevant market's characteristics allow for this.

Chapter 1. Introduction

On 7 January 2015, the OECD released a report on fighting bid rigging in the procurement procedures of the Electricity Federal Commission (Comisión Federal de Electricidad, CFE). The 2015 CFE Report¹ analysed the public-procurement regulations applicable to CFE and CFE's internal practices in the light of the *OECD Guidelines on Fighting Bid Rigging in Public Procurement*,² and provided recommendations for improving CFE's procurement procedures to prevent collusion and promote competition.

This chapter describes the background and context of the 2015 CFE Report and the recommendations it contained. It also provides an overview of the 2013 reforms of the Mexican energy sector (the Energy Reform) and its impact on CFE's budgetary system, governance and procurement regime. Chapter 1 also describes the background and scope of this report.

1.1. The 2015 CFE Report

1.1.1. Context

When the 2015 CFE Report was drafted, CFE was a legal quasi-monopoly with a public-service obligation.³ CFE was in charge of the planning of the national electricity system and was granted the exclusive rights to generate, transmit, distribute and sell electricity in Mexico and complete all works required for the fulfilment of this object.⁴ In 1992, private companies became able to apply for permits to generate electricity either for sale to CFE or for self-supply or co-generation.⁵

CFE's power-generation capacity in 1937, the year it was created, was 629MW and only 38% of the population had access to electricity. By early 2000, capacity had risen to 35 385MW and covered 94.70% of the Mexican population.⁶ Until recently, efficiency in the procurement of goods and services was not a strategic consideration for the company.

1.1.2. Recommendations in the 2015 CFE Report

When the 2015 CFE Report was prepared, CFE was subject to the Mexican Public Procurement Law (PPL) and Regulations.⁷ The Report contains two types of recommendations. The first aimed to improve the PPL and, although they were not directly addressed to CFE, were meant to inspire CFE's new procurement regime, then being designed (see Chapter 2). The second type of recommendations aimed to enhance procurement procedures at CFE, foster competition in its procurement processes, and allow CFE to prevent and detect bid-rigging conspiracies (see Chapter 5). These recommendations aimed to guide CFE in the establishment of its new procurement regime within the context of the then upcoming Energy Reform.

In order to reduce the risk of bid rigging, the 2015 CFE Report recommended that CFE better plan its procurements, including setting up a dedicated market-investigation unit to supervise and coordinate procurement market investigations. Moreover, the report advised that CFE should create a solid database of past procurements.

The report also suggested that CFE should analyse its past procurements to determine the best purchasing strategies for different goods and services. CFE was encouraged to be in closer contact with its suppliers.

Other recommendations included:

- not disclosing sensitive information to third parties about tenders and bidders
- increasing the appropriate use of consolidated purchases
- using framework agreements
- increasing the number of bidders
- allowing joint bids and subcontracting only when they are pro-competitive
- limiting split awards.

The recommendations of the 2015 CFE Report are summarised in Annex 1.

1.2. CFE and the 2013 Energy Reform

On 21 December 2013, the Mexican constitution was modified to reform the energy sector and end CFE's quasi-monopoly on the generation and sale of energy. The generation and sale markets were then liberalised in 2014. Article 27 of the Mexican Constitution reserves exclusively to the state the planning and control of the national electricity system, as well as the transmission and distribution of electricity, for which no concessions will be granted. However, the state may hire private companies to carry out the financing, installation, and maintenance of the infrastructure for transmission and distribution of electricity.⁸ Article 28 of the Mexican Constitution defines those areas as strategic and provides for regulatory bodies. These are the National Centre for Energy Control (Centro Nacional de Control de Energía, CENACE), formerly part of CFE, and the Energy Regulatory Commission (Comisión Reguladora de Energía, CRE). CENACE is in charge of the efficiency, safety and quality of the national electricity system and guarantees open and non-discriminatory access to the national transmission and distribution network. The CRE is responsible for granting generation permits and setting transmission and distribution tariffs.⁹ As a result of the Energy Reform, CFE is now overseen by the CFE Law (Ley de la Comisión Federal de la Electricidad) and its implementing regulation (Reglamento de la ley de la Comisión Federal de Electricidad). These legal texts set up the corporate governance of CFE and define the special legal regimes applicable to the company. The CFE Law entered into force on 14 October 2014, the day after the appointment of CFE's Board of Directors.¹⁰ However, some of the Law's provisions regarding CFE's special regime (for instance, on budget and debt) only entered into force on 17 February 2016, one day after the control, transparency and accountability mechanism were in place.¹¹ With regards to CFE's procurement regime, the PPL continued to apply until the entry into force of the CFE's General Provisions regulating procurement procedures (Disposiciones Generales en Materia de Adquisiciones, Arrendamientos, Contratación de Servicios y Ejecución de Obras de la Comisión Federal de Electricidad y sus Empresas Productivas Subsidiarias) on 28 July 2017.¹²

The CFE Law defines CFE as a state productive company wholly owned and controlled by the Mexican federal government.

It makes CFE responsible for the transmission and distribution of electricity for and on behalf of the Mexican state (public services), and competes with private operators in the markets for power generation and the sale of electricity.¹³

CFE has been granted budgetary autonomy. This means that it can prepare and approve its own staff and project budgets, within the annual budgetary limits authorised for CFE by the Mexican Congress.¹⁴

1.2.1. Governance

The Mexican federal government appoints government members of CFE's Board of Directors, proposes independent members, and evaluates the performance of CFE, its subsidiaries and their executive managers.¹⁵

CFE is managed by a Board of Directors and a Director General. The Board of Directors is responsible for the central planning and strategic direction of CFE and its subsidiaries'.¹⁶ The Director General is responsible for the management and operation of CFE in accordance with the strategies and objectives set by the Board of Directors.

The Board of Directors is composed of five government members,¹⁷ four independent members ratified by the Mexican Senate,¹⁸ and a member appointed by the employees of CFE and its subsidiary productive companies (SPCs).

The Board of Directors is assisted by the following committees:

- Audit
- Human Resources and Compensation
- Strategy and Investment
- Procurement.

The Procurement Committee, which issues recommendations on procurement, is chaired by an independent member of the Board of Directors appointed for an annual term. It also reviews CFE's Annual Procurement Programme (APP) and comments, upon the request of the Board of Directors, on procurement processes.¹⁹

An Advisory Council assists the Director as a collegiate body for consultation and decision on the procurement of goods, services, works and related services. It is chaired by CFE's Director of Administration and is, among other responsibilities, in charge of determining whether there is a need to use a procurement procedure different from those provided for in the General Provisions, following a valid request of a requiring or contracting units.²⁰

The Advisory Council is assisted by the Subcommittee of Exceptions to Open Tenders for Goods and Services, and the Subcommittee of Exceptions to Open Tenders for Works and Related Services. These Subcommittees are responsible for ruling on the application of some of the exceptions to open tenders provided for in Article 80 of the CFE Law.

1.2.2. Structure and organisation of CFE

CFE may own SPCs and other companies.²¹ On 29 March 2016, CFE published in the Official Journal the announcement of the creation of nine SPCs:

- CFE Distribution
- CFE Supplier of Basic Services
- CFE Transmission
- CFE Generation I
- CFE Generation II

- CFE Generation III
- CFE Generation IV
- CFE Generation V
- CFE Generation VI.

CFE and its various subsidiaries are audited and monitored by:

- the Audit Committee (composed of three independent members of the Board of Directors)
- Internal Audit (responsible for executing the policies defined by the Audit Committee)
- the External Auditor (appointed by the Board of Directors upon the recommendation of the Audit Committee).

The General Federal Audit Authority (Auditoría Superior de la Federación) may also audit CFE.²²

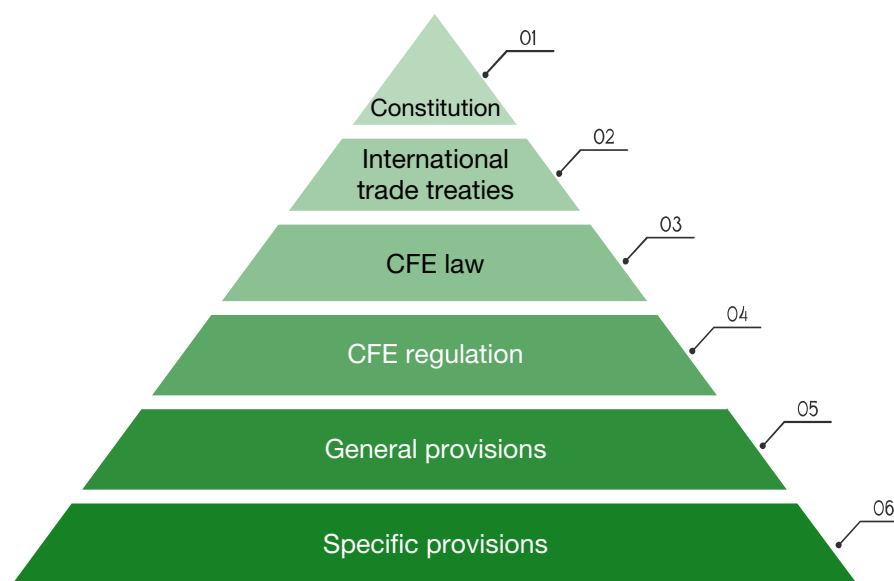
1.2.3. CFE's Procurement Regime

Once CFE's internal procurement regulations are adopted by CFE's Board of Directors, then CFE and its SPCs will no longer be subject to the PPL, but rather to the provisions derived from the CFE Law. The latter and its implementing CFE Regulation provide the principles for designing CFE's internal procurement regulations.

The General Provisions (GPs) defining and completing CFE's new procurement regime were adopted by the Board of Directors and published in the Official Journal on 23 June 2015. They were amended on several occasions²³. The latest modifications to the GPs were published in the Official Journal on 30 December 2016. The GPs entered into force on 28 July 2017.²⁴

CFE has also adopted specific provisions on different subjects relating to the supply and procurement process ("Specific Provisions"), such as:

1. the criteria for applying performance bonuses (CCT-001. Criterios para la Aplicación del Bono de Desempeño)²⁵
2. the criteria that should be considered when applying the exceptions to open tenders provided for in Article 80 of the CFE Law (CCT-002. Guías de Aplicación de Criterios Operativos a Considerar para la Acreditación de Supuestos de Excepción al Concurso Abierto, Previstos por el Artículo 80 de la Ley de la Comisión Federal de Electricidad)
3. the certification of officers responsible for procurement, transport and storage (A-001. Certificación de Funcionarios Responsables de Realizar Actividades en Materia de Contrataciones, Tráfico y Almacenes)²⁶
4. the application of criteria for the evaluation of bids (DA-002. Aplicación de Criterios de Evaluación de Ofertas en Materia de Adquisiciones, Arrendamientos y Contratación de Servicios)²⁷
5. the criteria for determining stock levels (DA-003. Criterios para la Determinación de Niveles de Existencias y Puntos de Reorden)
6. the criteria for identifying the risk level in procurement procedures (DA/DPIF-001. Criterios para Identificar el Nivel de Riesgo en las Contrataciones).

Figure 1. Hierarchy of Procurement Rules at CFE

1.3. Project description

As a result of the Energy Reform, CFE is undergoing a major transformation, involving the adoption of a new procurement regime.

Against this background, CFE invited the OECD to review whether its new procurement regime is aligned with the recommendations of the 2015 CFE Report, as well as to provide support through the production of training materials and the provision of capacity building.

This report reviews CFE's new procurement regime in light of the recommendations of the 2015 CFE Report, and takes into account data available to the OECD until 31 July 2017.

Chapter 2. Procurement at CFE

The CFE Law spells out the principles that guide CFE's Board of Directors when designing CFE's internal procurement regime, made up of the GPs and Specific Provisions (SPs). The GPs are adopted by the Board of Directors and the SPs by the relevant CFE bodies.

2.1. The Annual Procurement Programme

The Annual Procurement Programme (APP) of CFE and its SPCs lists the goods and services that will be acquired during the year in accordance with the companies' needs in implementing their business-plan projects. It is based on requirements determined by each of the business units/groups. CFE and its SPCs must carry out market investigations to create the APP and define the tender terms and the acquisition strategy prior to a procurement procedure. Minor purchases are exempted from this obligation.²⁸

Information contained in the APP that relates to the business plan and whose dissemination could compromise or jeopardise the performance of a firm's activities is considered as confidential commercial information. A public version of the APP containing only general, non-confidential data is published in the Electronic Procurement System (EPS) and on CFE's website.²⁹

2.2. Types of procurement procedures

The GPs provide for three types of procurement procedures:³⁰

- **Open tenders**

Open tenders begin with the publication of a call for tenders and conclude with the award of the contract or the cancellation of the procedure. If the requiring unit deems it necessary, visits to the site where the work or service will be performed may be arranged. Also, at least one question-and-answer meeting (clarification meeting) about the tender with potential suppliers must be held.

The open-tender procedure is used for all procurements, and is compulsory whenever the contract's value exceeds the threshold established for procurement subject to free-trade agreements including public-procurement provisions (MXN 7 208 319 for the second half of 2017).³¹

The GPs provide a simplified version of the open-tender procedure. Under this procedure, clarification meetings are optional, and the timeline for the different stages of the procedures is established in the tender terms and does not have to follow the timeline provided for in the GPs for open tenders. In simplified tender procedures, where it has been decided not to conduct a market investigation before the contracting procedure starts, the requirement of conducting a market investigation shall be deemed to be satisfied with the receipt, through the EPS, of at least three offers on sealed envelopes that are likely to be technically evaluated.

In general terms, simplified tender procedures may be used whenever the contract's value is between USD 4 000 and the threshold established for procurement subject to free-trade agreements.

- **Restricted invitations**

Under this procedure, only invited bidders can submit offers. CFE must invite at least three potential bidders and publish the invitation and the tender terms on its website and in the EPS.³²

The restricted invitation procedure may only be used when it is allowed by some of the exceptions listed in Article 80 of the CFE Law³³

- **Direct awards**

Under this procedure, the contract is directly awarded to one supplier without an open tender procedure.

Direct-award procedures may be used for exceptions provided for in Article 80 of the CFE Law that are not covered by the obligation to use the restricted-invitation procedure or where there are no conditions in the market to carry out a restricted invitation procedure.

2.3. Procurement mechanisms

The GPs provide for various procurement mechanisms,³⁴ such as:

- **Discount base price:** this consists of setting a starting price on the basis of which bidders propose discounts.
- **Multi-annual contracting:** this seeks to cover the needs for more than one fiscal year.
- **Joint bids by two or more bidders aimed at promoting competition:** joint bids may be submitted only when allowed in the tender terms.
- **Auctions:** in open-tender or restricted-invitation procedures, following the opening of sealed envelopes, qualified bidders may submit additional bids. At the bid opening, qualified bids will be classified in ascending or descending order starting with the lowest-price bid, and a deadline for submitting additional bids will be set. The contracting unit will then inform participants of the starting price, the auction type to be employed (ascending, descending or sealed-envelope, first-price auction³⁵), and, when appropriate, the maximum contracting price. This information can be submitted through the EPS or by email. Once bids are submitted, a decision will be issued.
- **Split award mechanism:** this allows parts of the contract to be awarded to two or more suppliers. The difference between the winning suppliers' prices must not exceed the percentage established in the tender terms and in any case must be lower than 5% of the lowest qualified bid. The first qualified bidder shall obtain 80% or more of the contract; the rest of the contract can be assigned to other bidders.
- **Consolidation:** this sees one procurement procedure awarding a contract that covers the needs of two or more requiring units.
- **Framework agreements:** these are purchasing arrangements in which CFE determines the technical and quality specifications, prices, and other contractual conditions on the basis of a market investigation. In the first stage, suppliers complying with the specifications and agreeing to the terms and conditions set up by the framework agreement may sign the agreement. In the second, CFE may conclude contracts with those suppliers.

2.4. Open tender and electronic procurement procedures

As a general rule, procurement at CFE must be performed through open-tender procedures,³⁶ and using electronic means.³⁷ The GPs set out a clear obligation to use the EPS,³⁸ an IT system which is currently being developed by CFE to conduct its procurement procedures. Consultation will be free of charge and it will contain all the necessary information for the process of supply and procurement.³⁹ The EPS will make it possible to carry out all stages of a contracting procedure, except site visits, electronically, without the presence of bidders.

The EPS will allow for the digitalisation of files and so the creation of electronic procurement records, in order to facilitate information handling and management.

The EPS will be implemented and start operating on 28 July 2018, 365 days from the entering into force of the GPs.

2.5. Exceptions to open-tender procedures

Article 80 of the CFE Law allows 25 exceptions to open-tender procedures,⁴⁰ of which 16 are also found in the PPL and 9 are CFE Law-specific. These include:

- Tenders directly linked to electricity-related incidents that endanger workers, the population, the environment or facilities (such as accidents, sabotage, theft, etc.).
- Those related to services rendered by public notaries or independent experts, legal services and representation in court, arbitration or administrative proceedings, banking services, brokerage or securities custody services, among others.
- Those relating to contracts entered into with agencies of the Federal or State Public Administration or their SPCs.

In cases where exceptions apply, CFE may procure the goods, services and works through restricted-invitation (i.e. procedures in which a limited number of bidders participate) and direct-award procedures.

In accordance with the CFE Regulation and the GPs,⁴¹ a contract whose value does not exceed MXN 650 000 may be awarded directly and contracts whose value does not exceed MXN 3 million may be awarded through restricted-invitation procedures. The use of these exceptions to open-tender procedures should be justified.⁴² The total value of the contracts procured under these exemptions should not exceed 30% of the total procurement budget authorised for a given fiscal year. For the purpose of the present report, this exception will be referred to as the “low-value exception”.

Purchases not exceeding the equivalent in local currency of USD 4 000 may also be exempted, as long as the total value of the contracts falling under this exception does not exceed 30% of the total budget authorised for procurement in a given fiscal year.⁴³ For the purpose of the present report, this exception will be referred to as “minor purchases”.

2.6. Opening of bids

The opening of bids in open tenders and restricted-invitation procedures is carried out in two stages. Firstly, technical proposals are opened and assessed. If a technical proposal meets all the necessary requirements, the economic offer is opened.⁴⁴

CFE may decide to add a negotiation stage to open tenders and restricted-invitation procedures when a market investigation shows that such a stage could help obtain better conditions. The inclusion of a negotiation stage has to be mentioned in the tender terms.⁴⁵

Negotiations will be carried out after having conducted the technical and economic evaluation of the initial bids. The negotiations are conducted separately with each participant and are confidential.

2.7. Award Criteria

Bids must be assessed in accordance with the criteria specified in the tender terms, and can be one the following:⁴⁶

- **Cost benefit:** this criterion takes into account the costs associated with the good or service, such as maintenance, operation, consumables and performance, factoring in the duration or volume of the product's consumption, as well as the capabilities and efficiencies the product entails.
- **Life-cycle cost:** this criterion involves a technical and economic examination by the contracting company that allows selecting the offer that represents the lowest cost or greater utility, at present value, during the time of execution and operation of the work or related services.
- **Price:** the contract is awarded to the bidder that offers the lowest price and which has met the technical requirements established in the tender terms.
- **Points:** this criterion involves the use of different weighted criteria to determine which offer represents the best combination of quality, experience, expertise and price.

Chapter 3. Alignment of CFE's Current Procurement Regime with OECD Recommendations

This Chapter assesses whether CFE's new procurement regime is in line with the recommendations set out in the 2015 CFE Report and the *OECD Recommendation on Fighting Bid Rigging in Public Procurement*. Where appropriate, it provides recommendations to align the new procurement regime with international good practice.

The CFE procurement regime is based on 112 provisions: 37 articles of the Mexican Constitution, CFE Law and the CFE Regulation, and 75 General and Specific Provisions; the general public-procurement regime contains 639 provisions. This reduction represents a positive step in terms of regulatory simplification.⁴⁷

3.1. Strategic Planning

Recommendation 5.1 of the 2015 CFE Report noted that the strategic planning of acquisitions is the most important preventive measure that an institution can put in place in order to reduce the risk of bid rigging. The OECD pointed out that in order to define this strategy, four conditions must be satisfied:

1. prioritising objectives subject to budgetary restrictions
2. gathering internal information in order to determine an institution's demand
3. gathering external information in order to understand the market clearly
4. evaluating the performance of procurement strategies over time, and establishing indicators for this purpose.

Under the GPs, the first two conditions are addressed by ensuring that the Board of Directors includes projects and acquisitions in CFE's business plan. This plan must contain CFE's business objectives and opportunities, as well as the firm's main commercial, financial and investment strategies, large-scale and technological development projects, and priority acquisitions. CFE's APP serves to implement the projects included in the business plan.

GP 14 refers to market investigations and supports meeting the third condition: gathering external information. Recommendations included in this report aim to provide additional support to this objective.

For the fourth condition, the assessment of the performance of procurement strategies over time, the 2015 CFE Report suggested carrying out cost-benefit analyses of procurement strategies to determine the most efficient procurement methods, develop procurement strategies, and measure their success through indicators.

The *OECD Recommendation on Public Procurement* (OECD, 2015b) advises driving "performance improvements through evaluation of the effectiveness of the public-procurement system from individual procurements to the system as a whole". In this spirit, CFE should periodically and consistently assess

the results of its procurement practices using indicators to measure performance, effectiveness and savings, as well as efficiency in terms of transaction costs and time of procurement procedures.

According to CFE Law, the Audit Committee is responsible for establishing objective and measurable indicators for evaluating CFE's economic and business performance.⁴⁸ It is recommended that these indicators also cover procurement performance.

3.2. Relying on appropriate information before designing a tender procedure

In order to design an efficient procurement strategy, CFE must understand the range of products or services available in each market that meet its specific requirements and needs. This section analyses the new regime's characteristics in this regard.

3.2.1. Market investigations

Market investigations preceding specific procurement procedures aim to identify price, quality and timing conditions.

There are two types of market investigations:⁴⁹

1. **Simplified market investigations:** these aim to verify price conditions and consist of collecting pricing information from CFE's information systems and from any of the following sources:
 - public information systems
 - contracts entered into by agencies and/or entities of federal, state or municipal government and/or state productive enterprises and their SPCs,
 - quotes offered by potential national and/or international bidders, or information obtained from their websites, or
 - price information obtained by any public or private entity in the same sector and relating to similar acquisitions,

CFE should have "evidence of the existence" of five potential bidders. Otherwise, an integral market investigation should be conducted.

2. **Integral market investigations:** these aim to verify the existence, in the quality and quantity required, of the goods, works or services, as well as the maximum contracting price. It also aims to identify market conditions that can increase the risk of collusion on the basis of the number of identified potential providers, and to carry out a basic assessment of competition in the market. This investigation will be based on the information obtained from at least three sources from the list outlined in Section II.b. of GP 14:
 - the contracting company's information systems
 - public information systems
 - contracts entered into by agencies and/or entities of the federal, state or municipal government and/or state productive enterprises and their SPCs
 - quotes provided by suppliers
 - information obtained from other contracting units within CFE or its SPCs.

In addition to these sources, CFE and its SPCs can use the purchases made by both national and international companies in the public and private sectors as a reference. Minor purchases can be exempted from the obligation to carry out market investigations.

A market investigation performed in order to develop the APP is intended to determine the estimated budget and to identify the most suitable goods, services or works for CFE's needs. This investigation is carried out by the requiring unit using any of the two types of market investigations.

In the case of simplified tenders, the market investigation prior to the contracting procedure may be considered to have been carried out after receiving, through the EPS, at least three offers that are likely to be technically evaluated.

The creation of a separate unit for market investigations

Recommendation 5.3.1 of the 2015 CFE Report refers to the creation of a new and separate unit within CFE for conducting market investigations, and eventually using this department to carry out similar tasks for SPCs, or alternatively, to have this organisational structure reproduced within each SPC.

In this regard, GP 14 foresees the creation of a specialised market-investigations unit (SMIU). The 2015 CFE Report recommended that SMIU's main responsibility be the preparation of market investigations. Its precise functions and structure are currently being defined and designed alongside with CFE's Articles of Organisation (Estatutos Orgánicos). The unit into which the SMIU will be incorporated is unknown at the time of preparing this report.⁵⁰

When establishing the new structure of the SMIU, CFE should pay special attention to guaranteeing the unit's independence, so as to avoid interference from the contracting and/or requiring units in the development and duration of the investigations. This will ensure that market investigations are objective and conducted in a timely manner. These units could, however, have an advisory role and assist the SMIU in conducting the market investigation.

Types of market investigations

Recommendation 5.3.6 of the 2015 CFE Report refers to the introduction of two different types of market investigations (for high- and low-risk purchases). High-risk purchases are the procurement of goods and services in markets that are more prone to collusion and markets that have shown low levels of competition or in which suppliers exist who have engaged in collusive practices in the past. This recommendation required focusing more attentively and in greater detail on market investigations related to high-risk purchases, so that procurement officers could design the necessary measures against collusion.

Although CFE has indeed created two different types of market investigations (simplified and integral), the justification for conducting one or the other does not depend on collusion risks, level of competition and past collusive behaviour as proposed in Recommendation 5.3.6.

It is recommended that CFE first look at the risk of bid rigging and the level of competition in the market, before choosing which type of market-investigation procedure to use. If there are bid-rigging risks or competition is low, then an integral market investigation should be undertaken.

The GPs do not establish when a simplified market investigation should be applied, but CFE considers that a simplified market investigation should be used for its routine procurement procedures, such as those related to frequently purchased goods and general services.⁵¹

International best practice and competition enforcement cases have shown that repetitive tenders, which may be the case in the acquisition of routine, high-rotation and frequently procured goods and services, increase predictability and facilitate collusion. For this reason, it is recommended that even routine procurement procedures be subject to an integral market investigation.

Minor purchases (for a value lower than USD 4 000) may be carried out without a market investigation. However, given the fact that this type of purchase can make up to 30% of the total procurement budget, it is recommended that some kind of market investigation be carried out even for the procurement of minor purchases. Also, minor purchases could be grouped and be included in framework agreements, which require a market investigation.

Sources of market investigations

Recommendation 5.3.4 of the 2015 CFE Report says that market investigations should use different information sources to estimate maximum contracting prices. GP 14 lists a number of information sources and requires that three of them be used for integral investigations. Discretion as to which information sources can be used may strip the new regime of its virtues, since information could be obtained through, for example, quotes obtained from manufacturers, who lack incentives to offer quotes at competitive prices, or through prior contracts entered into by CFE, which could have resulted from procedures that may not have been competitive or that may have been affected by collusive agreements; and any of the other sources of information provided for in the GPs. This means that information used for the market investigation might not reflect real market conditions. For this reason, it is recommended that information for market investigations be obtained from the largest number of sources as possible.

According to Recommendation 5.3.3 of the 2015 CFE Report, CFE should analyse the procurement processes of other public and private entities to benchmark procurement conditions for various goods and services, and detect possible bid-rigging schemes. GP 14 introduces the option for CFE of using purchases made by national or international companies, both in the public and private sector, as a reference. This should be compulsory: CFE should require, whenever possible, all market investigations to use the purchases made by national or international companies in the public or private sector as an information source.

Finally, and with regard to simplified tenders, GP 14 states that a market investigation may be considered as completed upon receipt, through the EPS, of at least three offers in closed envelopes and that are likely to be technically evaluated. It is not clear, however, how receiving three offers in closed envelopes is a substitute for a comprehensive market investigation. Investigations must be carried out prior to the procurement procedure, as elements that should be established by a market investigation, such as the existence of substitute goods or services or the number of suppliers in the market, are unlikely to be determined through offers. It is recommended that integral market investigations are always run in the cases of simplified tenders.

According to CFE estimates, 60% of contracts concluded by CFE in 2015 had a value below the thresholds established for the simplified tender procedure.⁵² While this does not mean that all these contracts would be now subject to a simplified-tender procedure – some constituted lots of bigger contracts that were awarded by public tender procedure under the PPL – it does show an indication of the potential high percentage of simplified tenders in CFE's procurement activity.

Procedure to conduct market investigations

The GPs do not provide a standard procedure for conducting market investigations; they only provide a list of sources that can be used for them. GP 14 states that a guide to the correct procedures for conducting market investigations will be issued by CFE's corporate-procurement unit⁵³. This guide could be the right instrument for establishing the principles for conducting market investigations. The box below illustrates some cases that could inspire CFE when putting together this guide.

Box 1. Market investigations

Market-investigation guidelines in the UK

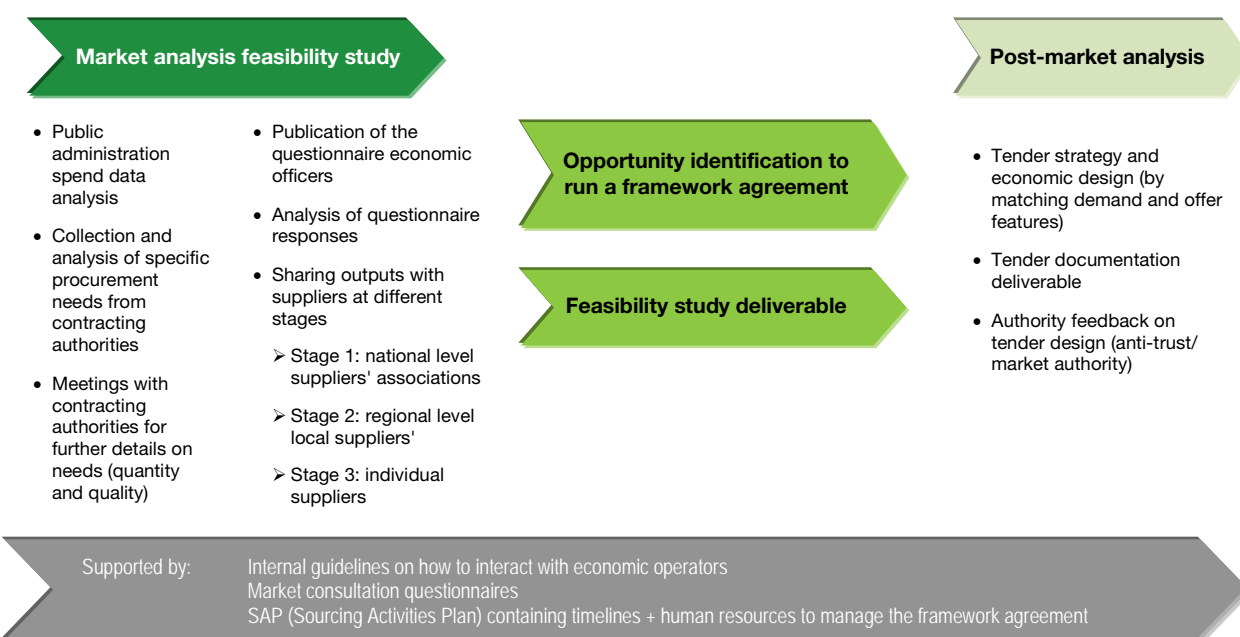
A set of guidelines illustrating how the UK's competition authority carries out market investigations was published in 2013 (Competition Commission, 2013). The guidelines provide insights on the procedural stages of the investigation, including how the authority gathers evidence and the analyses' range and depth. The sections on the determination of market characteristics and market outcomes, such as market prices, profitability, quality or innovation, are of particular interest to CFE. This document can serve as a reference for outlining the processes and procedures that can be followed in conducting a market investigation.

Market-investigation process at Italian central purchasing body, Consip

Consip is the Italian central-purchasing body, wholly owned by the Italian Ministry of Economy and Finance. Consip awards contracts (usually framework agreements) for goods and services for the Italian public sector.

To improve its procurements, Consip has developed a standardised internal process for running a market investigation, including how to interact with suppliers (economic operators). The process, shown in the visual below, identifies the activities necessary to a market investigation when completing a "feasibility study" as a preliminary step to tender-design and tender-notice publication.

The entire process is supported by internal guidelines on how to interact with economic operators; market consultation questionnaires; and the annual Sourcing Activities Plan (SAP).



1) Internal guidelines on how to interact with economic operators

Internal market-investigation guidelines guide interaction with businesses during a market investigation. The market investigation's goal is to collect the following data and characteristics on the goods and services to be procured:

- market size and the state's procurement volume in relation to market size
- market structure: percentage of small- and medium-sized enterprises in the market segment, or whether dominated by larger companies
- the biggest suppliers in the market

- maturity of the products/services, pricing models and different conditions offered by suppliers, potential standardisation of the products/services and their commercial capacity
- market-development outlook for the coming years.

This information is useful in defining the procurement characteristics, the tender strategy, the potential for splitting into lots, and the reference price. Information may be collected by means of interviews with suppliers' national associations and, if necessary, with individual suppliers, following the guidelines.

2) Market-consultation questionnaires and meetings with economic operators

Market-consultation activity starts by publishing project-customised questionnaires on the national e-procurement portal and on Consip's website. The aim of the questionnaires is to gain insight into market features, and ensure business participation and the spread of information. The questionnaires are valid up until the publication of a tender notice.

Meetings may be held with the economic operators; these must be requested by email and attended by at least two Consip employees (head of project and category manager). During the meeting, Consip presents the customised market questionnaire and distributes a copy of its code of ethics. The questionnaire is then completed by all of the meeting participants.

Questions are asked and answered during the meeting, but no additional information to that already published is provided, so that suppliers not participating in the meeting are not disadvantaged. The tender strategy (if existent) is not discussed and no comparison among the potential bidders takes place.

3) Sourcing Activities Plan (SAP)

A SAP is the general plan that Consip's sourcing division uses in order to plan and monitor its annual activity. It matches procurement phases with resources and timelines. It indicates the complexity of the procurement, the category manager in charge of it, the starting and final month of each main phase, and the forecasted contract availability date.

According to the complexity of procurement (low, medium or high), different durations of phase implementation are estimated, ranging from two to three months for the market-investigation feasibility study phase and six to nine months for the tender strategy and complete documentation-drafting phase (post-market investigation).

The SAP is for internal use, but the estimated month of the contract availability is published on the national e-procurement portal to prepare buyers and suppliers.

Source: OECD (2016), *Improving ISSSTE's Public Procurement for Better Results*, OECD Publishing, Paris. DOI: <http://dx.doi.org/10.1787/9789264249899-en>

3.2.2. Risk levels in procurement and involvement of the Board of Directors'

According to the CFE Law, contracts of high importance or significance must be authorised by the Board of Directors.⁵⁴

While the CFE Law does not define purchases of high importance or relevance, guidelines⁵⁵ establish that the purchases of high importance or relevance are those that exceed the amount of MXN 2,000 million. The importance and relevance of purchases may also be based upon the risk levels faced by CFE or the energy sector in terms of the following aspects:

- operations
- political and social context

- economic context
- finance
- environment
- labour.

In 2015, CFE issued a Specific Provision DA-DPIF-001,⁵⁶ which outlines the following types of situations that could be considered a risk:

- **Operational risk:** procurement that does not meet the required timing puts the operation of CFE and/or its SPCs at critical risk.
- **Political and social risk:** a) changes in the political environment, the government and social conditions that could have a foreseeable impact in the proper fulfilment of the contract; b) adverse conditions brought about by interest groups or by society (e.g. terrorist acts or acts of vandalism); and c) when the performance of the contract entails or brings about changes in political and/or social conditions (e.g. expropriation or rights of way).
- **Economic risk:** these are risks arising from the market's performance, such as exchange-rate volatility, fluctuations in input prices, shortages or speculation thereon.
- **Financial risk:** credit, liquidity or any other aspects that entail the risk of financial losses for the CFE or its SPCs.
- **Environmental risk:** there is a risk relating to compliance with pollution levels determined by the applicable rules or with environmental-management plans.
- **Labour risk:** the procurement process can entail labour-related consequences inside CFE or its SPCs (e.g. strikes).

The requiring unit will determine the risk during the elaboration of the APP and determine at that stage which contracts are considered of high importance or significance.

CFE says that the risk of collusion will be considered as a part of the economic risks described above.⁵⁷ This report contains observations only with regard to the risk of collusion.

Making procurement procedures subject to the Board of Directors' approval could generate inefficiencies. This is due to the fact that, since collusion risks can often be present in the markets where CFE regularly acquires goods, services and works (for example, cables and coal), the Board of Directors will have to authorise a large number of purchases and this could result in delays in acquisitions that might be essential for the functioning of CFE.

Specific Provision DA-DPIF-001 provides that the calculation of the risk percentage will depend on the requiring unit. It is recommended that this is done diligently on the basis of the requiring unit's experience and knowledge, and not on a discretionary basis.

Yet market conditions may change at any time. Therefore, the fact that risk analysis is carried out during the drafting of the APP and not when the procurement procedure is taking place can mean that the risks may be calculated on the basis of information that could become out-of-date.

In cases where market characteristics may facilitate collusion, CFE should design tenders that pay greater attention to this factor. In this regard, it is not clear that having these procedures authorised by the Board of Directors, which does not have better or more information about the market, would help fulfil this purpose. Unless, of course, the Board of Directors makes its own thorough analysis of collusion risks, takes them into consideration and defines a procurement strategy accordingly.

For these reasons, it is recommended that procedures that could entail risks of collusion should no longer need to be authorised by the Board of Directors, since this can generate unnecessary delays, while not generating any particular advantages.

3.2.3. Draft method for calculating the Installed Capacity Concentration Index

CFE is currently elaborating a methodology to calculate the Installed Capacity Concentration Index (ICCI) in order to identify the likelihood of collusion. The ICCI is calculated using the information obtained from the market investigation, in particular, the supply capacity reported by each potential bidder. The sum of the supply capacity of all potential bidders that have been identified during the market investigations is considered to represent 100% of the potential market for the procurement procedure concerned.

The percentage participation of each potential bidder is calculated on the basis of the total potential market. The ICCI is the result of the sum of the squared participation of each potential bidder.

The value of the ICCI can vary between 0 and 10 000. The lower the index, the higher the likelihood of the procedure taking place in effective competitive conditions.

Table 1 illustrates the methodology with an example:

Table 1. ICCI Methodology

Potential Supplier	1	2	3	4	5	Sum of the potential market supply
Bid in number of goods	58	28	46	52	25	209
Market share (%)	27.75%	13.40%	22.01%	24.88%	11.96%	100.00%
Setting of ICCI share	770.06	179.56	484.44	619.01	143.04	ICCI = 2 196.12

This methodology has a basic methodological problem: it treats supply capacity, market share and installed capacity as equivalent concepts. CFE is not a monopsony, however. Supply capacity, i.e. the supply volumes that firms can sell to CFE, does not necessarily coincide with firms' installed capacities, i.e. the volumes that firms are able to produce and that will not necessarily be sold in their entirety to CFE, since there may be other purchasers in the market.

For this reason, it is recommended that if CFE intends to assess the likelihood of collusion in procurement, it should refer to international best practices, which have shown that the following market characteristics increase the likelihood of collusion:

- few bidders
- high barriers to entry
- stable market conditions
- presence of industry associations⁵⁸
- repetitive purchases
- homogeneous goods, works or services
- few or no substitutes
- little or no technological change.

3.2.4. Maximum contracting prices and abnormally low prices

The GPs set out a maximum price and an abnormally low price.

Maximum contracting price

The maximum contracting price is the maximum price at which CFE or one of its SPCs may award a contract, and is determined in accordance with a quantitative methodology established specifically for this purpose in Specific Provision DA-002,⁵⁹ which uses price information obtained from various sources used in the market investigation.

As noted above, estimations of the maximum contracting price for market investigations must be based upon information from a wide variety of sources. They should include information regarding the purchasing experiences of other companies buying the same goods and services, and contract prices from purchasers in both the public and private sectors and within and outside Mexico. Armed with a breadth of pricing information, CFE will be in a much better position to establish reasonable maximum contracting prices.

Abnormally low tender

The abnormally low price is the minimum price below which CFE or its SPCs will not award a contract on the grounds that it would jeopardise contractual compliance.⁶⁰ The abnormally low price is decided on the basis of the market investigation. The use of an abnormally low price must be specifically mentioned in the tender terms.⁶¹ This price is calculated by subtracting 40% from the average price of the offers that have been proven to be technically apt.⁶²

Contracting authorities in many OECD countries consider that abnormally low prices are a problem because they can increase the risk that the company that wins the tender will refuse to deliver what it has promised without additional compensation. Furthermore, abnormally low tenders (ALTs) may lead the winning bidder to stop supply if it turns out that the price would not cover the costs (owing to poor cost estimation), leading to long delays in finalising a project and budget overruns.⁶³

However, there are no reliable techniques for identifying ALTs. National procurement laws sometimes identify as abnormally low bids that are below a certain level from the average of all the bids; this is also CFE's calculation method. Applying this methodology may result in mistakes, however, as the level of what is considered "abnormally low" depends on the other bids, which may, or not, be genuinely competitive.⁶⁴

A very low tender may be, for example, a valid bid that merely results from a new entrant having a more advantageous cost structure than its rival.⁶⁵ A low price could also be the consequence of efficiencies, such as the use of new technologies in the production, distribution and commercialisation of goods or services. It could also result from economies of scale or scope. The restoration of competitive conditions in a market could be yet another justification for a very low price.

Box 2. IMSS case

Procurements for human insulin awarded by the Mexican Social Security Institute (Instituto Mexicano del Seguro Social, IMSS) between 2003 and 2005 illustrate this last point. COFECE (one of the Mexican competition authorities) found that IMSS procurements were subject to a collusion surcharge of 57.6% over the market price meaning that competitive prices at the time of the purchases should have been at least 57.6% lower than the prices at which IMSS was purchasing.

In this way, competitive prices may be rejected by CFE on the grounds that they are abnormally low in cases where previous procurements were subject to collusion.

Source: www.cofece.mx/cofece/images/Promocion/Historias/HISTORIA_IMSS_080415.pdf.

In 2015, the OECD conducted a survey in 56 jurisdictions to gather information on the relevant legal provisions and enforcement practices in their procurement systems for ALTs.⁶⁶

This revealed that in most jurisdictions, ALTs were not automatically excluded. Generally, upon suspicion of an ALT, the contracting authority could request information from or hold consultations with the bidder to assess whether the submitted offer could be justified. An offer could only be rejected if the bidder did not provide sufficient explanation within a specific time limit.

The procedure for excluding ALTs in these jurisdictions can generally be described as follows:

Figure 2. Identification, assessment and potential rejection of ALTs



Box 3. Different types of investigations and information that may be used when determining if a tender is abnormally low

EU

The EU Directive on Public Procurement (Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement) lists the aspects on which contracting authorities can focus their information requests, namely the, “1) economics of the manufacturing process, of the services provided or of the construction method; 2) technical advantages or any other favourable conditions enjoyed by the economic operator; 3) originality of the work, supplies or services; 4) compliance with obligations in the fields of environmental, social and labour law and with the rules on subcontracting; 5) obtainment of illegal state aid by the tenderer”.

Romania

Romania specifies that the contracting authority can check related documents, e.g. a bidder’s prices, the raw-materials situation, workforce salaries, the organisation and methods used for delivering the contract, as well as the performance and costs of tools and work equipment.

Source: Hearing on Auctions and Tenders: Further Issues, Note by the Secretariat, [https://one.oecd.org/document/DAF/COMP/WP2\(2015\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2015)1/en/pdf)

Most respondents to the 2015 OECD survey on ALTs allowed the possibility of modifying the contract (including Brazil, Bulgaria, Czech Republic, Latvia, Estonia, Korea and Spain), but with legal provisions limiting the scope and extent of the changes. “Major” or substantial changes to the contract (e.g., those that surpass a given pre-specified percentage of the value of the initial contract, changing the economic balance or switching to another supplier) were often not allowed.

As shown in box 4, the EU Directive on Public Procurement requires that modifications of the scope and content of the mutual rights and obligations of the initial contract require a new public procurement process. However, it allows for renegotiation under certain conditions.

Box 4. Modifications to public contracts under the 2014 EU Directive on Public Procurement

The EU Directive on Public Procurement stipulates that material changes to public contracts require launching a new public procurement procedure. This is particularly true for modifications of the scope and content of the mutual rights and obligations of the initial contract, and when the outcome of the initial procedure would have been affected if it had included the amended conditions. Such changes are seen as a demonstration of the parties' intention to renegotiate.

Nonetheless, the Directive acknowledges the need for some flexibility, relaxing this requirement for minor changes, as well as, under certain conditions, for situations in which contracting authorities are faced with the need for additional works, supplies or services or with unforeseen external changes. Article 72 of the Directive specifies the range of circumstances in which the modifications may take place:

- non-substantial changes or those envisaged in the initial procurement documents through clear and precise review clauses
- modifications below 50% of the value of the initial contract, in the face of unforeseen circumstances, and which do not change the overall nature of the contract; or which become necessary when a change of contractor is not possible for economic or technical reasons and would cause a substantial duplication of costs
- where the original contractor is replaced as a consequence of an unequivocal review clause, universal or partial succession into the position of the initial contractor, or in the event that the contracting authority itself assumes the main contractor's obligations towards subcontractors.

The Directive defines unforeseen circumstances as those that could not have been predicted at the time of the initial contract, “despite reasonably diligent preparation of the initial award by the contracting authority”; and establishes a presumption of non-substantiality for changes that are below applicable thresholds, and that are lower than 10% of the initial contract value for service and supply contracts and below 15 % of the initial contract value for works contracts.

Source: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

According to CFE's GPs, the company may, on the basis of specific and well-founded reasons, modify the volume, the deadlines and period of the contracts but the modification of originally agreed prices is not allowed.⁶⁷ This discourages the submission of strategically low bids with the purpose of renegotiating an additional compensation afterwards.

Another way to reduce the risk of cost overruns or failure to deliver as a result of a very low bid is to ensure financial protection for the contracting authority.

For example, Canada requires bidders to provide security deposits and surety bonds where there may be performance and delivery issues associated with an ALT.

Taking these international practices into account, CFE could consider:

- Establishing a procedure to assess abnormally low bids and excluding those bidders only if they cannot justify their prices. Box 3 contains guidance on how to assess abnormally low bids.
- Imposing conditions so that awarding a bid is conditional on some kind of financial protection for CFE, such as insurance, to avoid budget overruns.
- If the chosen supplier with an abnormally low bid fails to deliver, the next bidder with a technically complete offer could be asked to supply, if the price offered is acceptable.

3.2.5. Identification codes for goods and services

CFE uses an excessive number of codes for the identification of goods and services. Indeed, in some cases the same product has more than one reference code. This could result in CFE inadvertently procuring the same products through different procurement procedures, and therefore not aggregating demand to create economies of scale for suppliers and obtain lower prices.

Recommendation 5.2.3 of the 2015 CFE Report notes that each of the goods and services procured by CFE should be identified by one single reference code and that this information should be the same in both CFE systems and Compranet (a centralised Internet-based platform used for most public-sector procurement in Mexico).

CFE has reported significant progress in fine-tuning its product catalogue, which has decreased from 793 264 items to 225 918.

According to the GPs, the catalogues are to be administered via the EPS.⁶⁸ However, no mention is made to their compatibility with other catalogues. With the entry into force of the new procurement regime, CFE will stop using Compranet for its purchases. Moreover, the product codes contained in the Compranet catalogues are not as detailed as those of CFE, thus the Compranet catalogues may not be a good reference point. CFE could consider other catalogues that are used as a world-wide reference, like the United Nations Standard Products and Services Code⁶⁹, for the purpose of standardising its internal catalogues.

3.3. Maximising participation by genuinely competing bidders

Effective competition can be improved if there is a sufficient number of credible bidders who are able to respond to the tender and who have incentives to compete for the contract.

3.3.1. Who can participate in CFE procurement procedures

In the PPL, which applied to CFE until the GPs entered into force, procurement procedures may be:⁷⁰

- **National procedures.** Under these procedures only Mexican bidders can participate, the goods have to be produced in the country and they must have at least 50% national content. Procurement procedures are national unless international trade treaties apply.
- **International procedures under international trade treaties.** Participation in these procedures is restricted to Mexican bidders and to bidders from countries that have signed a free-trade agreement with Mexico that include a chapter on public procurement.
- **Open international procedures.** Participation in these procedures is open to Mexican and all foreign bidders. They can take place whenever national supply or supply from countries that have concluded with Mexico an international free-trade agreement including a chapter on public procurement is not sufficient or convenient and under certain funding conditions.

Figures 3 and 4 show that for the period 2012-2016 the percentage of international open tenders at CFE has been higher than the national open tenders both in terms of number of contracts and their value. This is positive, as international tenders maximise the number of bidders and promote competition. However, the number of contracts awarded through an international open tender has been declining over time, as Figure 3 shows. CFE should pay attention to this fact, and further encourage the use of international open tenders.

Figure 3. Use of international and national open tenders (in terms of volume), 2012-2016

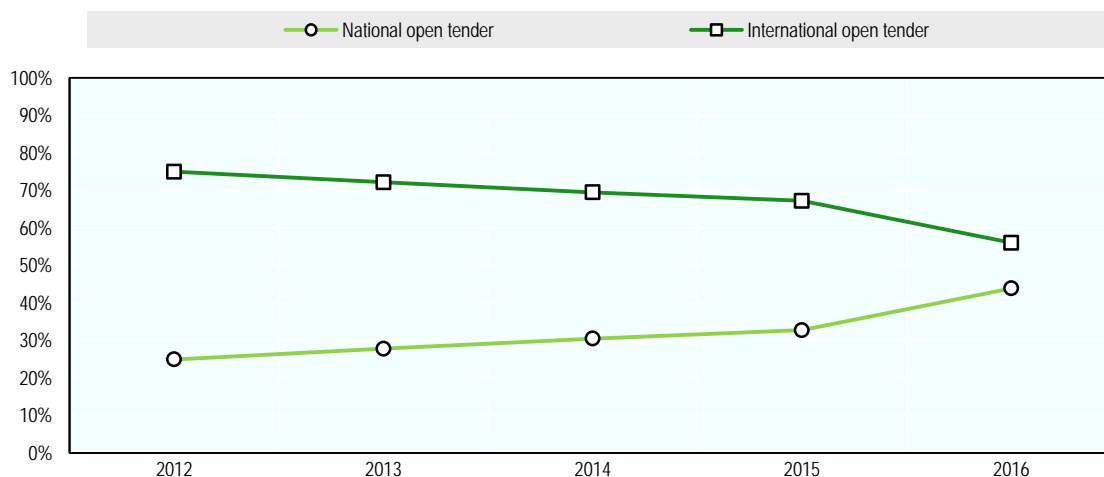
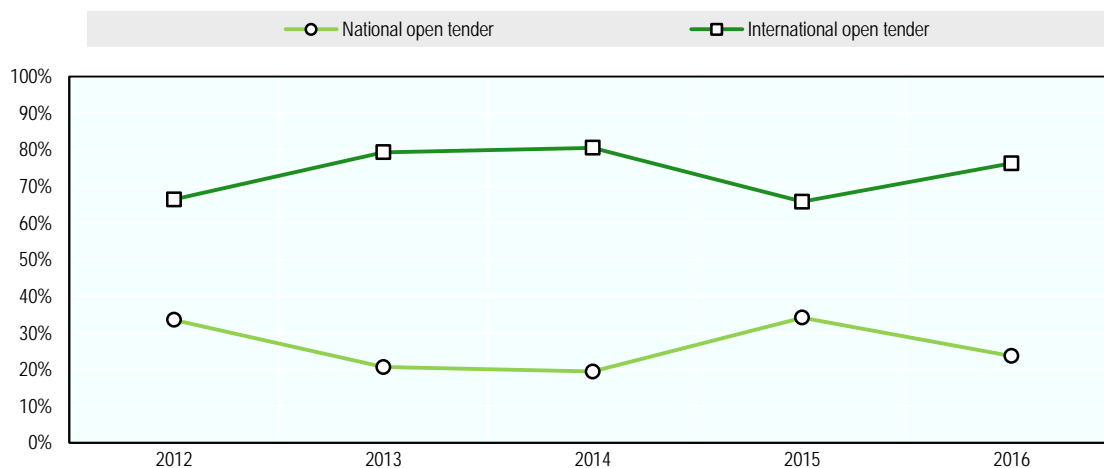


Figure 4. Use of international and national open tenders (in terms of value), 2012-2016



The new CFE procurement regime differs from the general PPL approach, as it does not limit the participation of foreign bidders, apart from the limitations established by provisions regarding international free-trade and public procurement agreements signed by Mexico and directly applicable to CFE.

The GPs set up several types of procedures for the acquisition of goods, public works and services, as seen in Chapter 2, namely open tenders, simplified open tenders, restricted-invitation and direct awards. Open and simplified open tenders should be chosen, unless one of the exceptions provided for in article 80 of the CFE Law justifies the use of restricted invitations or direct awards.

Open tenders should be used whenever the value of the acquisition meets the threshold established for procurement subject to international free-trade agreements with a chapter on public procurement.

Neither the CFE Law nor the GPs make any reference to the geographic scope of simplified tenders; according to CFE's answers during OECD's fact-finding, however, the scope of a simplified procedure will be determined on the basis of the information obtained from the market investigation. As noted earlier, it is possible that, in the case of simplified tenders, these investigations are considered to be completed with the receipt of at least three offers in a closed envelope.

In order to avoid situations where simplified tenders would mistakenly be classified as national-only, thus limiting the number of potential bidders, the OECD recommends that integral market investigations are always run in the cases of simplified tenders and that clear and appropriate criteria are established for determining the geographic scope of simplified tenders.

For some products and services and for lower-value procurements, national procedures could make sense. However, opening procurements to international competition would constitute a positive structural change, and would comply with Recommendation 5.4 of the 2015 CFE Report concerning the elimination or avoidance of any regulation, criterion or practice that discriminates or grants preferential treatment to any bidder in order to promote competition.

3.3.2. The use of the English language in calls for tenders in international procedures

Recommendation 5.10 of the 2015 CFE Report provides that, when it comes to international tenders, there should be a version of the call for tenders in English in order to reduce costs for potential bidders from countries where Spanish is not the official language.

In this regard, CFE has issued some calls for tenders in English, as was the case in the procurement of the gas-duct service. However, this has not always been the case when international tenders are carried out. It is, therefore, recommended to always publish at least a summary of each call for tender and the tender terms in English, even if the official binding documents remain in Spanish.

3.3.3. The use of electronic procedures

Recommendation 5.8 of the 2015 CFE Report referred to the establishment of a strategy to increase the number of electronic offers, which would not only reduce communications among bidders, but would also facilitate and maximise participation in procurement procedures.

The CFE Law provides that the bids may be submitted and analysed electronically.⁷¹ GP 23 notes that all the stages of open-tender, restricted-invitation and direct-award procedures will be carried out using the EPS, without the bidders' presence, except for:

- site visits
- when the electronic procurement system is not operative
- when the object of the procurement procedures are goods, works and/or services of considerable complexity or great scale
- in any other circumstance deemed appropriate.

The scale or the complexity of procedures should not prevent CFE from conducting them electronically. Also, CFE should limit the application of exceptions to the general rule of conducting electronic procurement procedures.

3.3.4. Prequalification

In order to ensure that participants in an open tender have the capacity and resources necessary to fulfil the contract, CFE and its SPCs may decide to prequalify bidders. Prequalification is based solely on the capacity and resources of the bidders and is independent from any contracting procedure.

The GPs note that the prequalification stage may take place when the procurement object is of considerable scale or complexity, or in any other circumstances in which the requiring or contracting units deem it appropriate. The terms of the prequalification procedure are set by the requiring or contracting unit.

Prequalification will be conducted through the EPS and is valid for one year. Prequalified suppliers are notified at a meeting or through the EPS.

CFE has stated that prequalification can be useful as it allows for the selection of truly qualified bidders, as well as:

- Inhibiting the submission of cover bids, i.e. where bidders submit an offer that they know cannot win because it includes unacceptable terms or because the price is known to be too high.
- Reducing the risk of non-compliance by the winning bidder.
- Ensuring that bidders who participate in the procedure have the technical, financial and labour resources needed to fulfil large-scale contracts.

A prequalification stage may, however, inhibit competition by minimising unnecessarily the number of bidders in a procurement procedure. In this regard, the potential advantages should be balanced against this risk. Firstly, a procedure involving a reduced number of prequalified bidders increases the risk of collusion. Secondly, a limited number of bidders reduces price and quality competition. Moreover, the fact the prequalification of bidders is made public adds unnecessary transparency to the process. Under these circumstances, prequalified bidders may find it easier to manipulate bids.

The OECD believes that it is not obvious that a prequalification stage actually inhibits the submission of cover bids. Any prequalified bidder is still able to submit a higher bid than that of the designated winner, an offer whose value exceeds the maximum contracting price, or an offer with conditions that are unacceptable for CFE. On the contrary, as has been noted, the chances of bid rigging increase when the number of bidders is reduced.

In terms of the alleged advantages of decreasing non-compliance risks and ensuring the participation of bidders with the necessary resources, the lack of a prequalification stage does not necessarily lead to the award of a contract to a non-qualified bidder. Nothing stops CFE awarding a contract to a bidder that it finds technically sufficient.

For these reasons, the OECD advises CFE to eliminate prequalification procedures and to evaluate bidders once they have submitted their offers. In this way, CFE maximises the participation of bidders and allows for more competition. Bidders will have more incentives to offer a competitive price when they face competition from many competitors.

3.3.5. Exceptions to open tenders

Public open tenders maximise participation and it is important that contracting authorities use this type of contracting procedures to the largest extent possible.

In Mexico, restricted-invitation and direct-award procedures are used as exceptions to open-tender procedures when certain conditions are met, such as single-source products (only one supplier in the market) or products supplied by a limited number of suppliers under similar conditions, or in case of an act of God or force majeure.

From 2012-2016, as shown in Figure 5, the percentage of contracts that CFE awarded directly to suppliers ranged from 78.24% to 62.8% while the open tenders only represented from 7.15% to 11.42% of the total number of contracts. In terms of value, Figure 6 shows that open tenders represented between 67.03% and 54.76% of the total value of contracts awarded by CFE. This shows that few but high-value contracts were subject to open tenders during the period 2012-2016.

Figure 5. Use of different types of contractual procedures (by volume), 2012-2016

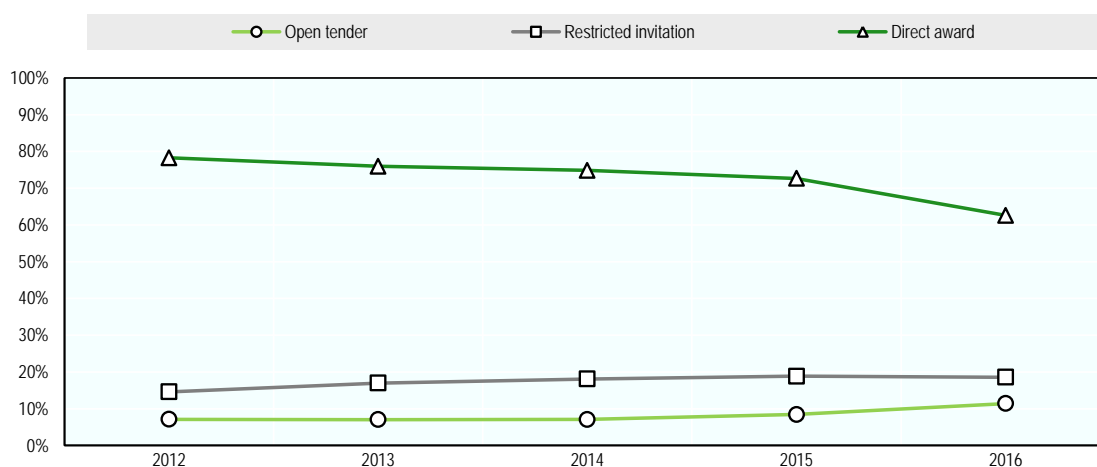
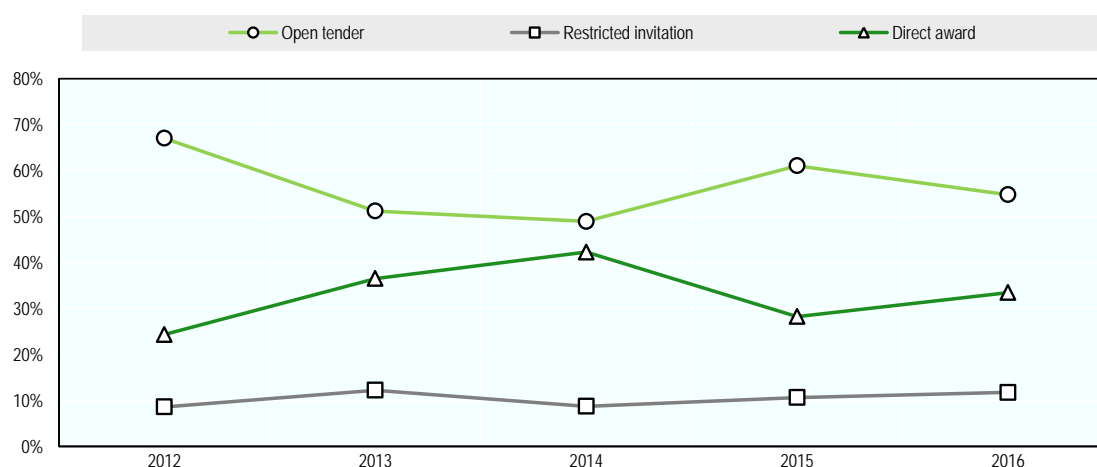


Figure 6. Use of different types of contractual procedures (by value), 2012-2016



Under CFE's procurement regime, the Subcommittees for Exceptions to Open Tenders must approve some exceptions to the open-tender procedure; these can include ones related to services provided by an expert or to circumstances that would entail losses or additional and justified costs except for the cases established under Article 52 of CFE Regulations. The decision to use other exceptions (such as cases established under Article 52 of CFE Regulations, in case of force majeure or when an open tender has been unsuccessful) is adopted by the head of the requiring unit and is not

subject to the approval of these Subcommittees. This could give rise to arbitrariness. CFE should, therefore, require that the use of all exceptions be reviewed and authorised by the Subcommittees.

CFE may use procurement procedures other than the restricted invitation and direct award, which are explicitly provided for in the CFE Law and the GPs, if these two types are not considered suitable by CFE to obtain the best conditions available in the market.⁷² However, neither the CFE Law nor the GPs indicate what those alternative procedures could be. This generates uncertainty as to the types of procedures that CFE may use.

It is recommended that CFE avoids using procedures different from those already in place (i.e. restricted invitations and direct awards). If CFE and its SPCs consider that alternative procurement procedures are required to obtain the best conditions, CFE should specify in the GPs what they should be and under which conditions they would be used.

3.3.6. Exceptions for low-value purchases

The PPL provides that restricted invitations and direct awards for contracts can be used if they do not exceed the maximum amounts established in the Mexican federal budget (approved each year by the Congress), and provided that the contracts have not been artificially split and that the total value of contracts that benefit from this exception in a year does not exceed 30% of the procurement budget of the concerned public buyer.

The maximum amount established for CFE in the 2016 Mexican federal budget was MXN 460 000 for direct-award procedures and MXN 3.2 million for restricted-invitation procedures. Neither the CFE Law nor the GPs provide for this exception.

However, Article 52 of the CFE Regulation and Section IX of General Provision 4 provide that requiring units are responsible for determining whether the requirements for applying the exception of Section VI of Article 80 of the CFE Law are met. This exception applies when “there are reasons to acquire or lease goods of a given brand or circumstances that could cause losses or additional costs”. According to Article 52 of the CFE Regulation, this is the case for contracts below MXN 650 000, which can be directly awarded, and for contracts below MXN 3 million, which can be awarded through a restricted-invitation procedure; for contracts exceeding those amounts the decision must be taken by the Subcommittees for Exceptions to Public Tenders. For this exception to be applied, the contracts cannot be artificially split. The annual value of contracts benefitting from this exception cannot exceed 30% of CFE’s procurement budget.

The Advisory Council adopted Specific Provision CCT-002 regarding the criteria that should be considered when applying exceptions to open tenders. This Specific Provision provides justifying circumstances for the application of Section VI of Article 80 of the CFE Law only for amounts higher than the ones provided for in Article 52 of the CFE Regulation. CFE should, therefore, detail and limit circumstances where open tenders may not be used (so as to limit procurement officials’ discretion in the cases not covered by the Specific Provisions) and avoid relying on exceptions in all events.

CFE should also monitor the number of contracts and the budget spent on purchases using exceptions and check them against CFE historical figures regarding exceptions justified under the PPL.

3.3.7. Framework agreements

Framework agreements are made with firms supplying widely used goods and services. On the basis of the results of a market investigation, CFE establishes the technical and quality specifications, prices, and other contractual conditions of a framework agreement.⁷³ Suppliers complying with the specifications and agreeing to the terms and conditions set up by the framework agreement may, then, sign the agreement. This type of agreement can have effects similar to those of consolidated

purchases, since CFE and its SPCs (and other federal, state and municipal government agencies) can use their buying power to negotiate purchasing conditions for certain goods and services with suppliers, generating favourable economies of scale.

Once framework agreements have been entered into, CFE can conclude second-stage contracts under these agreements. The contracts can be awarded through direct-award or restricted-invitation procurements. These direct awards or restricted invitations must be justified, by showing that the contracts avoid losses or costs.

Instead, CFE could consider concluding framework agreements resulting from a competitive procurement procedure. For the first stage, an open-tender procedure could be used to select a supplier (or suppliers) or a contractor (or contractors) to be a party (or parties) to a framework agreement with CFE. The open-tender procedure could also be used to achieve better terms and conditions for a certain need. At a second stage, CFE could award contracts directly or through a restricted invitation procedure to the selected supplier(s) and under the terms and conditions defined under the framework agreement.

This is a common practice in other jurisdictions. Box 5 below illustrates how framework agreements are concluded in the European Union.

Box 5. Framework agreements under Directive 2014/24/EU

According to Article 33 of European Union Directive 2014/24/EU, a Framework Agreement is “an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate the quantity envisaged”.

The establishment of a Framework Agreement must be advertised publicly via a contract notice and all suppliers must be considered for inclusion in the framework agreement if they respond to the initial Contract Notice by the stated deadline. The procurement process for awarding the framework agreement must follow all the usual procurement procedures and rules and be awarded according to how well suppliers satisfy the selection criteria.

In order to benefit from framework agreements, it is also recommended that procurement procedures for framework agreements be run jointly with other public buyers, to leverage buying power, depending on market conditions.

3.3.8. Joint bids

The 2015 CFE Report recommends that joint bids be permitted only when tender documents expressly mention them. If they are allowed, bidders should specify the rationale and expected benefits of the joint bids when presenting their offers. Joint bids should be accepted only when, on the basis of market conditions, they can be pro-competitive.

The GPs⁷⁴ provide that joint bids should promote competition and are only admissible if they are explicitly allowed by the tender terms. This is in line with the 2015 CFE Report recommendations and represents an improvement in relation to the former procurement regime.

However, it is also important that the contracting unit be given the power to refuse joint bids that may give rise to anticompetitive effects not outweighed by pro-competitive effects. The anticompetitive concerns about joint bidding are quite straightforward: joint tendering reduces the number of submitted bids and makes market-sharing agreements easier to implement. The pro-competitive effects of joint tendering are more difficult to justify, but, for example, joint tenders may allow participation of SMEs in tender procedures for large contracts. In complex works or supply contracts, or in large procurements,

joint tendering may result in better offers. Joint tendering may have pro-competitive effects if it allows firms unable to bid individually to participate in a tender procedure jointly with others.⁷⁵

Box 6. Anticompetitive joint bidding for oil and gas leases in the United States

The 2012 Colorado federal case *United States vs. SG Interests I, Ltd., et al.* considered antitrust issues in joint bidding to acquire federal mineral-rights (oil and gas) leases released by the US Bureau of Land Management (“BLM”). This was the first time that the United States had challenged a joint-bidding arrangement under antitrust laws.

In that case, the government alleged that two companies – SG Interests (“SGI”) and Gunnison Energy Corporation (“GEC”) – violated the antitrust laws by agreeing not to compete for BLM auctions. The government alleged that, prior to the auctions, both SGI and GEC “were independently interested in certain of the tracts that would be auctioned and both likely would have bid – and bid against each other – at the February auction”. The defendants had executed a memorandum of understanding (“MOU”) two days before the first auction. Under the MOU, only SGI would bid at the upcoming auctions; if successful, SGI would assign a 50% interest in the acquired leasehold interests to GEC. GEC did not bid. The government determined that SGI’s and GEC’s agreement not to compete pursuant to the MOU constituted a per se violation of Section 1 of the Sherman Act (which would amount, in the Mexican legal environment, to an absolute monopolistic practice).

Antitrust laws encourage pro-competitive collaborations. Indeed, in this case, the government specifically recognised that such arrangements are an established and accepted industry practice: “Because it usually involves a collaboration through which pro-competitive efficiencies arise, joint bidding at BLM auctions is both common and appropriate.” The agreement reflected in the MOU, however, was an aberration in that it “reflected a deviation from common industry practice, as the MOU was merely a naked restraint that allowed Defendants to avoid a bidding war.”¹

1. Complaint, *U.S. v. SG Interests I, Ltd., et al.*, 12-CV-0395 (D. Colo.), at ¶ 15, www.justice.gov/atr/case-document/file/510616/download (accessed 10 May 2017). Plaintiff’s Memorandum in Support of Its Motions for Entry of Final Judgment (“Memorandum”), 6 March 2013, at p.17, www.justice.gov/atr/case-document/file/510536/download (accessed 10 May 2017).

Source: *US v. SG Interests I, Ltd., et al.*, www.justice.gov/atr/case/us-v-sg-interests-i-ltd-et-al.

CFE should set specific criteria for determining the existence of pro-competitive effects. The 2015 CFE Report can provide a useful basis for this purpose, since it already proposes that joint bids should be allowed when:

- Two or more suppliers combine their resources to fulfil a contract that is too large or too complex for either of them individually.
- Two or more suppliers active in different product markets combine their resources to provide a single integrated service that none could supply independently.
- Two or more suppliers active in different geographic areas submit a single bid for all of Mexico or for multiple states that include areas that no single supplier can cover on its own.

Box 7. Guidance on joint bidding in OECD countries

In several OECD countries, competition authorities guide companies and procurement bodies to understand when joint bids are compatible with competition law.

Ireland

In 2014, the Irish Competition and Consumer Protection Commission issued a guide for small- and medium-sized enterprises (SMEs) on joint bidding. Although this guide is addressed to SMEs, the basic principles it describes may also apply to other types of companies participating in a tender under the form of a consortium. The guide explains when a joint bid is likely to be allowed under competition law. This is the case when the members are not actual or potential competitors. Among actual or potential competitors, consortia do not breach competition law if:

- None of the consortium members could fulfil the requirements of the contract alone.
- No subset of the consortium members could fulfil the contract.
- The information shared under the consortium should be strictly limited to what is necessary to formulate the bid on a need-to-know basis.
- consortium members must compete vigorously in other contexts.

If the consortium does not comply with the above-mentioned requirements, it may still be compatible with competition law if the following four criteria are met:

- The consortium must produce real efficiency gains.
- Consumers must benefit from those efficiencies.
- Any restrictions of competition involving the consortium bid must be indispensable.
- Consortium bidding must not substantially eliminate competition either in the specific public procurement involving the consortium or in other markets.

Source: www.cccpc.ie/sites/default/files/Consortium Bidding Guide_0.pdf

Norway

In 2008, the Norwegian Competition Authority published a guide on tendering and project agreements. This guide deals with, among other things, the assessment of joint bids under competition law.

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

If the parties are actual or potential competitors and are able to perform the project alone, a joint bid will be considered restrictive of competition. The joint bid might, however, be considered lawful if it generates efficiency gains that outweigh the restrictive effects on competition. For this to happen, four cumulative conditions have to be fulfilled:

- The agreement must contribute to the improvement of the production or distribution of goods or promote technical or economic progress.
- The agreement must ensure that a fair share of the achieved benefits is passed on to consumers.
- The undertakings must not impose restrictions that are not necessary for achieving these benefits.
- The agreement should not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

Joint bids that aim at fixing prices or sharing the market are not lawful.

Source: www.konkurransetilsynet.no/en/legislation/fact-sheet-guidance-on-tendering-and-project-agreements/

Spain***Travel-services case in Spain***

In 1995, four companies set up a group to take part in a tender for senior-citizen travel services. When the procurement board did not allow the group to participate, the companies chose to submit individual bids but fixed prices and certain conditions in their offers, and agreed that the winning bidder would subcontract the work to the other members of the group. The Spanish Competition Defence Tribunal (Tribunal de Defensa de la Competencia, TDC) found that an anti-competitive agreement existed and imposed fines against all companies.

Source: Decision of the TDC, 25 November 2000, Case 476/99 Travel Agencies. www.cnmc.es/expedientes/47699

3.3.9. Guarantees and sanctions

The GPs allow CFE to request different types of guarantees to ensure suppliers' solvency and their ability to comply with contract terms;⁷⁶ they do not, however, indicate the nature or amount of these guarantees. During the fact finding, CFE informed the OECD that a Specific Provision on the amount and modalities of guarantees was being prepared.

Before this specific provision comes into force, CFE should not design guarantees in a way that unnecessarily prevents the participation of potential bidders. For example, instead of requesting bid bonds at the time of bid submission, CFE officers could screen the financial vulnerability of contractors before the award (so that they can take an informed decision) and/or require performance guarantees. Should the first successful candidate fail to provide the requested performance guarantees, the contract could be awarded to the next best candidate who is able to provide them, if that offer is acceptable.

Other risk-mitigation measures could be taken post award, in addition to performance guarantees. The OECD has developed a checklist for post-award risk assessments that can be used to ensure the timely and pertinent delivery of procured supplies, services or works (see Box 8). This checklist can guide procurement officials during the performance of already-concluded contracts, and support the monitoring of contractor delivery.

Box 8. OECD checklist for post-award risk assessments of contractors' financial vulnerability

1. Have procurement practitioners updated their financial-viability assessments of contractors and their parent company and related entities, to ensure they have not fallen into financial distress?
2. Have procurement practitioners developed contingency plans in case a major contractor fails – and ensured that they have sufficient resources available for the contingency plans?
3. Have procurement practitioners identified any contractual rights that can be enforced to mitigate risk exposure of the government; e.g. guarantees by parent company or insurance certificate?
4. Have payment regimes and invoices been reviewed to ensure payment for goods or services are not made in advance, where not required, or that additional charges have not accrued for incidental services?
5. Is it possible to renegotiate more far-reaching arrangements, such as escrow arrangements or financial guarantees, and so vary the contract?
6. Have all contract changes been made according to the procedure set out in the contract to ensure that the variation is enforceable?

Source: OECD, "Public Procurement Toolbox", www.oecd.org/governance/procurement/toolbox/search/checklist-post-award-risk-assessments-contractor-financial-vulnerability.pdf

Bidders that fail to comply with certain contractual obligations can be temporarily barred by CFE from participating in new procurement procedures, if market conditions allow.⁷⁷

The OECD recommends that CFE facilitates the participation of as many bidders as possible in its procurements, and then takes risk-mitigation measures either before the award (by running financial vulnerability checks or requiring performance guarantees) or afterwards (correct performance monitoring and sanctions).

3.4. Define tender terms clearly and avoid predictability

The specification and the terms of reference should be designed so as to avoid biases and limitations to bidder participation.

The drafting of the tender requirements affects the number and type of bidders that a contracting procedure attracts and, therefore, it also has an influence in how competitive it is. This section will analyse the new procurement regime in this respect.

3.4.1. Split awards

The 2015 CFE Report recommended that CFE should only split the award of a single contract between multiple suppliers in exceptional circumstances where there is real concern about security of supply. The split contracts should have different values.

GP 29 regulates the splitting of awards and provides that split awards are only possible if the tender terms explicitly allow this. Tender terms should also indicate the quantities that can be assigned to each bidder, and explicitly state that the maximum price difference allowed between the accepted offers may not exceed 5%. In cases where CFE uses split awards, it should award the best bidder at least 80% of the total contract. The remaining shares of contract should be divided among the other bidders, according to their classification in the evaluation.

Ideally, bidders should not be aware of the possibility of the award being split, with all of them competing for the entirety of the contract. Instead of splitting the awards and if market conditions allow, CFE could consider planning tenders more frequently and award the contract to a single bidder each time, provided that this purchasing method guarantees the security of supply. If CFE still considers that splitting the award of the contract is necessary, it should inform the bidders of its decision to split the award only after the offers have been submitted.

CFE should avoid disclosing information that may facilitate the sharing of the contract among bidders, such as the maximum price difference between offers or the number of providers to be awarded the contract.

3.4.2. Consolidation of purchases

Regular scheduling of repetitive procurement procedures, the procurement of fixed quantities and the use of the same procurement terms and mechanisms facilitate collusion.

The GPs contain a number of procurement tools and mechanisms that allow CFE to introduce variety in its procurement procedures, such as the possibility to opt for smaller contract lots or, inversely, larger consolidated purchases, or multi-annual procurements.

Recommendation 5.3.8 of the 2015 CFE Report suggested introducing variations in procurement terms and experimenting with tender sizes or with contract aggregation and disaggregation. CFE and its SPCs are advised to continue these practices.

With regard to consolidated purchases, CFE should consider specific market conditions and analyse the appropriateness of consolidating purchases on a case-by-case basis. In general, consolidating or aggregating purchases in one procurement helps generate economies of scale and, thus, savings for the contracting authority; however, it can also exclude smaller firms (unable to offer large quantities or, in general, deliver a large project) from the procurement procedure. If consolidation of purchases lasts for a long period of time, it may force firms to exit the market. Excluding smaller firms could allow a few big firms able to satisfy the quantity requirements to coordinate more easily and conspire to raise prices, lower quality or restrict output. Box 9 illustrates a case where the consolidation of purchases was not considered to be the best option in view of the specific market conditions and the effects on competition, and was thus denied.

Box 9. Refusal of consolidation in waste-management services

In December 2016, the Australian Competition and Consumer Commission (ACCC) decided not to authorise Council Solutions and a group of five metropolitan Adelaide councils to consolidate the procurement of waste-management services in the Adelaide region.

The purchasing authorities had sought authorisation for 17 years to consolidate the supply of waste-management services.

A large number of public submissions expressed concerns about the fact that the consolidation would introduce an unprecedented level of complexity for bidders and that this would prevent some businesses from taking part.

The ACCC assessed the potential benefits of the consolidation and the potential harm to the situation in place where the purchasing authorities were procuring their waste services individually.

Overall, the ACCC concluded that the expected benefits of a consolidation would not outweigh its adverse effects on competition. Therefore, the ACCC denied the authorisation.

Source: www.accc.gov.au/media-release/accc-denies-authorisation-to-joint-procurement-of-sa-waste-arrangements

3.4.3. The participation of industry experts in the design of procurement procedures

Recommendation 5.5 of the 2015 CFE Report recommended that technical staff from different CFE departments, as well as specialists from the Laboratories for Testing Equipment and Materials (Laboratorio de pruebas de equipos y materiales, LAPEM), assist and advise officials conducting the procurement procedure.

The GPs establish that procurement technical specifications should comply with national and international standards and/or LAPEM-issued technical specifications.⁷⁸ LAPEM and other specialised units can also be asked to take part in the evaluation of technical offers if requested by a requiring unit.⁷⁹ This is in line with the above recommendation.

A proper description of procurement requirements is essential to ensure potential bidders understand the needs of the contracting authority and so submit appropriate offers. This is particularly important when needs are very complex or technical. In these cases, CFE should also consider the possibility of involving experts from within its technical units at the stage of the definition of tender terms.

3.5. Transparency, disclosure and sharing of information

Transparency may help fight corruption, but it can also facilitate collusion. A balance must, therefore, be found in the application of transparency obligations for CFE procurements.

Recommendation 5.16 of the 2015 CFE Report advised against the dissemination of sensitive information when the APP is published, and for the creation of a separate, public version of the programme. To this end, GP 13 considers the APP as confidential information under Articles 13 and 114 of the CFE Law, and applicable transparency laws. CFE will only make public a summary of the programme containing general data.

Article 13 of the CFE Law also states that only a public version of the business plan should be published on CFE's website. The public version is a summary that does not contain any information that could compromise or endanger CFE's commercial strategies.

Under Article 114 of the CFE Law, CFE is required to adopt the necessary measures to protect the information related to its commercial, economic and industrial activities, and to classify it as reserved information.

CFE should prevent the disclosure of commercial information that may facilitate collusion, as such disclosure exposes CFE's procurements to risks of bid rigging. Information that should be considered confidential is primarily non-winning bidders' identities and offers.

Recommendation 5 of the 2015 CFE Report advised that sensitive information, such as bidders' identities and offers, and information on the tender award be made public only with a certain time delay (for instance, six or eight months after the conclusion of the procedures) to make the monitoring of collusive agreements more difficult.

CFE could develop and adopt a strategy on the basis of Articles 13 and 114 of the CFE Law that allows it to guarantee the legality of its decisions in terms of transparency and at the same time fight against bid rigging.

3.5.1. Electronic means reduce opportunities for collusion

The 2015 CFE Report's recommendation (5.9) to avoid bringing potential suppliers physically together has been partially addressed with CFE's implementation of electronic procedures for bidder clarification meetings (i.e. meetings where bidder questions on the tenders are answered).

According to the GPs, clarification sessions concerning prequalification documents and the tender terms in open-tender procedures will be held using the EPS.

Electronic means of identification, as set out in the Law of the Advanced Electronic Signature (Ley de la Firma Electrónica Avanzada), will be used for CFE electronic-procurement procedures. CFE and its SPCs should adopt the necessary measures so that the electronic identification does not allow third parties to identify bidders. If bidders can identify their competitors, this could facilitate communication among them.

3.5.2. Disclosure of the maximum contracting price

The OECD recommends that the maximum contracting price should not be revealed, since this may inhibit the presentation of aggressive offers and possibly facilitate collusion.

GP 30 provides that in open tenders, the maximum contracting price may be communicated to participants only once the bids containing the economic and technical offers have been submitted and the technical offers have been accepted. Offers in open tenders that exceed the maximum contracting price will not be considered.⁸⁰

Should the offers in restricted invitation procedures exceed the maximum contracting price, this price will be made public and bidders will be given the option to present a counter offer at a discount of at least 1% lower than the maximum contracting price.⁸¹ CFE may consider using the auction mechanism described below for these cases.

GP 28 on auction procedures notes that in open tender or restricted invitation procedures, bidders have the chance to present additional price offers in a reverse (lowest price) auction, once the initial bids have been opened and are technically qualified. At least one minute before they present the new price bids, CFE must inform the bidders of the starting price for the auction and may inform the bidders of the maximum contracting price. If the time that elapses between the communication of the maximum contracting price and the presentation of bids is short, this may reduce the risk of participants coordinating their offers and fixing them close to the maximum contracting price. CFE could consider providing a more specific rule regarding this time.

3.5.3. Certificate of independent bid determination

Recommendation 5.22 of the 2015 CFE Report suggested that signing a certificate of independent bid determination (i.e. a contractual clause in which bidders undertake to present a bid that is independent from other bids) be a mandatory requirement for participation in CFE and SPC tenders.

GP 63 establishes that in open-tender and restricted-invitation procedures procurement officers and the legal representatives of the bidders sign a declaration pledging to adhere to honest behaviour during their participation in the procurement procedure, as well as during the performance of the contract.

On this basis, CFE designed the model “Declaration of Integrity and Lack of Legal Impediments on the Part of Bidders” (see Annex 2), which contains a declaration that the signatories commit to integrity during the procurement procedure and, if relevant, during the contract’s performance; a statement of not having concluded, or ordered the conclusion of contracts or arrangements with the object of carrying out any of the practices mentioned in Article 53 of the Federal Economic Competition Law; an acknowledgement of the sanctions established in this regard in Article 254 bis of the Federal Criminal Code; and a declaration that they do not fall under any of the conditions listed in GP 42 (impediments).

It is recommended that the Declaration of Integrity and Lack of Legal Impediments on the Part of Bidders also covers Article 127, Sections I, IV, X and XI and fourth and fifth paragraphs of the Federal Economic Competition Law regarding administrative sanctions.

The declaration of integrity and non-collusion proposed by COFECE in the *Recommendations to Promote Competition in Public Procurement* and reproduced in Annex 3 can be used to enrich and develop CFE’s own declaration.⁸²

3.5.4. Subcontracting

Under the CFE regime, tender terms establish whether bidders may subcontract parts of the contract to individuals or companies. In cases where it is possible, the value of all subcontracts must not exceed 49% of the contract’s total value.

Recommendation 5.25 of the 2015 CFE Report addressed the possible use of subcontracting for anti-competitive purposes, and proposed actions that could address the problem.

These actions have not been implemented in the GPs. For this reason, it is again recommended that at the beginning of a procurement procedure in which subcontracting is envisioned, bidders are requested to:

- Disclose their intentions to use subcontractors in their bid submissions.
- Disclose the identity of the subcontractors
- Justify why subcontracting is necessary for the proper performance of the contract.

It is also recommended that procurement officers be entitled to object to any subcontracting, if it lacks sufficient justification (for instance, when a bidder with sufficient capacity to comply with the contract in its entirety proposes to subcontract to its competitors).

3.5.5. Debarment

Recommendation 13 of the 2015 CFE Report advised prohibiting suppliers convicted of bid rigging by the competition authorities from participating in procurement procedures, provided that there are sufficient remaining qualified bidders. In Mexico, no suppliers have so far been debarred from participating in procurement due to past collusion and CFE has not been given the power to debar suppliers.

GP 39 lists the circumstances under which CFE may reject bids, e.g. where bidders are responsible for a serious infringement of their fiscal and/or labour obligations or have had sanctions imposed against them under the Federal Law against Corruption in Public Procurement. There is no mention of conviction for bid rigging by the competition authorities. On the basis of Section VI of Article 78 of the CFE Law, which empowers the Board of Directors to establish the cases in which CFE may refuse to consider offers or conclude contracts, it is recommended that GP 39 state that CFE and its SPCs may choose to refrain from considering offers or concluding contracts with suppliers convicted of participating in bid-rigging schemes. This choice should take into consideration the relevant market's characteristics; for example, if there are few offers, then CFE may not be able to reject offers by suppliers convicted of bid rigging.

As shown in Box 10 below, EU Directives, US Federal Acquisition Regulation and the World Bank's procurement framework contain provisions that allow for the exclusion of companies from procurement procedures when they have been involved or when there are indications that they may be involved in bid rigging.

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

European Union

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

United States

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

World Bank

According to section 1.14 of its Procurement Guidelines, the World Bank will reject a proposal for award if it determines that the bidder recommended for the award has, directly or through an agent, engaged in collusive practices in competing for the contract in question.

Sources: European Union (2014), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Official Journal of the European Union, L 94/65, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>. US Federal Acquisition Regulation, www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf. Guidelines Procurement Under IBRD Loans and IDA Credits, not Procurement Guidelines, <http://pubdocs.worldbank.org/en/828321467230376082/Procurement-GuidelinesEnglishMay2010.pdf>

3.6. Carefully choosing the criteria for awarding contracts

3.6.1. The evaluation criteria

The GPs set up a number of criteria that can be used for the evaluation of bids. Most of these criteria are based upon those listed by the PPL. The GPs also include an extra evaluation criterion (life-cycle cost, which was not included in the PPL) for public works.

Specific Provision DA-002 provides a framework for the application of almost all evaluation criteria (with the exception of the life-cycle cost criterion). However, it does not offer clear indications of when each evaluation criterion should be applied and notes that the choice of criteria will depend on the procurement procedure's characteristics and the results of the market investigation.

It is recommended, whenever non-price criteria are used, to avoid using criteria that are not directly and objectively related to the object of the procurement procedure. In this regard, CFE should follow Recommendation 5.21 of the 2015 CFE Report, which advised that evaluation criteria should not favour incumbents or place too much emphasis on prior experience unless strictly necessary.

3.6.2. Cancellation of procurement procedures

Under the GPs, the procurement unit can cancel procurement procedures, without incurring any liability, for the following reasons:

- act of God
- force majeure
- no need for the good, service or work
- when continuing the procedure would entail harm to CFE or its SPCs
- when the procedure has been suspended for more than 90 days
- when deemed appropriate by CFE.

The last option allows CFE to suspend a tender procedure or not to award a contract, if the result is deemed not to be competitive.

CFE is advised to issue clear guidelines on when procurement procedures can be cancelled for lack of competitive conditions. The improper use of this power can have negative effects (such as supply shortage or inability to respond in a timely manner to a need), and therefore guidelines must be clear and objective, explicitly stating that cancellation will only be used exceptionally and as a measure of last resort. The cancellation of a procurement procedure due to suspicions that bidders may be colluding should be discussed with the competition authorities in order not to jeopardise any ongoing competition investigation.

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

Professional training is important to strengthen procurement officers' awareness of competition issues in public procurement.

Recommendation 5.6 of the 2015 CFE Report advised developing specific training modules for procurement officers about detecting and preventing collusion, and suggesting that attendance at training sessions should be a requirement to obtaining certification as a purchasing agent.

CFE has issued Specific Provision DA-001 on the certification of procurement officers. This Provision notes that, in order to obtain this certification, among other requirements, it is necessary to have participated in a procurement training course (which includes a module on bid rigging in procurement). As noted in recommendation 5.3.7 of the 2015 CFE Report (which deals with the certification of officers in charge of carrying out market investigations), CFE is advised to train and certify officers from the specialised market investigations unit (SMIU) in fighting bid rigging. It is also advised to create specific training programmes for those officers, which deal with issues related to market investigations and best practice.

To that end, CFE invited the OECD to produce training materials on bid rigging. These materials are to be used by CFE's instructors to train CFE's officers on how to prevent and detect bid-rigging practices within the context of CFE procurement.

3.8. Detection of collusive agreements

The secretive nature of cartels makes them extremely difficult to detect. Nonetheless, international experience has proven that there are tools that can help procurement officers to detect indications of potential anti-competitive practices. Capacity building on relevant competition issues is essential to strengthening awareness among procurement officers. International experience has demonstrated that these officers sometimes warn competition authorities about potential collusive schemes. This section will analyse the new regime's characteristics in terms of detecting collusion.

3.8.1. Incentives and mechanisms to fight collusion

Recommendation 5.13 of the 2015 CFE Report advised creating procedures and incentives to enable CFE officers to report bid-rigging suspicions. The new CFE procurement regime does not create any reporting mechanism, however. CFE should develop a mechanism allowing CFE procurement officers to report their suspicions, preferably, to a specially appointed officer from the legal department who would analyse the seriousness of the suspicions and take relevant action. This mechanism should keep the reporting officer's identity confidential and could be established on the basis of Article 84 and Article 85, Section III, of the CFE Law.

Even if secure reporting mechanisms are put in place, CFE procurement officers may choose not to use them if they have no incentives to do so. Recommendation 5.13 of the 2015 CFE Report suggested providing CFE procurement officers with financial incentives to report bid rigging (if such reporting leads to bid-rigging investigations by the competition authorities). Incentives can provide for economic rewards, but also for career progression incentives or public recognition.

3.8.2. Creating a procurement database or information exchange between procurers and enforcers

Section XIV of GP 23 establishes that one of the functions of the EPS is the digitalisation of documents to create electronic-procurement files, in order to facilitate information management.

In line with Recommendation 5.2.2 of the 2015 CFE Report, it is advised that digitalised files include information on all submitted bids. They should also contain information about contracts entered into with firms and their performance. This would provide CFE and the competition authorities with valuable searchable data for the detection and investigation of potential collusive patterns.

If possible, all this information should be stored in a database that allows manipulation and analysis, and competition authorities should be granted access to this database. Most contracting authorities save scanned copies of the procurement documents, but this makes finding patterns extremely resource and time consuming as all the data must be processed to be analysed. If the

information could be stored in, for example, an Excel spreadsheet, finding patterns would be easier and less costly.

Box 11 below illustrates an example of sharing information between public contracting authorities and the competition authority.

Box 11. Korea's bid-rigging indicator analysis system

In September 2006, the Korea Fair Trade Commission (KFTC) began using a bid-rigging indicator analysis system (BRIAS), to monitor signs of bid rigging in public procurement. This system represents an evolution of KFTC's earlier practice, begun in 1997, of manually analysing bidding data from public-procurement procedures. Since 1 January 2009, under the amended Monopoly Regulation and Fair Trade Act, all public bodies have been legally required to provide bid-related information to KFTC.

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

KFTC first applied BRIAS to tenders of the Public Procurement Service, the largest Korean central purchasing body, in 2006. In 2007, the system was extended to cover tenders of four major state-owned companies (Korea Electric Power Corporation, Korea Land and Housing Corporation, Korea Expressway Corporation and Korea Water Resources Corporation). In 2014, a total of 332 public procurement agencies were participating in BRIAS, including central administrative agencies, local governments and state-owned companies.

On average, BRIAS flags more than 80 cases a month for further analysis by KFTC. Based on BRIAS indications, the KFTC opened a successful investigation on a bid-rigging conspiracy for the extension of a subway line; a cartel was found and fined USD 20 million. KFTC also estimates that BRIAS dissuades companies from bid-rigging schemes by signalling to the market that every public tender is screened.

Source: OECD 2016 Report on the Recommendation of the Council on Fighting Bid Rigging in Public Procurement, www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf

Chapter 4. Recommendations

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

Recommendation 1. Strategic planning

When defining its strategic planning of acquisitions, it is recommended that CFE make sure to evaluate the performance of procurement strategies over time, establishing indicators to measure performance, effectiveness and savings, as well as efficiency in terms of transaction costs and time of procurement procedures.

According to the CFE Law, the Audit Committee is responsible for establishing objective and measurable indicators for evaluating CFE's economic and business performance. It is recommended that these indicators also cover procurement performance.

Recommendation	Action	Legal basis
Evaluating the performance of procurement strategies over time.	Have the Audit Committee establish indicators that cover procurement performance.	Articles 13 and 50 of the CFE Law.

Recommendation 2. Ensure the independence of the Specialised Market Investigation Unit (SMIU)

When establishing the new structure of the SMIU, CFE should pay special attention to guaranteeing the unit's independence, so as to avoid interference from the contracting and/or requiring units in the development and duration of the investigations. This will ensure that market investigations are objective and conducted in a timely manner. These units could, however, have an advisory role and assist the SMIU in conducting the market investigation.

Recommendation	Action	Legal basis
Ensuring the independence of the SMIU.	Ensuring this independence when establishing the new structure of the SMIU in the Articles of Organisation.	Not required.

Recommendation 3. Preferential use of integral market investigations

Although CFE has indeed created two different types of market investigations (simplified and integral), the justification for conducting one or the other does not depend on collusion risks, level of competition or past collusive behaviour.

It is recommended that CFE first look at the risk of bid rigging and the level of competition in the market, before choosing which type of market-investigation procedure to use. If there are bid-rigging risks or competition is low, then an integral market investigation should be undertaken, even for routine procurement procedures. It is also recommended that the procurement of minor purchases be also subject to some kind of market investigation, or grouped and included in framework agreements, which require a market investigation.

Recommendation	Action	Legal basis
Consider the risk of bid rigging and competition in the market before choosing a market investigation type.	Modify GP 14.	Article 78 of the CFE Law.

Recommendation 4. Broaden the range of sources for market investigations

GP 14 lists a number of information sources and requires that three of them be used for integral investigations. It is recommended that information for market investigations be obtained from the largest number of sources possible. In particular, although GP 14 introduces the option for CFE of using purchases made by national or international companies, both in the public and private sector, as a reference, this should be compulsory. Moreover, it is recommended that integral market investigations are always run in the cases of simplified tenders.

Recommendation	Action	Legal basis
Obtain the information for market investigations from as many sources as possible.	Modify GP 14.	Article 78 of the CFE Law.

Recommendation 5. Create a standard procedure to conduct market investigations

GP 14 states that a guide to the correct procedures for conducting market investigations will be issued by CFE's corporate-procurement unit. This guide could be the right instrument for establishing the principles for conducting market investigations.

Recommendation	Action	Legal basis
Create a standard procedure to conduct market investigations.	Issue a guide establishing the principles for conducting market investigations.	Article 78 of the CFE Law.

Recommendation 6. Improve the handling of collusion risks

It is recommended that procedures that could entail risks of collusion should no longer need to be authorised by the Board of Directors, since this can generate unnecessary delays, while not generating any particular advantages.

The fact that risk analysis is carried out during the drafting of the APP and not when the procurement procedure is taking place can mean that the risks may be calculated on the basis of out-of-date information.

In cases where market characteristics may facilitate collusion, CFE should design tenders that pay greater attention to this factor.

Recommendation	Action	Legal basis
<p>Abolish the requirement that the Board of Directors authorises procedures that could entail risks of collusion.</p> <p>The risk analysis should be carried out just before the procurement procedure is taking place.</p> <p>When designing tenders, CFE should pay attention to market characteristics that may facilitate collusion.</p>	<p>Modify Specific Provision DA-DPIF-001 and Section IV of GP 5.</p>	<p>Sections V and XX of Article 12 of the CFE Law.</p>

Recommendation 7. Improve the Installed Capacity Concentration Index (ICCI) calculation method

This ICCI calculation methodology has a basic methodological problem: it treats supply capacity, market share and installed capacity as equivalent concepts, despite the fact that CFE is not a monopsony.

It is recommended that if CFE intends to assess the likelihood of collusion in procurement, it should refer to international best practices.

Recommendation	Action	Legal basis
<p>Refer to international best practices to assess the likelihood of collusion in procurement.</p>	<p>Modify the ICCI calculation methodology so as to acknowledge the differences between supply capacity, market share and installed capacity. For the purposes of determining the likelihood of collusion, analyse: 1) number of bidders, 2) barriers to entry, 3) stability of market conditions, 4) presence of industry associations, 5) presence of repetitive of purchases, 6) presence of homogeneous goods, works or services, 7) number of substitutes, 8) presence of technological change.</p>	<p>Not required.</p>

Recommendation 8. Modify internal rules regarding abnormally low tenders

CFE could eliminate provisions aimed at automatically excluding bids under a certain price threshold. Instead, and on the basis of international best practices, CFE could: 1) establish a procedure to assess abnormally low bids and exclude them only if the bidders cannot justify their prices; 2) impose conditions so that awarding a contract is conditional on some kind of financial protection for CFE; 3) if the chosen supplier with an abnormally low bid fails to deliver, the next bidder with a technically complete offer could be asked to supply, if the price offered is acceptable.

Recommendation	Action	Legal basis
Refrain from automatically excluding bids under a certain price threshold.	Modify Section XXXV of GP 4, Section V of GP 30, and GP 37.	Article 78 of the CFE Law.

Recommendation 9. Standardise CFE's catalogues

It is recommended that CFE standardise its goods, services and works catalogues. CFE could consider other catalogues that are used as a world-wide reference, like the United Nations Standard Products and Services Code for the purpose of standardising its internal catalogues.

Recommendation	Action	Legal basis
Standardise CFE's catalogues and consider their compatibility with other catalogues that are used as a world-wide reference.	When designing the Electronic Procurement System, standardise CFE's catalogues and consider their compatibility with world-wide reference catalogues.	Not required.

Recommendation 10. Encourage the use of international open tenders

The number of contracts awarded by CFE through an international open tender has been declining over time. CFE should pay attention to this fact, and encourage the use of international open tenders.

In particular, in order to avoid situations where simplified tenders would mistakenly be classified as national-only, it is recommended that integral market investigations are always run in the cases of simplified tenders and that clear and appropriate criteria are established for determining the geographic scope of simplified tenders.

Recommendation	Action	Legal basis
Run integral market investigations in the cases of simplified tenders and establish clear and appropriate criteria for determining the geographic scope of simplified tenders.	Modify GPs 14 and 31.	Article 78 of the CFE Law.

Recommendation 11. Use of the English language in international procedures

It is recommended to always publish at least a summary of each call for tenders in English, even if the official binding documents remain in Spanish.

Recommendation	Action	Legal basis
Publish at least a summary of each call for tenders in English.	Modify Section 1 of GP 30.	Article 78 of the CFE Law.

Recommendation 12. Maximise the use of electronic procurement procedures

It is recommended that the scale or the complexity of procedures should not prevent CFE from conducting them electronically. Also, CFE is advised to limit the application of exceptions to the general rule of using electronic procurement procedures.

Recommendation	Action	Legal basis
Maximise the use of electronic procurement procedures.	Limit the application of exceptions to the general rule of using electronic procurement procedures in GP 23.	Article 78 of the CFE Law.

Recommendation 13. Eliminate prequalification procedures

It is recommended that CFE eliminates prequalification procedures and evaluates bidders once they have submitted their offers, in order to maximise the participation of bidders and allow for more competition.

Recommendation	Action	Legal basis
Eliminate prequalification procedures and evaluate bidders once they have submitted their offers.	Abolish Chapter IV of the GPs and modify Section XIII of GP 5 and Sections VIII, XI and XII of GP 23 accordingly.	Article 78 of the CFE Law.

Recommendation 14. Limit the use of exceptions to the open-tender procedure

Under CFE's procurement regime, the Subcommittees for Exceptions to Open Tenders must approve some exceptions to the open-tender procedure. The decision to use other exceptions is adopted by the head of the requiring unit and is not subject to the approval of these Subcommittees. This could give rise to arbitrariness. CFE should, therefore, require that the use of all exceptions be reviewed and authorised by the Subcommittees.

It is also recommended that CFE avoids using procedures different from those already in place (i.e. restricted invitations and direct awards). If CFE and its SPCs consider using alternative procurement procedures, CFE should specify in the General Provisions what they should be and under which conditions they would be used.

CFE should detail and limit circumstances where open tenders may not be used (so as to limit procurement officials' discretion in the cases not covered by the Specific Provisions) and avoid relying on exceptions in all events.

CFE should also monitor the number of contracts and the budget spent on purchases using exceptions and check them against CFE historical figures regarding exceptions justified under the formerly applicable general public procurement regime.

Recommendation	Action	Legal basis
Require that the use of all exceptions be reviewed and authorised by the Subcommittees, avoid using procedures different from those already provided for in the GPs, detail and limit circumstances where exceptions to open tenders are used and monitor the use of exceptions.	Modify GP 38 with regard to the Subcommittees' responsibilities, modify Section XIII of GP 18, modify Specific Provision CCT-002 and establish a monitoring regime.	Articles 78 of the CFE Law.

Recommendation 15. Benefit from framework agreements

CFE may consider concluding framework agreements following a competitive procurement procedure, using an open-tender procedure for the first stage, and direct-award or restricted-invitation procedures for the second stage.

CFE may make use of the existing framework agreements concluded under the formerly applicable general public procurement regime, if their terms are competitive. Moreover, procurement procedures for framework agreements can be run jointly with other public buyers.

Recommendation	Action	Legal basis
Conclude framework agreements on the basis of a competitive procurement procedure; Benefit from existing framework agreements; engage in joint procurement procedures with other public buyers for framework agreements.	Modify GP 47. Use existing framework agreements, run framework agreements jointly with other public buyers.	Article 78 of the CFE Law.

Recommendation 16. Give the contracting unit the power to refuse anti-competitive joint bids

It is recommended that the contracting unit be given the power to refuse joint bids that may give rise to anti-competitive effects not outweighed by pro-competitive effects. The 2015 CFE Report contains criteria for determining the existence of pro-competitive effects.

Recommendation	Action	Legal basis
Give the contracting unit the power to refuse anti-competitive joint bids.	Modify GP 27.	Article 78 of the CFE Law.

Recommendation 17. Ensure that guarantees do not hinder participation

CFE should not design guarantees in a way that unnecessarily prevents the participation of potential bidders. It is recommended that CFE facilitates the participation of as many bidders as possible in its procurements, and then takes risk-mitigation measures either before the award (by running financial vulnerability checks or requiring performance guarantees) or afterwards (correct performance monitoring and sanctions).

Recommendation	Action	Legal basis
Ensure that guarantees do not hinder participation.	Modify GP 51; introduce clauses to this effect in the upcoming Specific Provision dealing with guarantees.	Article 78 of the CFE Law.

Recommendation 18. Introduce limitations to the use of split awards

CFE should avoid disclosing the possibility of an award being split or of information that may facilitate the sharing of the contract among bidders, such as the number of providers to be awarded the contract.

Instead, if market conditions allow, CFE could consider awarding the contract to a single bidder each time, provided that this purchasing method guarantees the security of supply. In any event, CFE should inform the bidders of its decision to split the award only after the offers have been submitted.

Recommendation	Action	Legal basis
Introduce limitations to the use of split awards so that they cannot be used for anti-competitive purposes.	Modify GP 29.	Article 78 of the CFE Law.

Recommendation 19. Consider the use of consolidated purchases on a case-by-case basis

CFE should consider specific market conditions and analyse the appropriateness of consolidating purchases on a case-by-case basis.

Recommendation	Action	Legal basis
Considering the use of consolidated purchases on a case-by-case basis.	Modify the GPs to include a requirement to analyse the appropriateness of consolidating purchases during market investigations.	Not required.

Recommendation 20. Use industry experts in the design of procurement procedures

CFE should consider the possibility of involving experts from within its technical units in the definition of tender terms when needs are very complex or technical, in order to ensure potential bidders understand the needs of the contracting authority and so submit appropriate offers.

Recommendation	Action	Legal basis
Using procurement experts in the design of procurement procedures.	Modify GP 25 in order to require the involvement of experts from within CFE's technical units in the definition of tender term when needs are very complex or technical.	Article 78 of the CFE Law.

Recommendation 21. Find a balance in the application of transparency obligations

CFE should prevent the disclosure of commercial information that may facilitate collusion. Information that should be considered confidential consists primarily of non-winning bidders' identities and offers. Moreover, information on the tender award should be made public only with a certain time delay.

CFE could develop and adopt a strategy that allows it to guarantee the legality of its decisions in terms of transparency and at the same time fight against bid rigging.

Recommendation	Action	Legal basis
Prevent the disclosure of commercial information that may facilitate bid rigging.	Develop and adopt a strategy that allows CFE to guarantee the legality of its decisions in terms of transparency and at the same time fight against bid rigging.	Articles 13 and 114 of the CFE Law.

Recommendation 22. Avoid giving competitors the chance to identify each other through the Electronic Procurement System (EPS)

According to the GPs, clarification sessions concerning prequalification documents and the tender terms in open-tender procedures will be held using the EPS. CFE and its SPCs should adopt the necessary measures so that the electronic identification does not allow third parties to identify bidders.

Recommendation	Action	Legal basis
Avoid giving competitors the chance to identify each other through the EPS.	Design the EPS in a way that does not allow third parties to identify bidders.	Not required.

Recommendation 23. Specify rules regarding reverse auctions and the publication of maximum contracting price

CFE may consider using the auction mechanism described in GP 28 for offers in restricted invitations that exceed the maximum contracting price (see GP 34).

GP 28 on auction procedures provides for the possibility to communicate the maximum contracting prices at least one minute before the bidders present their offers. The shortest the time that elapses between the communication of the maximum contracting price and the presentation of bids the lowest the risk of participants coordinating their offers. CFE could consider providing a more specific rule regarding this time.

Recommendation	Action	Legal basis
Specify rules regarding reverse auctions and the publication of maximum contracting price	Use auction mechanism described in GP 28 for offers in restricted invitations that exceed the maximum contracting price. More specific rule regarding the time that elapses between the communication of the maximum contracting price and the presentation of bids.	Not required.

Recommendation 24. Certification of independent bid determination

It is recommended that the Declaration of Integrity and Lack of Legal Impediments on the Part of Bidders also covers Article 127, Sections I, IV, X and XI and fourth and fifth paragraphs of the Federal Economic Competition Law regarding administrative sanctions.

Recommendation	Action	Legal basis
Adapt the Declaration of Integrity and Lack of Legal Impediments on the Part of Bidders.	Mention Article 127, Sections I, IV, X and XI and fourth and fifth paragraphs of the Federal Economic Competition Law in CFE's Declaration of Integrity.	Article 78 of the CFE Law.

Recommendation 25. Limit the use of subcontracting

It is recommended that at the beginning of a procurement procedure in which subcontracting is envisioned, bidders are requested to disclose their intentions to use subcontractors in their bid submissions and the identity of the subcontractors, as well as to justify why subcontracting is necessary for the proper performance of the contract.

It is also recommended that procurement officers be entitled to object to any subcontracting, if it lacks sufficient justification.

Recommendation	Action	Legal basis
Limiting the use of subcontracting	Modify GP 45 so that at the beginning of a procurement procedure, bidders are requested to: <ol style="list-style-type: none"> 1) Disclose their intentions to use subcontractors in their bid submissions. 2) Disclose the identity of the subcontractors 3) Justify why subcontracting is necessary for the proper performance of the contract. 	Article 78 of the CFE Law.
Limiting the use of subcontracting	Modify GP 45 so that procurement officers are entitled to object to any subcontracting, if it lacks sufficient justification.	Article 78 of the CFE Law.

Recommendation 26. Provide for the possibility of rejecting offers from bidders who have been convicted of bid rigging

CFE should contemplate the possibility of rejecting offers from bidders who have been convicted of bid rigging. This choice should take into consideration the relevant market's characteristics; for example, if there are few offers, then CFE may need to allow offers by suppliers convicted of bid rigging.

Recommendation	Action	Legal basis
Provide for the possibility of rejecting offers from bidders who have been convicted of bid rigging.	Modify GP 39 so that it states that CFE and its SPCs may choose to refrain from considering offers or concluding contracts with suppliers convicted of participating in bid-rigging schemes.	Section VI of Article 78 of the CFE Law.

Recommendation 27. Further regulate the use of non-price criteria

Although Specific Provision DA-002 provides a framework for the application of almost all evaluation criteria, it does not offer clear indications of when each evaluation criterion should be applied and notes that the choice of criteria will depend on the procurement procedure's characteristics and the results of the market investigation.

It is recommended, whenever non-price criteria are used, to avoid using criteria that are not directly and objectively related to the object of the procurement procedure. In this regard, evaluation criteria should not favour incumbents or place too much emphasis on prior experience unless strictly necessary.

Recommendation	Action	Legal basis
Further regulate the use of non-price criteria.	Modify Specific Provision DA-002 to ensure that the criteria used are directly and objectively related to the object of the procurement procedure.	Article 78 of the CFE Law.

Recommendation 28. Further regulate the cancellation of procurement procedures for lack of competitive conditions

CFE is advised to issue clear guidelines on when procurement procedures can be cancelled for lack of competitive conditions. These guidelines must be clear and objective, explicitly stating that cancellation will only be used exceptionally and as a measure of last resort, so as not to create any negative effects on supply.

Recommendation	Action	Legal basis
Further regulating the cancellation of procurement procedures for lack of competitive conditions.	Modify GP 6 and GP 30 to include clear and objective guidelines about when procurement procedures can be cancelled for lack of competitive conditions.	Article 78 of the CFE Law.

Recommendation 29. Raise awareness among staff about the risks of bid rigging in procurement

CFE is advised to train and certify officers from the specialised market investigations unit (SMIU) in fighting bid rigging. It is also advised to create specific training programmes for those officers that deal with issues related to market investigations and best practices.

Recommendation	Action	Legal basis
Raise awareness among staff about the risks of bid rigging in procurement.	Create a specific training programme for procurement officers, especially for those at the SMIU.	Not required.

Recommendation 30. Create a reporting mechanism

CFE should develop a mechanism allowing CFE procurement officers to report their suspicions, preferably to a specially appointed officer from the legal department who is in charge of analysing the seriousness of the suspicions and taking the relevant action. This mechanism should keep the reporting officer's identity confidential.

Recommendation	Action	Legal basis
Create a reporting mechanism for bid rigging suspicions.	Develop a reporting mechanism, including the appointment of an officer from the legal department in charge of dealing with reports, while keeping the reporting officer's identity confidential.	Article 84 and Section III of Article 85 of the CFE Law.

Recommendation 31. Create incentives for reporting bid-rigging suspicions

It is recommended to provide CFE procurement officers with financial incentives to report bid rigging (if such reporting leads to bid-rigging investigations by the competition authorities). Incentives can provide for economic rewards, but also for career progression incentives or public recognition.

Recommendation	Action	Legal basis
Creating incentives for reporting bid-rigging suspicions.	Modify CFE's internal rewards regime in order to incentivise the report of bid-rigging suspicions.	Section II of Article 75 of the CFE Law.

Recommendation 32. Create a procurement database that allows manipulation and analysis of information

In the context of the digitalisation of procurement files by means of the EPS, it is advised that digitalised files include information on all submitted bids, as well as on contracts entered into with firms and their performance.

If possible, all this information should be stored in a database that allows manipulation and analysis, and competition authorities should be granted access to this database.

Recommendation	Action	Legal basis
Create a procurement database or information exchange between procurers and enforcers.	When digitalising procurement files by means of the EPS, store all relevant information in a database that allows manipulation and analysis	Section XIV of GP 23.

Annex 1. Recommendations of the 2015 CFE Report

Chapter 2 of the 2015 CFE Report includes the following recommendations:

1) **Remove preferential treatment in laws and procedures.** Abolish restrictions on participation so that all qualified bidders were treated equally, irrespective of their nationality and of the origin of the goods and services they intend to provide.

2) **Limit the use of exceptions to public tender.** The OECD has advised public agencies to limit the use of the exceptions permitted under the PPL, as their excessive and unjustified use results in fewer bidders and lessens the likelihood that “value for money” is being achieved.

3) **Use expert advice.** The OECD recommended that when a good or a service is extremely specialized an independent expert body should approve the technical arguments for using one of the exemptions in the PPL.

4) **Remove the requirement in the PPL to establish a “convenient price”.** Establishing a convenient price (minimum price below which bids cannot be accepted) should no longer be a requirement under the PPL. If the PPL is not amended in this sense, the OECD recommended using a discount factor larger than 40% when establishing a convenient price or using guarantees that vouch for the seriousness of providers as an alternative option.

5) **Change a number of requirements relating to clarification meetings.** The OECD recommended abolishing the mandatory requirement to hold a clarification meeting for each call for tenders at the federal level, as it runs against the OECD recommendation to limit communication among bidders. Instead, procurement officials should try to carry out several different clarification meetings so that the potential bidders do not meet face-to-face or, alternatively, they should use electronic systems (e-procurement) to decrease the likelihood of communication between bidders. The records of clarification meetings should not list or identify the participants in the procurement process. Finally, site visits should be planned so as to avoid bringing potential bidders together.

6) **Eliminate several problematic disclosure requirements.** The OECD pointed out that some current disclosure requirements, such as those concerning reference prices, the identity of bidders and the value of the bids they submit can facilitate bid rigging, especially if these details are disclosed at an early stage of the tender procedure or just after the award of the contract. The OECD has, in the past, recommended that the disclosure of such information be eliminated or substantially limited.

7) **Enact legislative changes to deal with joint bids.** The OECD considers that federal legislation should be amended so that joint bids are permitted only when tender documents expressly allow for it. Bidders should specify the rationale and expected benefits of the joint bids and, on this basis, the procurement institution should be able to determine whether the joint bids are acceptable.

8) **Assess the need for legislative changes relating to split awards.** Splitting a contract among multiple suppliers may facilitate collusion. The OECD recommended that a study be undertaken by the Ministry of Public Administration (Secretaría de la Función Pública, SFP) and COFECE to assess how often split contracts are used in Mexico, as well as the justifications for employing this award method.

9) **Establish disclosure requirements for subcontracting.** Subcontracting is not regulated in the PPL. The OECD recommended legally requiring bidders to disclose if they planned to subcontract in order to make it more difficult for them to implement collusive agreements. Bidders should, for example:

- a) **advise** the contracting authority of their intention to subcontract
- b) **clearly identify** the firms to which they are subcontracting
- c) **explain** why subcontracting is necessary for the proper performance of the contract.

10) **Allow micro-, small-, and medium-sized companies to participate on their own in reverse auctions (OSD).** The OECD advised abolishing the provision in the PPL that forbids micro-, small- and medium-sized companies from participating.

11) **Amend the PPL and other Federal procurement statutes to require a Certificate of independent bid determination (CIBD).** A signed declaration by bidders indicating that their bid is independent from other bids, a CIBD acts as a deterrent for company executives because it makes them directly responsible for any collusive conduct later proven in court.

12) **Enhance the participation of social witnesses.** The role of social witnesses in tender procedures should be enhanced by having them focus on competition issues in addition to transparency and adherence to laws and procedures.

13) **Revise penalties.** The OECD recommended that the SFP study whether guarantees should be mandatory in direct-award contracts and in those contracts awarded through restrictive invitation procedures, and that it propose the necessary amendments to the laws.

14) **Revise legal framework for penalties.** The current requirement that the amount of the penalty cannot exceed the value of the guarantee and by establishing higher penalties should be removed. Also, lists of problematic and sanctioned suppliers and contractors should be available to and shared by all public agencies.

15) **Impose sanctions on suppliers convicted of bid rigging in Mexico.** The PPL should be amended to prevent firms and individuals convicted for bid rigging by the competition authority from participating in public procurement for a specific period of time.

Chapter 5 of the 2015 CFE Report includes the following recommendations:

1) **Strategic planning aimed at fighting bid rigging.** The OECD recommended that CFE plan all tender procedures strategically to reduce the risk of bid rigging and to be able to choose the most advantageous form of procurement. Strategic planning requires clear, feasible and measurable objectives over a period of time. In order to design such a strategy, CFE should:

- a) **Prioritise** its objectives subject to budget and other internal restrictions.
- b) **Gather internal information** to determine its demand for goods, services and leases.
- c) **Be informed**, usually through the use of market assessment, to be able to set a benchmark for market prices, substitutes and quality standards.
- d) **Systematise** information and design indicators to evaluate the progress of procurement strategies over time.

2) **Gathering and organising procurement information.** The primary requirement for designing an effective procurement strategy aimed at fighting bid rigging and improving procurement efficiency is the systematisation of market information.

To improve the availability and classification of information, the OECD recommended that CFE adopt the following measures.

2.1) **Categorise sensitive information.** Dissemination of sensitive information, such as procurement strategies, non-acceptable prices and quantities, increases the likelihood of collusive agreements among potential participants in tenders. CFE should identify sensitive information and the distinction between public and sensitive information be aligned and in compliance with the Federal Law of Transparency and Access to Public Government Information (LFTAIPG). Therefore, sensitive information should be considered, in light of Article 114 of the CFE Law, as confidential business information.

2.2) **Systematise documents related to the procurement processes in order to facilitate the research of collusive patterns.** To help detect bid-rigging patterns, it is important that information and documents on all procurement procedures within CFE be systematised and digitalised. The archived information should not be limited to suppliers who have been awarded a contract, but should include all participants in the procedures, including information on the conditions attached to their proposals. This information should be able to be certified by CFE as meeting the qualification standards required by the judiciary for judicial evidence. There must be physical records that make that process possible.

2.3) **Identify products and services purchased by CFE by a single reference code recognised by both CFE systems and CompraNet.** A single product code would facilitate the comparison of institutional purchases of the same product on a regional/central level, as well as across public administration. This would facilitate detection of differences in prices for the same product.

2.4) **Create an automatic system for detecting high-risk purchases.** This could be based on indicators of high-risk markets (based on product and market characteristics) and historically few competitive tenders. This information should be readily available for the competition authorities whenever necessary.

3) **Create a specific administrative unit for market studies.** The OECD recommended that CFE establish a special regime that would provide the necessary means to develop robust market analysis and allow its procurement departments to make the best decisions concerning the purchasing method and strategy. During the preparation of the 2015 CFE report, it was noted that the Department of Evaluation and Cost Analysis (DEAC) did not have the capacity or the hierarchy necessary to perform this work. The creation of a specialised department dedicated to market studies and market research for all central-level purchases would significantly improve CFE's ability to identify markets and industries at higher risk of collusion, and so plan its procurement strategy accordingly. This new department should work closely with the purchasing units that have the necessary specialised knowledge. The 2015 CFE Report contained a specific set of recommendations to help implement this measure.

3.1) **Create a new unit or strengthen the Department of Evaluation and Cost Analysis.** Established as an administrative unit independent from the Supply Management, it would be responsible for developing all market studies at the centralised level. This unit should be in charge of conducting market investigations for the subsidiary productive enterprises (SPCs), or an equivalent unit should be created within each of the SPCs.

3.2) **Establish minimum requirements and basic principles for conducting market investigations.** The 2015 CFE Report recommended following the OECD Guidelines to develop better

market investigations. The recommended minimum requirements of a market investigation are the following:

a) **Identify the characteristics of markets that could facilitate bid rigging:** identical or simple products or services, few if any substitutes, little or no technological change, small number of companies, little or no entry to the market, presence of strong industry associations, and repetitive bidding.

b) **Include** information on domestic and foreign supply.

c) **Assess** the existence of substitute products.

d) **Describe** different procurement options (for example, buying or leasing).

e) **Assess** the relative level of competition in the market.

The recommended principles for market studies are the following:

a) **Trustworthy information:** information must come from official sources and be readily available or be the result of a trustworthy investigation.

b) **Confidentiality:** information regarding market studies must be kept secret from suppliers at all times.

c) **Transparency:** documented accounts of all meetings, (i.e. of the Joint Advisory Committee meetings) are invaluable tools for transparency.

d) **Preparedness:** market studies must be considered with anticipation.

e) **Differentiation:** procurement officials must be prepared to decide on the extent of the analyses required, depending on the structure of the market and the characteristics of the goods or services.

3.3) **Analyse procurement conditions of other public and private entities and benchmark their procurement conditions for various goods and services.** The first step towards gathering trustworthy information for market studies is to analyse the procurement conditions of other companies (even internationally) that procure the same goods or services. This should allow CFE officials to estimate prices more objectively, learn about new procurement strategies, and detect possible bid-rigging schemes.

3.4) **Market studies should use information from different sources to estimate reference prices.** CFE should avoid establishing its price estimates solely on the basis of information obtained from companies through requests for quotations. CFE should look at the procurement strategies of other companies that require the same products and services to reduce the risk of flawed price estimations.

3.5) **Favour first-price sealed-bid auctions over “maximum-reference price-discount” procedures.** When the price the entity is willing to pay is published, it becomes easier for bidders to agree on prices and rig bids. For this reason, procurement officials are advised to favour first-price, sealed-bid auctions over maximum-reference, price-discount procedures.

3.6) **CFE should introduce different market studies for high- and low-risk purchases.** High-risk purchases are the procurement of goods and services in markets more prone to collusion and that have shown low levels of competition or in which suppliers have engaged in monopolistic practices. In

these cases, market studies should be more in-depth to allow CFE procurement officials to design the necessary countermeasures.

3.7) Design a specific certificate for high-risk market studies. CFE should introduce new professional certification for staff responsible for the preparation of market research for products and services in high-risk markets for collusion.

3.8) Carry out a cost-benefit analysis of procurement strategies in order to obtain value for money over time. To determine the most efficient procurement method, CFE should develop short-term and long-term pricing strategies and use indicators to measure their success over time. This will allow for comparison between procurement types, and an estimation of the most efficient form of procurement for each processes.

4) Eliminate or avoid regulations, criteria or practices that discriminate or give preferential treatment to any provider or group. CFE should always maximise the number of genuinely competitive bidders and eliminate any preferential treatment.

5) Create a list or a record of industry specialists for internal consultation and allow the CFE Laboratories for Testing Equipment and Materials (Laboratorio de pruebas de equipos y materiales, LAPEM) to comment on and/or object to technical requirements that do not follow existing standards. Given the extremely technical nature of its different production processes, CFE should create a list of approved technical staff from different CFE departments (although external consultants could also be included) who could be consulted and assist procurement departments, especially in the pre-tender phase. For example, LAPEM has in the past participated in all tendering procedures; its role should be reinstated. Consultation and assistance should focus on the definition of tender terms to avoid unclear or biased specifications, especially in the case of high-risk purchases.

6) Design and establish specific training modules on the prevention and detection of collusion. These should be part of regular training for CFE procurement officials. Specific training sessions should also be required for certified purchasing agents.

7) Establish open, documented and individualised dialogue with losing bidders, as well as with suppliers that did not participate in tenders despite being identified in market studies as potential participants. This will enable CFE to become aware of potential problems in its procedures and identify clues of possible collusive arrangements. It is important to point out that any information obtained through this process should be considered as classified information and not revealed to all interviewed parties.

8) Establish a strategy for increasing the number of remote electronic tenders. To meet the provisions of Section X, Article 78 of the CFE Law, CFE should endeavour to facilitate the bidding process to the fullest extent, preferably by using electronic bidding systems. Adopting electronic bidding procedures more frequently (especially for decentralized offices) will help to reduce communications among bidders, while at the same time reducing costs for potential bidders and maximising tender participation.

9) Avoid bringing potential suppliers together in clarification meetings. The 2015 CFE Report recommended limiting whenever possible clarification meetings that gather bidders in the same physical space. When these meetings cannot be conducted electronically, CFE should ensure that the identity of potential competitors remains secret, at least until bids have been submitted.

10) Expand the use of public and international tenders and include an English version of all the international calls for tenders.

11) **The special regime should consider adopting the Central Acquisitions Committee's practice of so-called "previous revision meetings" (*reuniones previas*).** These meetings gathered 41 Subcommittees for Reviewing Calls for Tenders (SURECON) at CFE: one at the central level and 40 at the regional offices. These subcommittees were responsible for analysing and drafting the final versions of calls for tenders, as well as for reviewing their legal coherence. This practice should increase the clarity of tender requirements, reduce the number of unnecessary exceptions to public tenders, and increase the number of competitive bids.

12) **Establish incentives (awards) and deterrents (sanctions) for CFE procurement departments.** To make purchasing processes a strategic activity, it is important to create appropriate incentives for procurement officers. According to Section VI, Article 106 of the CFE Law, procurement officers can be rewarded for complying with best purchasing practices when savings can be proven.

13) **Create procedures and incentives for CFE staff to raise concerns relating to bid rigging in procurement procedures, i.e. a whistle-blower programme.** According to the 2015 CFE Report, this reporting mechanism should protect officers who report suspicions of bid rigging against any form of retaliation. Moreover, officers should have incentives to make use of this mechanism.

14) **Regulate joint bids to ensure their pro-competitive use.** The special regime should make it clear that joint bids will only be accepted when there are pro-competitive justifications, such as:

a) two or more suppliers combining their resources to fulfil a contract that is too large for any of them individually

b) two or more suppliers active in different product markets providing a single integrated service that none could supply independently

c) two or more suppliers active in different geographic areas submitting a single bid for all of Mexico or for multiple states that include areas that no single supplier can accommodate on its own.

15) **Reserve the right to suspend a tender procedure or not to award the contract if it is suspected that the bidding outcome is not competitive.** Article 84 and Section I, Article 85 of the CFE Law require CFE and its SPCs to detect, prevent and correct any action that could affect or impact the company's operations. This could be used as a legal basis for CFE to reserve the right to suspend proceedings or, alternatively, not to award the contract when it appears that there are strong suspicions of collusion.

16) **Avoid the public release of confidential information in the Annual Procurement Programme, and any other document containing sensitive information.** To avoid sensitive information being disclosed with the publication of the Annual Procurement Programme, CFE should create two versions: one without sensitive information for the general public, and another for internal use by CFE only. This would ensure transparency and avoid disclosing sensitive information that could help bidders collude.

17) **Create or adhere to consolidated purchases with other agencies and institutions.** The OECD recommended that CFE analyse the advantages of adhering to established purchasing processes with other government entities and institutions. The implementation of consolidated purchases among several institutions greatly increases purchasing power, generating more competition and encouraging lower prices. Consolidated purchases are also an effective way of disrupting possible collusive agreements.

18) **Include regional departments and subsidiary productive enterprises in the planning of consolidated purchases and framework agreements.** CFE should include the requirements of

regional offices, and or where feasible its SPCs, in its planning of consolidated purchases and framework agreements.

19) **Encourage regional offices and SPCs to carry out consolidated purchases.** The special regime should encourage consolidation where feasible and appropriate for the interests of CFE. Monitoring and supervising mechanisms should be put in place to guarantee accountability.

20) **Avoid sharing sensitive information with the Joint Advisory Committee and industry chambers and trade associations.** CFE should ensure that only public, non-strategic information is shared within the Joint Advisory Committee.

21) **When using point-based awarding criteria or when establishing minimum requirements for bidders interested in CFE tenders, procurement officers should not favour incumbency or overemphasise the importance of past performance.** This recommendation was meant to facilitate the entry of new suppliers and to increase rivalry in public tenders. CFE should explore other ways to ensure good contract performance, such as dealing with breaches of contract through effective and dissuasive sanctions.

22) **Make a CIBD a mandatory requirement for participation in CFE public tenders.** CFE should make CIBDs mandatory for each interested bidder. Senior corporate officials should be required to sign CIBDs. The use of CIBDs should be included in the special regime.

23) **Include a warning against collusion and publish the sanctions specified in Federal Economic Competition Law and the Federal Criminal Code in the calls for tenders.** Just as calls for tenders refer directly to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, so there should also be a clause warning potential bidders of the legal sanctions applicable for collusive tendering.

24) **Limit the use of split awards.** CFE should only split a single contract between multiple suppliers in exceptional circumstances, such as when there is concern about security of supply, and should avoid similar or identical values in the respective contracts. CFE should consider issuing tenders with a variety of volumes and involving smaller amounts or consolidating purchases in order to attract large bidders.

25) **Deter the use of sub-contracting as an anti-competitive practice.** In order to deter the use of sub-contracting as a means to implement collusion, CFE should require bidders before the bidding process to:

- a) **disclose** in the bidding documentation submitted to CFE their intention to use sub-contractors
- b) **clearly** provide details of the identities of the sub-contracting companies
- c) **explain** why sub-contracting is necessary for the proper performance of the contract.

26) **Adopt a policy of seeking damages in established bid-rigging cases.** It is recommended that CFE proactively seek opportunities to obtain compensation for damages under Federal Economic Competition Law whenever CFE has been the victim of any collusive conduct that has been investigated and successfully prosecuted by competition authorities.

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

Annex 2. Declaration of Integrity and Absence of Legal Impairments of Competitors

1. Name: _____
2. I am currently participating in the following procedure:

• Open tender		Number of procurement procedure:
• Open simplified tender		
• Restricted invitation		

3. In this procurement procedure, in my capacity as *(an official or manager with the power to submit bids on behalf of his/her company and/or the legal representative with power of attorney authorising him/her to submit bids on behalf of the company)* I am intervening in the name and representing: _ *(name of the company)*, with No. of Federal Register of Taxpayers _____, and with address located in *(street and number, district, postal code, delegation or municipality, federal entity, country)*.
4. By signing this declaration, I engage to adopt an integral behaviour during my participation in this procurement procedure and, if applicable, during the execution of the corresponding contract; Therefore, I will refrain from adopting a conduct, either by myself or through a third person, to make the officials of CFE or its Subsidiary Productive Companies alter the evaluations of the offers, the result of the procurement procedure or any other aspects that improperly grant me more advantageous conditions than those granted to other bidders. Likewise, I undertake to observe the provisions of the legal texts that regulate the procurement activity carried out by CFE and its Subsidiary Productive Companies, such as the Federal Anti-Corruption Law in Public Procurement, the General Provisions on Procurement, Leasing, Services and Public Works of CFE and its Subsidiary Productive Companies and any other applicable legal provision.
5. I declare that I have not celebrated, ordered or executed contracts, agreements, arrangements that have as their object any of the practices provided for in article 53 of the Federal Economic Competition Law and that I am aware of the sanctions provided for in article 254 bis of the Federal Criminal Code.
6. In addition, I declare that I do not fall under any of the cases provided for by article 42 of the General Provisions on Procurement, Leasing, Services and Public Works of CFE and its Subsidiary Productive Companies and by Specific Provision DA / DPIF-002 that sets up the criteria to consider that a breach or debit of a person causes serious damage to CFE and its Subsidiary Productive Companies.

Signature

Annex 3. Declaration of Integrity and Non-collusion of COFECE

DECLARATION OF INTEGRITY AND NON-COLLUSION

Mexico City, [DATE]

Contracting Authority
Procurement procedure no. XXX

The undersigned

[Name of the representative], representing [Name of the company or the person] (hereinafter, the bidder), presents the OFFER:

[The powers to represent must include that of signing this declaration on behalf of all who are represented]:

For: [No. of the procurement procedure]

Tender called by: XXX (hereinafter, the Contracting Authority)

I hereby present on behalf of the BIDDER, the following Declaration of Integrity and Non-Collusion (hereinafter, the Declaration of Integrity):

1. I have read and understand the terms of this Declaration of Integrity;
2. I understand that if this Declaration of Integrity is not truthful, I expose myself and commit the responsibility of my represented in civil, criminal and administrative offenses, and especially of the penalties incurred by those who falsely declare before an authority other than the judiciary, in terms of article 247, section I, of the Federal Criminal Code. This is without prejudice to the sanctions that are contemplated in terms of the laws applicable to this procedure. I also understand that the bid will be disqualified if it does not comply with this declaration;
3. I am aware of the Federal Economic Competition Law, published on 23 May, 2014 in the Official Journal of the Federation and that entered into force on 7 July of the same year, in particular, of Articles 53, 127, sections I, IV, X and XI and fourth and fifth paragraphs, As well as Article 254 bis of the Federal Criminal Code.
4. Each person whose signature appears in the presented OFFER has been authorized by the BIDDER to define the terms and conditions of the latter and to formulate it on his behalf.
5. For the purposes of this Declaration of Integrity and of the presented OFFER, I understand that the word "Competitor" includes any physical or moral person, besides the BIDDER, affiliated or not with the latter who:
 - a. Has submitted or may submit an OFFER in the present procedure; or
 - b. Could potentially submit an OFFER in the present procedure.
6. The PARTICIPANT declares that [mark with a X one of the following options]
 - a. [...] It participates in this procedure independently, without consultation, communication, agreement, arrangement, combination or agreement with any competitor; or
 - b. [...] it has entered into contracts, agreements and arrangements with one or more competitors regarding this tender. The attached document(s) states all the detailed

information, including the names of the competitors and the nature and reasons of such consultations, communications, agreements or conventions;

7. In particular, and without limiting the general statements of what it is indicated in 6 (a) or 6 (b), it has not entered into any contract, agreements or arrangement with any competitor in relation to:
 - a. Prices;
 - b. Methods, factors or formulas used for pricing;
 - c. The intention or decision to present or not an OFFER; or
 - d. The presentation of an OFFER that does not meet the requirements of this procedure; excepting what it has been expressly declared in relation to point 6 (b) above;
8. Moreover, there has been no consultation, communication or agreement with any competitor in terms of the quality, quantity, specifications or shipping details of the products or services referred to in this procedure, except what it has been expressly authorized by the contracting authority or in accordance with the facts disclosed in relation to point 6 (b) above.
9. The terms of the OFFER have not been and will not be directly or indirectly revealed by the BIDDER to any competitor with the object or effect to manipulate, fix or agree on prices; to manipulate, establish or agree on methods, factors or formulas used for the determination of prices; to affect or influence the intention or decision whether or not to submit an OFFER or to present an OFFER that does not meet the specifications of this procedure.

In addition, the terms of the OFFER that are submitted have not been and/or will not be directly or indirectly revealed by the BIDDER to any competitor until the AWARD OF THE CONTRACT with the object or effect of manipulating, fixing, or arranging the quality, quantity, specifications or details of the delivery of the products or services referred to in this procedure or in accordance with the above mentioned declaration in relation to point 6 (b) above.

10. Likewise, I declare that I will abstain from adopting any behaviour so that the officials of the Contracting Authority alter the evaluations of the OFFER, the outcome of the procedure or any other aspects that improperly grant me more advantageous conditions than those granted to other bidders.

Date: _____

Name of the legal representative: _____

Signature: _____

Notes

- ¹ OECD (2015), “A Secretariat Analytical Report on Compliance with OECD Standards of Procurement Legislation, Regulations and Practices in CFE”, www.oecd.org/daf/competition/fighting-bid-rigging-mexico-cfe-report-2015.htm.
- ² OECD (2009), Guidelines For Fighting Bid Rigging In Public Procurement, <http://oe.cd/gfbr>
- ³ The only exception to this historical monopoly had been Luz y Fuerza del Centro, a company entitled to provide the public service of electric energy in Mexico City; it was closed in 2009.
- ⁴ Article 1 of the 2013 CFE Organic Statute, www.cfe.gob.mx/ConoceCFE/1_AcercadeCFE/MarcoLegalNormativo/Lists/Normatividad/Attachments/62/Estatutoorganicoconfereformado31mar2014.pdf. For more information see Chapter 3, Section 3.1 of the 2015 CFE Report.
- ⁵ OECD (2017), *Driving Performance of Mexico’s Energy Regulators*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264267848-en>.
- ⁶ For more information, see “CFE y la Electricidad en México”, www.cfe.gob.mx/ConoceCFE/1_AcercadeCFE/CFE_y_la_electricidad_en_Mexico/Paginas/CFEylaelectricidadMexico.aspx, (accessed, 20 April 2017).
- ⁷ The Public Procurement Law (Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público, LAASSP), the Public Procurement Regulation (Reglamento de la Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público), the General Procurement Manual (Manual Administrativo de Aplicación General en Materia de Adquisiciones, Arrendamientos y Servicios del Sector Público), the Public Works Law (Ley de Obras Públicas y Servicios Relacionados con las Mismas), the Public Works Regulation (Reglamento de la Ley de Obras Públicas y Servicios Relacionados con las Mismas) and the Policies, Principles and Guidelines for Acquisitions and leases, and Policies, Principles and Guidelines for Public Works and related services (Políticas, Bases y Lineamientos en Materia de Adquisiciones y Arrendamientos/Obras Públicas y Servicios Relacionados).
- ⁸ Ministry of Energy (2015), “Preguntas frecuentes acerca de la Reforma Energética”, <http://reformas.gob.mx/reforma-energetica/preguntas-frecuentes>
- ⁹ Comisión Reguladora de Energía, “Preguntas Frecuentes sobre la Nueva Regulación en Temas Eléctricos”, www.cre.gob.mx/documento/faq-regulacion-electricos.pdf.
- ¹⁰ First transitory provision of CFE Law.
- ¹¹ Fourteenth transitory provision of CFE Law and Declaration of 16 February 2016, www.diputados.gob.mx/LeyesBiblio/ref/lcfe/LCFE_decla_16feb15.doc.

- 12 First transitory provision of the General Provisions. Declaratoria de entrada en vigor de las Disposiciones Generales en Materia de Adquisiciones, Arrendamientos, Contratación de Servicios y Ejecución de Obras de la Comisión Federal de Electricidad y sus Empresas Productivas Subsidiarias published in the Federation Official Journal on 27 July 2017.
- 13 Article 5 of the CFE Law.
- 14 Chapter VII of the CFE Law.
- 15 Ministry of Energy (2015), “Preguntas frecuentes acerca de la Reforma Energética”, <http://reformas.gob.mx/reforma-energetica/preguntas-frecuentes>
- 16 Article 11 of the CFE Law.
- 17 The Minister of Energy will preside and will have the casting vote, the Minister of Finance and three other directors of the Federal Government will be appointed by the Federal Executive.
- 18 They serve part-time and may not be public servants.
- 19 Article 44 of the CFE Law.
- 20 General Provision 17. The requiring unit is the unit that, based on its need, formally requests the purchase of a certain good or service by the contracting unit. The contracting unit is the unit empowered by CFE and its SPCs to conduct contracting procedures.
- 21 CFE should own directly or indirectly 50% of the subsidiary companies’ capital.
- 22 The Superior Audit Office is a technical body attached to the Legislative Branch that carries out external auditing functions for the three branches of government, the constitutionally autonomous bodies, Mexican federal states, municipalities and individuals using federal resources.
- 23 Modifications to the GPs were published on the Official Journal on 31 July 2015, 12 November 2015 and 27 April 2016.
- 24 Declaratoria de entrada en vigor de las Disposiciones Generales en Materia de Adquisiciones, Arrendamientos, Contratación de Servicios y Ejecución de Obras de la Comisión Federal de Electricidad y sus Empresas Productivas Subsidiarias published in the Federation Official Journal on 27 July 2017.
- 25 Published on 7 October 2015 in CFE’s Institutional Rules Library. Accessible at : www.normateca.cfe.gob.mx
- 26 *Id Ibid.*
- 27 *Id Ibid.*
- 28 General Provision 13.
- 29 General Provision 13.
- 30 General Provision 22.
- 31 This amount is updated every six months by the Ministry of Economy.

32 General Provision 37.

33 Section IV, Article 80 of the CFE Law (termination of a contract awarded through an open-tender procedure): in this case, the contract would normally be awarded through a direct-award procedure to the bidder that came in second. However, if the difference between the winning and the second-best bid is greater than 10% of the lowest bid price, the contract shall be awarded through a restricted-invitation procedure. Section VI, Article 80 of the CFE Law (need to procure products of a specific brand or existence of circumstances that may give rise to extra losses or costs): in this case, the procedure shall be aimed at the conclusion of a framework agreement. Section VIII, Article 80 of the CFE Law (need to procure certain professional services), with the exception of training services. Section XIV, Article 80 of the CFE Law (need to procure certain maintenance services). Section XV, Article 80 of the CFE Law (procurement of prototypes). Section XVI, Article 80 of the CFE Law (chemical and related products for experimental purposes). Section XXIV, Article 80 of the CFE Law (procurement aimed at developing innovative technologies). Specific Provision CCT 002.

34 General Provision 26.

35 This kind of auction refers to auction where bidders simply present their respective offers with the lowest price winning.

36 Article 79 of the CFE Law.

37 Article 79 of the CFE Law and General Provision 23.

38 General Provision 23.

39 Section XLII of General Provision 4.

40 Article 80 of the CFE Law.

41 Article 52 of the CFE Regulation and General Provision 4, section IX.

42 Section VI, Article 80 provides that an exemption to the open tender may be granted if there are “justified grounds for the purchase or lease of a certain brand, or [the existence of] circumstances that may cause additional and justified losses or costs”.

43 General Provision 35.

44 Section V of General Provision 30.

45 General Provision 35.

46 General Provision 37.

47 The new CFE procurement regime is regulated by one article of the Mexican Constitution, one transitory article of the Decree of 20 December 2013, 12 articles of the CFE Law, 23 articles of the CFE Regulation, 69 General Provisions (not counting transitory articles) and six Specific Provisions. The new regime does not only deal with the purchasing of goods and services, but it also includes provisions on works and related services. The Mexican procurement regime is regulated by one article of the Mexican Constitution, 96 articles of the PPL, 137 articles of the PPL Regulation, 110 articles of the Public Works Law (PWL), 295 articles of the PWL Regulation (not counting transitory articles). Moreover, the Administrative Manual of General Application on public sector purchases,

leases and services, its counterpart on public works and related services, as well as the different Policies, Bases and Guidelines on procurement also contained relevant provisions.

48 Article 50 of the CFE Law.

49 General Provision 14.

50 Reply to a questionnaire submitted to CFE on 29 July 2016.

51 *Id Ibid.*

52 Oral statement by a CFE official during a telephone conversation, 17 November 2016.

53 The corporate-procurement unit comprises the Administration Directorate that deals with the acquisition of goods and services and the Directorate of Projects of Financed Investment that deals with the contracting of works. Among other things, corporate-procurement unit consolidates the PAC based on the information provided by the requiring units, to provides a quarterly report to the Advisory Council regarding the general results of the procurement of goods, services, and works and establishes guidelines for the implementation of GPs.

54 Section V of Article 12 of the CFE Law and General Provision 5.

55 Guidelines for the approval, financing and monitoring of the investment projects and programmes of CFE and their SPCs and subsidiaries.

56 Specific Provision DA-DPIF-001.

57 Oral statement by CFE at a meeting on 12 August 2016.

58 Such as Confederation of Industry Associations (Confederación de Cámaras Industriales, CONCAMIN), Electric Manufacturing Industry Association (Cámara Nacional de Manufacturas Eléctricas, CANAME), National Association of the Transformation Industry (Cámara Nacional de la Industria de la Transformación, CANACINTRA), National Association of the Electronic Industry, Telecommunications and Information Technologies (Cámara Nacional de la Industria Electrónica, de Telecomunicaciones y Tecnologías de la Información, CANIETI), National Association of the Steel and Iron Industry (Cámara Nacional de la Industria del Hierro y del Acero, CANACERO), Mexican Association of Valves and Related Goods Producers (Asociación Mexicana de Fabricantes de Válvulas y Conexos, AMEXVAL), Mexican Association of Electroplaters (Asociación Mexicana de Galvanizadores, AMEGAC).

59 Specific Provision DA-002, numeral 6.1.

60 General Provision 37.

61 General Provision 30.

62 Section XXXV of General Provision 4 and Specific Provision DA-002, numeral 6.2.

63 *OECD (forthcoming) Working Party No. 2 on Competition and Regulation, Guidance on Protecting Competition in Public Procurement, DAF/COMP/WP2/WD(2017)20/REV1.*

64 *Id Ibid.*

65 *Id Ibid.*

- 66 *Working Party No. 2 on Competition and Regulation – Hearing on actions and tenders: Further issues, Note by the Secretariat*, [https://one.oecd.org/document/DAF/COMP/WP2\(2015\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2015)1/en/pdf)
- 67 General Provisions 53 and 54.
- 68 Section XVIII of General Provision 23.
- 69 See <https://www.unspsc.org/>
- 70 Article 28 of the PPL.
- 71 Article 79 of the CFE Law.
- 72 Article 79 of the CFE Law states that, “When, as an exception, the open tender procedure is not suitable to ensure the best conditions, *other procurement procedures* as established by the Board of Directors could be used” (emphasis added). Article 80 of the CFE Law states that, “the firm may use *other procedures which may consist of, among others*, restrictive invitation and direct award procedures, when some of the circumstances provided for below are met” (emphasis added). Section XIII of General Provision 18 provides that the Advisory Council has the following function: “to determine, at the request and with the justification of the requiring and contracting units, the suitability of using procurement procedures which are different from those provided for in the present provisions, when these procedures present an advantage to obtain the best conditions available in the market.”
- 73 General Provision 47.
- 74 Section V of General Provision 26 and General Provision 29.
- 75 *Albano, Gian Luigi (2017), Competition in Public Procurement Markets*, [https://one.oecd.org/document/DAF/COMP/WP2\(2017\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2017)1/en/pdf).
- 76 General Provision 53. The tender terms may request the following guarantees: bid-upholding guarantee, payment guarantee, compliance guarantee and quality and hidden-defects guarantee.
- 77 Section XI of General Provision 39.
- 78 General Provision 25.
- 79 Section XII of General Provision 5.
- 80 Section V of General Provision 30.
- 81 General Provision 34.
- 82 See COFECE (2016), “Recomendaciones para Promover la Competencia y Libre Concurrencia en la Contratación Pública”, www.cofece.mx/cofece/attachments/article/38/RecomendacionesContratacionPublica-v2.pdf.

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