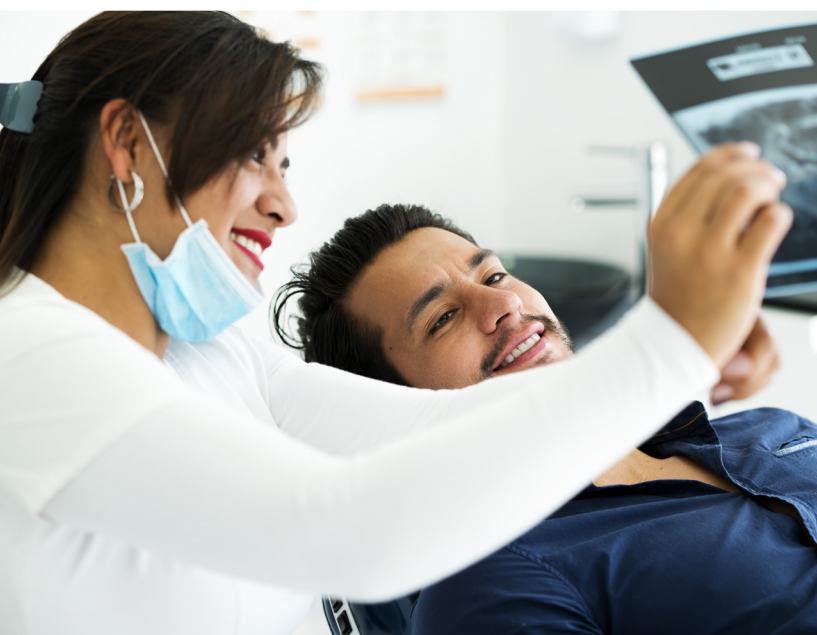




FIGHTING BID RIGGING IN THE HEALTH SECTOR IN PERU
A review of public procurement at EsSalud
2021



Fighting Bid Rigging in the Health Sector in Peru

A Review of Public Procurement at EsSalud



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Foreword

Public procurement plays a strategic role in the quality and effectiveness of services that governments provide to citizens, and represents a significant part of public spending. In 2017, the share of procurement spending out of general government expenditure in Peru was 46.4%, the highest in Latin America and the Caribbean, according to the OECD's *Government at a Glance: Latin America and the Caribbean 2020*. Robust public procurement that is free of bid rigging can generate important savings and help the public sector to offer fit-for-purpose public services.

Governments across the OECD have shown themselves willing to promote competition in public procurement and reduce the risk of rigging bids. The Recommendation of the Council on Fighting Bid Rigging in Public Procurement and the Guidelines it includes are the reference public-policy instruments guiding countries towards achieving those goals.

The OECD has been working closely with governments and public bodies to facilitate the implementation of both the Recommendation and Guidelines. If public procurement has a strong impact in all public services, this is even more so in the health sector. It is against this background that Peru sought the OECD's support to improve the public procurement framework used by Peru's Social Security body (Seguro Social de Salud del Peru, EsSalud) and to help its fight against bid rigging.

This report contains recommendations on measures to both prevent and detect bid rigging. The first set of recommendations aims to set up more competitive and effective tender design. The second set aims to identify possible manipulations of the procurement process. In addition, the OECD prepared an action plan to implement these recommendations.

The OECD prepared a draft inter-institutional co-operation agreement between EsSalud and Peru's Institute for the Defence of Competition and Intellectual Property (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual, Indecopi) on the promotion of competition and the fight against bid rigging in accordance with OECD best practices.

The implementation of the recommendations and EsSalud's increased awareness of the negative impact of bid rigging, together with Indecopi's effective enforcement of competition law, will help Peru combat bid rigging in public procurement and achieve better procurement outcomes, for the benefit of its citizens.

Acknowledgments

This report was prepared by Despina Pachnou, Competition Expert, and Jordi Calvet Bademunt, Competition Analyst, with the assistance of Marina Fraile and Julieth Sanclemente at the Competition Division of the OECD Directorate for Financial and Enterprise Affairs. Ronald Fernández Dávila, Carlos González Prada and Angelita Ruíz, from Philippi Prietocarrizosa Ferrero DU & Uría, provided law research and input. The following persons and institutions provided comments to the draft report: Antonio Capobianco, Acting Head of the Competition Division (OECD); Iratxe Gurpegui (OECD); Sabine Zigelski (OECD); Frédéric Boehm (OECD); Matthieu Cahen (OECD); Jacobo García Villarreal (OECD); Frederico Guanais (OECD); Ruth Lopert (OECD); Peru's Social Security body (Seguro Social de Salud del Peru, EsSalud); Peru's Institute for the Defence of Competition and Intellectual Property (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual, Indecopi); Peru's central procurement agency, Perú Compras; the Spanish National Commission of Markets and Competition (Comisión Nacional de los Mercados y la Competencia, CNMC); and the Mexican Federal Economic Competition Commission (Comisión Federal de Competencia Económica, COFECE).

The OECD expresses its gratitude to EsSalud and Indecopi for their co-operation, commitment and support during this project. We are particularly thankful to: Mario Carhuapoma Yance, Executive President of EsSalud; Fiorella Molinelli, former Executive President of EsSalud; Julián Palacín Gutiérrez, Chairman of Indecopi; Hania Pérez de Cuéllar, former Chairwoman of Indecopi; Ivo Gagliuffi Piercechi, former Chairman of Indecopi; Javier Coronado Saleh, former general manager of Indecopi; María del Carmen Portillo Brousset, Elena Portilla Odlianitskaya, William Cuba Arana, Carolina Cabanillas Horna and Daniel Casella D'Alascio, all from EsSalud; and Jesús Espinoza, Arturo Chumbe, Rosa Cabello, Zenia Panduro and Shantal Pérez, all from Indecopi.

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This report also benefited from inputs and exchanges during two OECD-organised workshops on fighting bid rigging for procurement officials, held online on April 13-16 and 26-29 2021. The OECD is grateful to all participants, with special thanks to the expert speakers: Kirschen Mirella Antonio Sánchez from Indecopi; Felipe Leitão Valadares Roquete from the Brazilian Administrative Council for Economic Defense (Conselho Administrativo de Defesa Econômica, CADE); Julia García-Royo Díaz and Pilar Vega from the CNMC; María José Contreras de Velasco and Rodrigo Ríos Dordelly from COFECE; and Juan Pablo Herrera Saavedra, Ismael Beltrán, and María Manuela Palacio from the Colombian Superintendence of Industry and Commerce (Superintendencia de Industria y Comercio, SIC).

In the context of the project *Fighting Bid Rigging in the Health Sector in Peru: A Review of Public Procurement at EsSalud*, the OECD delivered an action plan to implement the recommendations included in the report, in co-operation with Bonnie Epema, consultant. In addition, the OECD prepared a draft inter-institutional co-operation agreement between EsSalud and Indecopi on the promotion of competition and the fight against bid rigging in accordance with OECD good practices. The draft agreement was developed jointly by EsSalud and Indecopi and was peer reviewed by CADE, CNMC, COFECE, and SIC. The OECD thanks in particular Carolina Araújo de Andrade (former CADE), Susana Campuzano Fernández (CNMC), Heidi Sada Correa and Paulina Valladares Huidobro (both COFECE), and Mateo Varela Martínez and Cristina Rodríguez Corzo (both SIC).

The opinions expressed in the report do not necessarily reflect the views of the above-mentioned organisations or individuals.

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Acronyms and abbreviations

ACFFAA	Central Purchasing Body of the Armed Forces, Peru (Agencia de Compras de las Fuerzas Armadas)
AGCM	Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato)
CADE	Administrative Council for Economic Defence, Brazil (Conselho Administrativo de Defesa Econômica)
CEABE	Strategic Goods Supply Office, Peru (Central de Abastecimiento de Bienes Estratégicos)
CENARES	National Centre for the Supply of Strategic Resources in Health, Peru (Centro Nacional de Abastecimiento de Recursos Estratégicos en Salud)
CGR	General Comptroller of the Republic, Peru (Contraloría General de la República)
CIBD	Certificate of independent bid determination
CNMC	National Commission of Markets and Competition, Spain (Comisión Nacional de los Mercados y la Competencia)
COFECE	Federal Economic Competition Commission, Mexico (Comisión Federal de Competencia Económica)
CONOSCE	OSCE business intelligence system, Peru
DGA	General Supply Directorate, Peru (Dirección General de Abastecimiento)
DIGEMID	General Directorate of Medicines, Supplies and Drugs, Peru (Dirección General de Medicamentos, Insumos y Drogas)
FONAFE	National Fund for Financing the Corporate Activity of the Government, Peru (Fondo Nacional de Financiamiento de la Actividad Empresarial del Estado)
GDP	Gross domestic product
IETSI	Institute for Health Technology Assessment and Research, Peru (Instituto de Evaluación de Tecnologías en Salud e Investigación)

IMSS	Mexican Social Security Institute (Instituto Mexicano del Seguro Social)
MINSA	Ministry of Health, Peru (Ministerio de Salud)
MoU	Memorandum of understanding
NAO	National Audit Office, UK
OCI	Institutional Control Body, Peru (Órgano de Control Institucional)
OFIN	Integrity Office, Peru (Oficina de Integridad)
OII	Office of Institutional Integrity, Peru (Oficina de Integridad Institucional)
OSCE	Government Procurement Supervisory Agency, Peru (Organismo Supervisor de las Contrataciones del Estado)
PAC	Annual Procurement Plan (Plan Annual de Contrataciones)
PEN	Peruvian sol
PPL	Public Procurement Law (Ley de Contrataciones del Estado y Reglamento)
QR code	Quick-response code
RNP	National Supplier Registry, Peru (Registro Nacional de Proveedores)
ROF	OSCE Regulation of Organisation and Functions, Peru
RPPL	Regulations on the Public Procurement Law, Peru (Reglamento de la Ley de Contrataciones del Estado)
SEACE	Electronic System for Government Procurement and Contracting, Peru (Sistema Electrónico de Contrataciones del Estado)
SIP	Secretariat of Public Sector Integrity, Peru (Secretaría de Integridad Pública)
SMEs	Small- and medium-sized enterprises
UNOPS	United Nations Office for Project Services

Summary of recommendations

This report, part of a co-operation agreement between Peru's Social Security body (Seguro Social de Salud del Peru, EsSalud) and the OECD, assesses the public-procurement framework applicable to EsSalud and the body's procurement practices against the OECD Recommendation and Guidelines on Fighting Bid Rigging in Public Procurement. The scope of the report extends to provisions and practices that apply and affect all public procurement in Peru. Certain of the report's recommendations are addressed not only to EsSalud, but also to other public-sector bodies in Peru.

Public procurement plays a strategic role in the economy, as well as the quality and efficiency of services that governments provide to their citizens. According to the OECD's *Government at a Glance: Latin America and the Caribbean 2020*, in 2017, public procurement represented 46.6% of Peru's government expenditures and 9.9% of Peru's gross domestic product. Due to the size of the financial flows involved in public procurement, it is the government activity that attracts the most supplier collusion or bid rigging, as well as fraud and corruption.

This report recommends actions that help prevent and detect bid rigging in public procurement in line with the OECD Recommendation and Guidelines on Fighting Bid Rigging in Public Procurement.

Key recommendations include:

Design procurement procedures based upon appropriate information

- Publish EsSalud's annual procurement plan as early as possible and modify it as few times as possible.
- Centralise market research in a central EsSalud department, such as the Strategic Goods Supply Office (CEABE), ensuring that it has sufficient resources and updated guidelines on minimum market-research content, including factors beyond price.
- Engage with potential suppliers early in the procurement process to be informed of market trends and conditions, while ensuring that tender terms are not tailored exclusively according to information provided by potential suppliers.
- Establish a comprehensive EsSalud database with information from past and ongoing procurement processes.

Maximise participation of genuine competing bidders

- Assess the level of bidder participation in EsSalud's tenders and remove barriers to bidding.
- Monitor reasons for direct awards, including those made during the COVID-19 pandemic.

- Ensure that the Government Procurement Supervisory Agency (OSCE) consults with Peru's competition authority, Indecopi, in preparing standard tender documents to ensure that they include competition-related aspects.
- Clarify in calls for tenders that joint bids and subcontracting are allowed only when justified and pro-competitive, and request information from bidders justifying their choices, such as why they are not bidding separately.
- Simplify Peru's system of consolidation and centralisation for healthcare procurement.
- Consider increasing co-operation between EsSalud, the National Centre for the Supply of Strategic Resources in Health (CENARES) and Peru's central purchasing body, Perú Compras.

Improve tender terms and contract-award criteria

- Use quality award criteria, in addition to price, when quality and innovation are relevant dimensions of the procured goods, services and works.
- Consider how award criteria could also reward savings in contract delivery.
- Avoid modifying contracts post-award and remain attentive to renegotiation.

Pay attention to transparency, disclosure and sharing of information

- Refrain from publishing the complete version of the annual procurement plan and publish only the simplified version.
- Limit transparency when it might increase a procurement procedure's vulnerability to collusion, for example, avoid any public release of information about bids and bidders until a set time after the tender conclusion.

Raise awareness of the forms and risks of bid rigging

- Increase co-operation between EsSalud and Indecopi, based upon the draft memorandum of understanding that the OECD has prepared, and develop a joint long-term action plan for its implementation.
- Ensure that EsSalud, Indecopi, OSCE and Perú Compras design a joint strategy for public procurement and competition training for public procurement officials and the private sector, and have resources to implement this strategy.
- Realise an ex post evaluation to assess the implementation of this report's recommendations and evaluate their impact.

Part I – Background: the public procurement framework and its application to EsSalud

1 Introduction and project scope

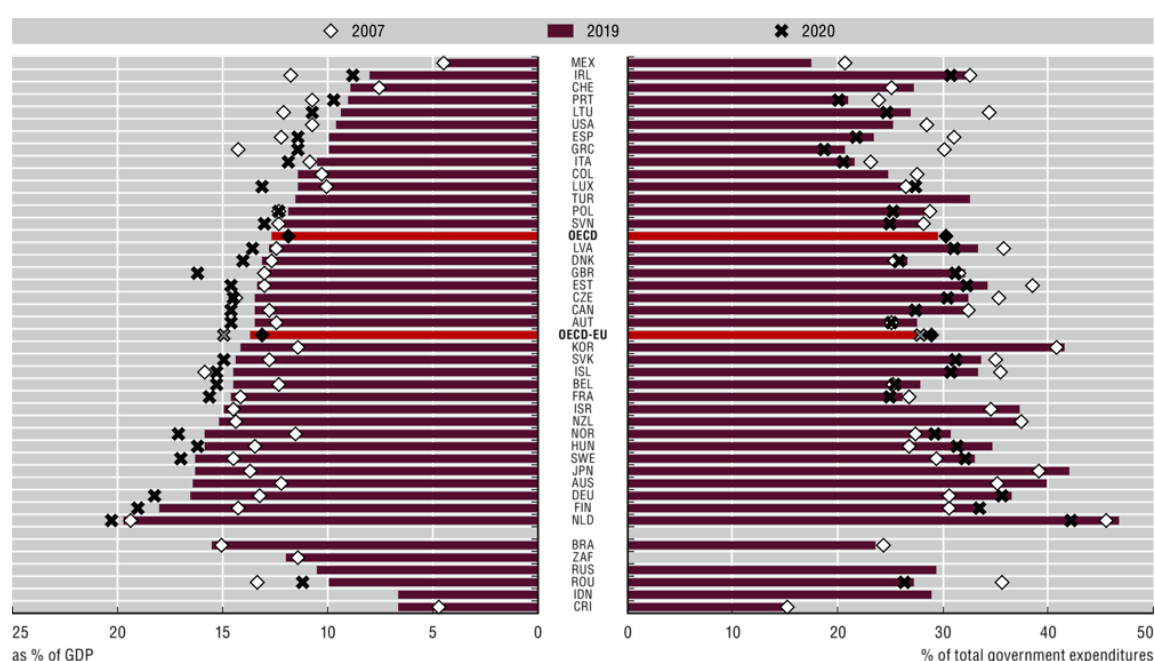
1.1. OECD work on fighting bid rigging in public procurement

Bid rigging is an illegal agreement through which companies that should be genuinely competing in a tender process conspire to raise prices or lower the quality of the goods or services that they offer. Bid rigging is a form of collusion, a “hard-core” cartel conduct prohibited under competition laws. In this report, the terms “collusion”, “cartel” and “bid rigging” are used interchangeably; all refer to rigging – the fixing and co-ordinating – of offers among competitors in a public procurement process.

Bid rigging occurs between bidders participating in public procurement; it does not require the involvement of a procurement official. If a public procurement official is involved, bid rigging may be accompanied by other illegal and punishable conduct, such as corruption, fraud, misrepresentation, or misappropriation of public funds.

Public procurement is the process used by the public sector to buy goods and services and to contract public works from the private sector so it can deliver public services to citizens. In 2019, public procurement represented 12.6% of gross domestic product (GDP) in OECD countries and almost 30% of total government expenditures, making it a core economic activity.

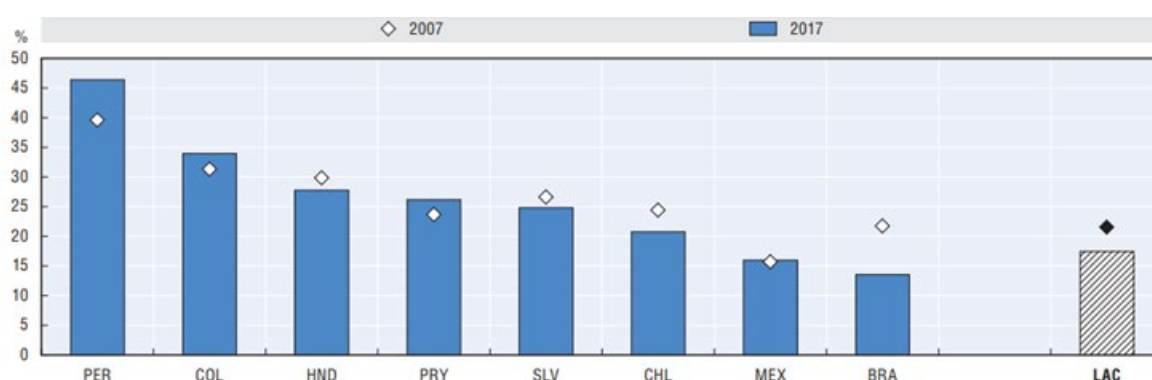
Figure 1.1. General government procurement spending as a percentage of GDP and total government expenditures, 2007, 2019 and 2020



Source: (OECD, 2021^[1]).

In Latin America and the Caribbean, in 2017, spending on public procurement averaged 17.4% of total government expenditures, lower than the OECD country average of 29.1%. This share varied widely across countries: Peru has the highest share of procurement spending as part of general government expenditures (46.4%) and Brazil the lowest (13.5%). The difference might be explained by certain countries' efforts to promote economic growth through public procurement, with Peru devoting a large share of government expenditures to public-sector investment.

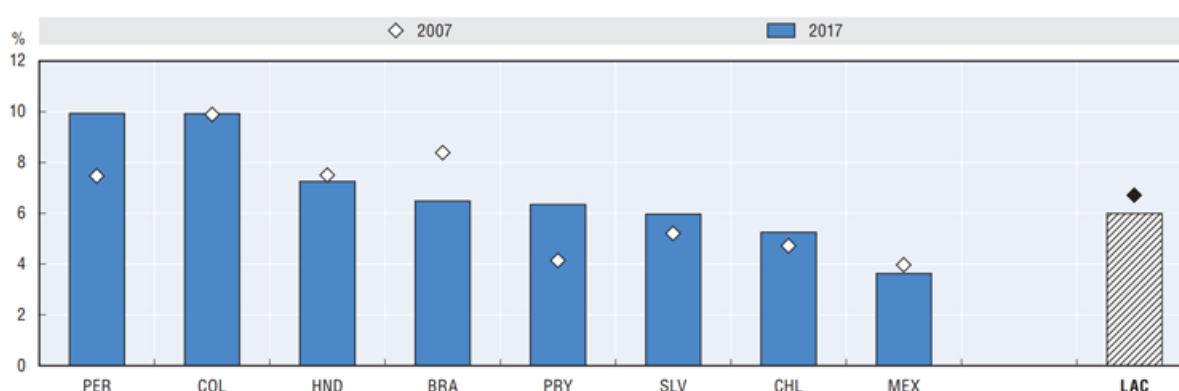
Figure 1.2. Government procurement spending as a share of total government expenditures, Latin America and the Caribbean, 2007 and 2017



Source: (OECD, 2020^[2])

Procurement's economic significance in Latin America and the Caribbean is evident when its size is seen in terms of GDP. In 2017, public procurement represented 6% of GDP in the region (lower than the OECD countries' average of 11.8%), ranging from 3.6% in Mexico to 9.9% in Peru, which again had the highest share in the region.

Figure 1.3. Government procurement spending as percentage of GDP, Latin America and the Caribbean, 2007 and 2017



Source: (OECD, 2020^[2])

Public procurement has a strong impact upon all public services, particularly in the health sector. Health expenditures represent the largest share of public procurement across OECD countries, accounting for 29.3% of total procurement spending in 2019.

Table 1.1. Government procurement spending by function as a percentage of total procurement spending, 2019

Country	General public services	Defence	Public order and safety	Economic affairs	Environmental protection	Housing and community amenities	Health	Recreation, culture and religion	Education	Social protection
Austria	11.8	1.6	3.0	21.4	1.3	0.7	36.3	3.9	9.1	10.9
Belgium	12.7	1.5	2.0	13.1	2.8	1.1	46.7	3.1	6.7	10.3
Chile	4.8	7.9	8.0	13.5	1.3	6.3	25.3	2.1	20.5	10.3
Czech Republic	8.6	2.5	4.1	22.3	5.0	3.4	32.5	5.4	11.5	4.7
Denmark	15.0	5.0	2.8	10.4	1.3	0.7	32.0	5.2	12.0	15.8
Estonia	9.5	10.7	3.9	18.1	3.7	2.4	24.8	6.8	15.7	4.4
Finland	22.6	3.8	2.3	12.8	0.5	1.1	23.0	4.1	11.8	18.0
France	7.3	6.2	2.5	13.0	4.2	3.5	38.1	4.8	6.5	13.8
Germany	11.2	4.0	3.2	9.2	2.1	1.1	39.6	3.4	6.7	19.4
Greece	18.0	4.4	1.6	15.3	5.1	1.7	38.6	3.3	7.7	4.1
Hungary	18.2	3.9	3.9	29.5	2.4	2.2	18.3	8.7	8.7	4.1
Iceland	7.5	0.4	3.8	20.3	2.4	2.4	25.7	8.7	19.0	9.8
Ireland	5.5	0.9	4.6	15.3	2.7	5.6	31.1	3.9	9.2	21.2
Israel	6.6	21.0	3.4	5.9	2.5	2.4	27.5	5.2	15.1	10.3
Italy	13.4	3.6	3.5	12.3	6.9	3.3	42.3	4.1	5.1	5.6
Japan	6.5	3.3	1.9	14.4	5.7	2.1	44.4	1.6	6.3	13.9
Korea	5.7	11.6	2.8	15.6	3.9	6.1	32.2	2.8	12.5	6.8
Latvia	7.9	7.1	4.4	19.9	3.6	4.0	28.4	5.5	12.3	6.7
Lithuania	7.6	11.1	5.4	23.2	2.8	6.0	14.7	6.0	17.1	6.2
Luxembourg	15.1	1.3	3.1	21.4	4.4	2.2	21.6	5.9	7.9	17.1
Netherlands	6.2	3.2	3.5	11.4	4.8	1.5	35.9	3.2	8.4	21.8
Norway	10.0	7.9	3.0	22.9	4.0	3.9	24.4	4.9	9.9	9.2
Poland	6.2	6.0	4.3	27.0	3.0	4.0	28.8	5.9	11.3	3.6
Portugal	12.8	2.7	3.3	21.1	3.9	3.3	35.3	4.7	9.3	3.6
Slovak Republic	8.8	3.6	4.3	21.1	3.7	2.5	43.6	3.4	6.8	2.1
Slovenia	10.2	2.7	3.4	22.7	2.9	2.9	31.5	5.1	13.3	5.4
Spain	10.8	3.2	2.8	14.8	6.8	3.0	32.4	6.1	10.9	9.3
Sweden	18.7	4.5	2.9	13.6	2.1	2.9	21.7	3.7	16.1	13.7
Switzerland	21.8	6.0	5.7	15.6	4.0	1.4	1.9	3.1	18.8	21.6
United Kingdom	3.7	10.3	6.0	14.3	3.8	3.4	32.1	2.8	10.0	13.6
United States	10.4	21.7	6.1	22.3	0.0	2.4	13.6	1.7	18.5	3.2
OECD	9.4	10.5	4.1	16.7	2.8	2.6	29.3	3.0	11.6	10.0
OECD-EU	10.7	4.2	3.2	13.8	3.7	2.4	36.4	4.3	8.1	13.4
Costa Rica	4.7	0.0	7.7	13.5	3.7	4.5	35.4	1.8	21.2	7.6
Romania	8.7	3.6	2.8	29.7	4.5	8.6	26.9	5.2	6.6	3.6

Source: (OECD, 2021^[1]).

Given the significant amount of public resources spent on public procurement, governments and public-sector entities are expected to procure following general principles of integrity, transparency, accountability, efficiency, effectiveness, and competition (OECD, 2015^[3]).

When bid rigging affects a public-procurement process – such as when suppliers rig their bids to determine in advance who will win in a public-sector tender and how – public procurement principles are breached, and both the public budget and public-service quality are harmed. Studies show that bid rigging in public procurement can increase prices by 20%, and this percentage can be even higher in certain cases (see, Section 4.1). Bid rigging is illegal in all OECD jurisdictions, and a criminal offence in 29 out of 38 member states.¹

The prevention and detection of bid rigging in public procurement are crucial to ensuring that procedures are genuinely competitive. Competition among potential suppliers increases the likelihood that the public sector achieves value for money, understood as better products at cheaper prices. The importance of fighting bid rigging is such that, in 2009, the OECD developed Guidelines for Fighting Bid Rigging in Public Procurement (OECD Guidelines) (OECD, 2009^[4]) and then, in 2012, included and expanded them in a Recommendation (OECD Recommendation) (OECD, 2012^[5]). Recommendations are OECD legal instruments that, while not legally binding, have moral and political force as they reflect the political will of OECD member states and non-member jurisdictions that adhere to them. There is an expectation that member states and adherents will do their utmost to implement them fully. Recommendations are relatively rare. At the time of drafting in May 2021, only 170 OECD Recommendations were in force, including 10 in competition law and policy.²

The OECD Guidelines and Recommendation call on governments to assess their public procurement laws and practices – at all levels of government – to promote competitive procurement and reduce the risk of bid rigging in public tenders. Based on international good practices, they offer advice to public institutions on how to reduce the risk of bid rigging through effective tender design and how to detect collusive practices during the tender process, while identifying those market characteristics that can facilitate bid-rigging schemes. They also include two checklists: the first, whose main objective is prevention, deals with the optimal design of tender processes to reduce the risk of bid rigging; the second includes advice on how to detect bid rigging during and after the tender process by identifying suspicious pricing patterns and bidder behaviour, as well as statements that should alert procurement officials to possible manipulation of the procurement process.

The OECD Guidelines and Recommendation have become global references, and have helped a number of countries assess the pro-competitiveness of their procurement laws and implement improvements and reforms. They have served as the basis of many national strategies to fight bid rigging, and guided pro-competitive tender design, as well as structured advocacy and training programmes for public procurers on bid-rigging risks. They have also been used to develop bid-rigging detection tools (OECD, 2016^[6]).

Over the past 10 years, the OECD Competition Division's Secretariat has conducted numerous projects on fighting bid rigging in public procurement, reviewing the quality of procurement law and soundness of procurement practices of public entities in Mexico, Colombia and Argentina.³ In addition to Peru, the OECD has recently reviewed public-procurement regimes and practices in Brazil and Ukraine using the Guidelines and Recommendation.⁴

1.2. Scope of the EsSalud-OECD project

In November 2019, Peru's Social Security body (Seguro Social de Salud del Peru, EsSalud) requested the OECD's support in evaluating its public procurement rules and practices in light of the Recommendation and Guidelines.

This report is a response to that request and analyses EsSalud's public-procurement regulatory framework and practices. It makes recommendations on preventing bid rigging through the design of competitive and effective procurement processes, and how to improve detection of collusive schemes when they occur. The recommendations relate to EsSalud-specific rules and practices, but also to general rules and practices where relevant to EsSalud. Some recommendations are therefore addressed not only to EsSalud, but also to other public-sector entities. Where necessary, the report clarifies in the endnotes which entity or body should implement certain recommendations. All recommendations are based on the OECD Recommendation and Guidelines and reflect international good practice established by the Secretariat in projects and discussions during meetings of the OECD Competition Committee, in which Peru participates.

As the report focuses on procurement under Peru's public-procurement law, it does not analyse concessions and public-private partnerships.⁵

As part of the project, the OECD also prepared an agreement for EsSalud's co-operation with Peru's competition authority, the Institute for the Defence of Competition and Intellectual Property (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual, Indecopi). The goal of this agreement is to foster co-operation between EsSalud and Indecopi to promote competition and prevent bid rigging in EsSalud's procurements, and improve detection and investigation of bid rigging by Indecopi.

In April 2021, the OECD, together with Indecopi, trained approximately 80 senior public procurement officials on the risks of bid rigging, the forms it can take, and OECD good practices for the design of competitive tenders. The capacity building was based on the OECD's research and project experience that show that effective prevention and enforcement against bid rigging require providing public procurement officials with an understanding of the risks of bid rigging and the requirements of competition law. In these training sessions, competition authorities from OECD members (Colombia, Mexico and Spain) and an OECD key partner (Brazil) shared their experience in cartel detection and punishment, as well as in anti-cartel advocacy and training for public procurement officials in their jurisdictions.

Finally, the OECD prepared an action plan for EsSalud's implementation of the recommendations provided in this report. The recommendations and the action plan need to be adopted flexibly and dynamically to be effective. No single recommendation or action-plan step can be applicable to all tenders in all cases. Bidders that have colluded or will collude may be expected to react to policy changes and explore new, more inventive and secretive ways to collude. Implementation needs to be dynamic and take into account the changing reality of public-sector capacities and the conditions of the private supply market.

Notes

¹ Eighteen OECD members (Australia, Canada, Chile, Denmark, Estonia, France, Greece, Iceland, Ireland, Israel, Japan, Korea, Mexico, Norway, Slovak Republic, Slovenia, United Kingdom and the United States) provide for criminal sanctions for all hardcore cartels (including bid rigging). An additional 11 members (Austria, Belgium, Colombia, Czech Republic, Finland, Germany, Hungary, Italy, Poland, Portugal and Turkey) provide for criminal sanctions for bid-rigging cases only. See, www.oecd.org/daf/competition/review-of-the-1998-oecd-recommendation-concerning-effective-action-against-hard-core-cartels.htm.

² In reverse chronological order, these are: Recommendation on Competitive Neutrality (2021); Recommendation concerning Effective Action against Hard Core Cartels (2019); Recommendation on Competition Assessment (2019); Recommendation concerning International Co-operation on Competition Investigations and Proceedings (2014); Recommendation on Fighting Bid Rigging in Public Procurement (2012); Recommendation on Merger Review (2005); Recommendation concerning Structural Separation in Regulated Industries (2001); Recommendation concerning the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements (1989); Recommendation for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies (1986); and Recommendation concerning Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licences (1978). See, <https://legalinstruments.oecd.org/en/instruments?mode=normal&committeelds=1673&statuslds=1&dateType=adoption> and www.oecd.org/competition/recommendations.htm.

³ Mexico was the first country to seek the OECD's support in evaluating the public procurement rules and practices of a number of Mexican public-sector authorities and local governments. Between 2011 and 2018, the OECD conducted seven projects with Mexico, and issued reports with tailored recommendations on ways to fight procurement collusion (www.oecd.org/daf/competition/fightingbidriggingingovernmentcontractsmexico-oecdpartnership.htm). In 2014, the OECD reviewed Colombia's public procurement rules and practices, and analysed the initiatives taken by the Colombian competition authority (Superintendencia de Industria y Comercio) to combat bid rigging (www.oecd.org/daf/competition/fighting-bid-rigging-in-public-procurement-in-colombia.htm). In 2019, in partnership with Argentina's competition authority (Comisión Nacional de Defensa de la Competencia), the OECD assessed the rules governing procurement of public works in Argentina at the federal level, as well as the procurement practices of major federal buyers of public works, such as the Ministry of the Interior, Public Works and Housing, the Ministry of Transport, and the National Directorate for Roads (www.oecd.org/competition/fighting-bid-rigging-in-public-procurement-in-argentina.htm). All projects included extensive capacity-building for senior public procurement officials on the risks and costs of bid rigging, its various forms, and good practices to design competitive tenders and detect collusion by bidders.

⁴ In 2019-2021, the OECD assessed the rules governing public procurement in Brazil at the federal level, including a 2021 new public-procurement law, and the procurement practices of major federal Brazilian procurers (www.oecd.org/daf/competition/fighting-bid-rigging-in-brazil-a-review-of-federal-public-procurement.htm). In 2020-2021, the OECD assessed the procurement practices of the Ukrainian state-owned electricity-transmission system operator Ukrenergo against the Recommendation on Fighting Bid Rigging in Public Procurement (www.oecd.org/daf/competition/fighting-bid-rigging-in-public-procurement-in-the-energy-sector-in-ukraine.htm). In all projects, the OECD also delivered capacity-building workshops on fighting bid rigging for public procurement officials.

⁵ EsSalud has several public-private partnerships, including partnerships concerning the operation of two hospitals.

2 Health-sector public procurement rules and bodies

Section 2.1 of this chapter provides an overview of the legal framework for the public procurement of goods, services and works, and its application to EsSalud. Section 2.2 identifies the main bodies involved in public procurement in the health sector. Section 2.3 deals with the internal structure and teams involved in procurement at EsSalud. All laws and regulations that are relevant to EsSalud are detailed in Annex A. to this report.

2.1. Public-procurement framework and its application to EsSalud

Article 76 of Peru's Constitution (Constitución Política del Perú) stipulates that the purchase of works, supplies and services using public funds should be the result of a public tender.¹ According to Peru's Constitutional Court (Tribunal Constitucional), the purpose of Article 76 is to ensure that all public procurement is carried out in a regulated manner that guarantees goods, services and works are purchased or leased in an efficient and timely manner, from bidders offering the most competitive technical and financial terms, following principles of transparency, equal treatment, free participation of suppliers and fairness.²

Based on Article 76, Peru adopted Public Procurement Law No. 30225 (Ley de Contrataciones del Estado, PPL) in 2014. The law's implementing regulation (Reglamento de la Ley de Contrataciones del Estado, RPPL) was approved in 2018 by Decree No. 344-2018-EF. The law was last amended in 2019 by Decree No. 082-2019-EF, while the regulation was last amended in 2021. Peru's Government Procurement Supervisory Agency (Organismo Supervisor de las Contrataciones del Estado, OSCE) also issues regulations and guidelines on public procurement; its mandate and work are detailed in Section 2.2.

The scope of the PPL is defined in Article 3, which stipulates its applicability to the procurement of goods, services or works using public funds by entities of the public administration named in the article, including "the ministries and their attached public organisations, programmes and projects". EsSalud, as a decentralised body under the Ministry of Labour and Promotion of Employment (Ministerio de Trabajo y Promoción del Empleo), meets this definition of "entity" and is covered by the PPL, the RPPL, and any additional applicable rules and regulations.

Box 2.1. Principles of public procurement in Article 2, Public Procurement Law No. 30225

While other general principles of public law may also apply, government procurement is carried out based on the following principles. These serve as the interpretative criteria for the application of the PPL and its regulations, and condition the actions of public bodies and private-sector actors involved in the process.

Free participation. Public entities promote free access and participation of suppliers in their selection processes, avoiding expensive and unnecessary demands and formalities. The adoption of practices that limit or affect free competition among suppliers is prohibited.

Equal treatment. All suppliers must have the same opportunities to formulate their offers, and the existence of privileges or benefits and, consequently, discrimination – either apparent or not – is prohibited. Similar situations must be treated using similar methods; different situations must not be treated identically provided that different methods have objective and reasonable justifications, which favour effective competition.

Transparency. Public entities should provide clear and coherent information so that all stages of the public procurement process are understood by suppliers, guaranteeing freedom of competition, equal treatment, objectivity and impartiality. This principle allows for exceptions established in law.

Publicity. The procurement process must be publicised and circulated widely to promote free and effective competition, and facilitate supervision and control of the process.

Competition. The selection processes should allow the establishment of effective competitive conditions and should obtain the most advantageous proposal for the public interest addressed in the procedure. The adoption of practices that restrict or affect competition is prohibited.

Effectiveness and efficiency. The selection process and the decisions adopted in it must serve the fulfilment of the public entity's aims, goals and purposes, prioritise these over non-essential formalities, guarantee the effective and timely satisfaction of public objectives, and have a positive impact on people's living conditions and the public interest, while guaranteeing quality conditions and the best use of public resources.

Technological validity. The goods, services and works must meet the conditions of quality and technological development necessary to fulfil effectively their required public purpose for a set and foreseeable duration, with the possibility of their being adapted, integrated and repurposed if necessary to adapt to scientific and technological advances.

Environmental and social sustainability. In the design and execution of public procurement procedures, criteria and practices that contribute to both environmental and social protection, as well as human development, should be taken into account.

Equity. The benefits and rights of concerned parties must be equivalent and proportionate.

Integrity. The conduct of participants at any stage of the contracting procedure should be guided by honesty and truthfulness, avoiding any improper practice. If this occurs, it must be reported to the competent authorities in a direct and timely manner.

Source: Public Procurement Law No. 30225; <https://portal.osce.gob.pe/osce/sites/default/files/Documentos/legislacion/ley/Ley%2030225%20Ley%20de%20contrataciones-julio2014.pdf>.

Procurement processes must also comply with the Transparency and Access to Public Information Law No. 27806, its implementing Decree No. 043-2003-PCM, and its regulation approved by Decree No. 072-2003-PCM. This law allows all citizens to request information from public entities, such as EsSalud, and requires that all information regarding public procurement processes be published on web portals.

2.2. Main bodies involved in health-sector public procurement

2.2.1. EsSalud

EsSalud is Peru's health insurer and health-provider body for salaried formal-sector employees, independent professionals, and domestic workers and their families. It offers medical care in its 415 health facilities nationwide and in 2015, covered 25% of Peru's population or nearly 12 million persons. In 2020, EsSalud's total expenses amounted to PEN 12.6 billion.³

Created in 1998 by Law No. 27056, Ley de Creación del Seguro Social de Salud, EsSalud is a public decentralised body under the Ministry of Labour and Promotion of Employment. It has technical, administrative and accounting independence, and is financed mainly by a 9% payroll-tax contribution made by employers and a 4% contribution from revenues of the retired population (OECD, 2017^[7]).

As mentioned in Section 2.1, EsSalud qualifies as a contracting entity under the PPL and procures goods, services or works that allow it to operate and provide health care to its affiliated population.

Section 2.3 provides a detailed overview of EsSalud's procurement-related units and structure.

2.2.2. National Centre for the Supply of Strategic Resources in Health (CENARES)

The National Centre for the Supply of Strategic Resources in Health (Centro Nacional de Abastecimiento de Recursos Estratégicos en Salud, CENARES) is a body of the Ministry of Health (Ministerio de Salud, MINSA) responsible for the planning, acquisition, storage and distribution of strategic goods in the health sector.⁴ These include pharmaceutical products, medical and dental supplies, laboratory equipment, materials for diagnosis, medical instruments, medical and dental equipment, as well as pesticides and veterinary health products (OECD, 2017^[8]).

CENARES buys health-related goods through two mechanisms. With the first, it undertakes centralised purchasing for medicines required by the national health strategies for specific illnesses and patient groups (HIV/AIDS, tuberculosis, and others).⁵ These purchases are financed by MINSA, with CENARES organising tenders using PPL tender methods, signing contracts, and purchasing and distributing goods.

The second mechanism is what CENARES calls corporate purchasing (*compra corporativa*). This is an optional process in which public institutions (including EsSalud) and regional governments choose to send their annual needs to the General Directorate of Medicines, Supplies and Drugs (Dirección General de Medicamentos, Insumos y Drogas, DIGEMID), which is part of MINSA. DIGEMID regulates medicines, medical devices and other health-related products, and is responsible for evaluating products, inspecting pharmaceutical establishments, and issuing certificates. DIGEMID compiles a single national list of essential medicines – updated every two years – in co-ordination with different public-sector health entities, including EsSalud, and undertakes market analyses to assess whether essential medicines are available, and, if not, why.

Once DIGEMID has received public entities' purchasing needs, it draws up a consolidated list of the required medicines, provided that 1) they are part of the national list of essential medicines; and 2) the total purchase order for each one is at least PEN 60 000. CENARES conducts market research, which

consists of asking suppliers that CENARES has on its lists for price quotes, product types and delivery availabilities. CENARES then procures the required volumes of medicines based upon the consolidated list (which must be first approved by Perú Compras; see, Section 2.2.4) through electronic reverse auctions for which CENARES sets the starting price based on its market research and previous winning prices. The bidders with the lowest offer win. The participating institutions or regional governments that requested corporate purchasing by CENARES sign the purchasing contract with the selected providers, for the winning (lowest) price and for the volume that it has agreed to buy.

Corporate purchasing is open to national suppliers only. According to OECD data, in 2013, corporate purchasing of medicines by CENARES represented 29.3% of EsSalud's total drug budget. However, corporate purchasing may be less relevant for EsSalud than for other health providers in Peru, since expensive drugs for high-cost treatments of the type EsSalud provides are bought in extremely small quantities and likely to be excluded from the list given the established minimum order amount (OECD, 2017^[7]). During fact-finding, the OECD was informed that EsSalud's use of CENARES corporate purchasing has been decreasing.

2.2.3. The policy guidance and monitoring role of the Government Procurement Supervising Agency (OSCE)

The Government Procurement Supervising Agency (Organismo Supervisor de las Contrataciones del Estado, OSCE) is a body under the Ministry of Economy and Finance with technical, functional, administrative, economic and financial autonomy. The main laws and regulations applicable to it are the PPL and the RPPL, as well as the OSCE Regulation of Organisation and Functions (ROF), approved by Decree No. 076-2016-EF.

OSCE, which has over 600 employees, has jurisdiction over all procurement regulation and performance, and can selectively check specific procedures; its mandate is detailed in Box 2.2.

Box 2.2. OSCE's procurement functions

- 1) To monitor contracting entities and promote the creation of efficient contracts under the parameters of the Public Procurement Law No. 30225 and its complementary regulations, and in doing so maximise the value of public funds and ensure best results.
- 2) To supervise tendering methods referred to in the legislation or regulations.
- 3) To perform supervisory actions at the request of an entity.
- 4) To implement activities and mechanisms that develop skills and competencies in management and contractual terms.
- 5) To propose amendments deemed necessary to regulations, within the framework of its authority.
- 6) To issue directives, standardised documents and guidance documents on matters within its competence.
- 7) To resolve matters within its competence in last administrative instance.
- 8) To manage and operate the National Registry of Providers (RNP).
- 9) To develop, manage and operate the Electronic System for Government Procurement and Contracting (SEACE).

- 10) To manage and operate the National Register of Arbitrators and ensure an easy-to-access arbitration-award database, in which it is possible to find categories such as arbitrators, topics, terms of the process and parties.
- 11) To certify institutions that provide arbitration services and administration and supervise state contracts, according to the provisions of the regulations.
- 12) To organise and manage arbitration according to the provisions of the regulations and in accordance with the directive adopted for this purpose.
- 13) To appoint arbitrators and resolve arbitration disputes not subject to an arbitration institution.
- 14) To resolve claims for refunds of fees for arbitrators, as stated in regulations.
- 15) To respond to queries about the meaning and scope of contracting rules made by entities, as well as by the private sector and civil society; queries made by the entities are free of charge.
- 16) To alert the General Comptroller of the Republic to clear evidence of breaches observed in the performance of public entities' duties, when there are reasonable signs of economic prejudice to the state, crime or serious offences by those with administrative responsibility, according to the current legal framework.
- 17) To suspend procurement procedures during the supervisory process of its own initiative or at the request of a party in order to identify any reasons that might prevent an entity from continuing with the procurement.
- 18) To decentralise its own functions into regional or local bodies according to the provisions of its Regulation of Organisation and Functions.
- 19) To evaluate the performance of government procurement regimes, analyse and propose new, appropriate procurement mechanisms according to markets, and propose strategies for the efficient use of public resources.
- 20) Any other duties established in the rules.

Source: (OECD, 2017^[8]).

OSCE's functions most relevant to the scope of this project are the:

- 1) promotion of public procurement good practice, such as those to prevent and detect bid rigging
- 2) management of the Electronic System for Government Procurement and Contracting (Sistema Electrónico de Contrataciones del Estado, SEACE) and of the National Supplier Registry (Registro Nacional de Proveedores, RNP)
- 3) issuance of technical opinions regarding specific issues of application of public procurement laws and regulations
- 4) issuance of standard tender documents for different procurement processes and different acquisition categories (goods, supply of goods, services, works consulting, or works)
- 5) issuance of opinions on enquiries and observations raised by bidders during the public procurement process
- 6) monitoring of procurements
- 7) hearing of bidder appeals and the imposition of sanctions through the Public Procurement Tribunal
- 8) suspension or annulment of procurement processes when public procurements rules have been breached, or if there are reasonable indications of economic harm to the public sector, such as bid rigging.

OSCE has a supervisory role in ensuring compliance with public procurement law, as well as a regulatory role in the issuance of standard tender documents and its participation in all law and regulation reforms in public procurement.

OSCE's standard tender documents are compulsory for public-sector buyers according to Article 47.3 of the RPPL.⁶ They contain a section with general terms (provisions concerning the procurement procedure and the execution of the contract) and a section with special terms (the specific details of each procurement that must be completed by the procuring entity). These special terms include the characteristics of the goods, services and works, reference or estimated price, qualification requirements, evaluation criteria and rules regarding how award points will be assigned. The procuring entity may also add clauses to the special terms as long as they do not contravene public procurement rules. General terms remain the same for all procurement procedures; indeed, any change to the terms by a procurement entity voids the procurement. OSCE's standard documents include a model agreement, which contains clauses on warranties, anticorruption, dispute resolution, and contracts annulment for lack of performance. Works contracts also include clauses on performance risks, and which party is liable for them.

As part of its supervisory role, OSCE can verify whether procurement actions are in line with public procurement rules and public-management practices; for example, by investigating whether one of the risks expressly mentioned in OSCE's ROF is relevant. Among the identified risks, competition is of particular importance; others include direct awards; the use of exceptions to open tenders; and possible barriers to access to tenders. On this basis, OSCE can pilot a red-flag system to identify competition risks.

Particularly relevant to the fight against bid rigging is OSCE's duty to report any suspicions to Indecopi. When OSCE or the Public Procurement Tribunal (see, Section 2.2.5) finds indicia of anti-competitive practices in public procurement, including procedures run by EsSalud, it must send all relevant information to the Directorate for Competition Investigations and Advocacy of Indecopi (Article 14.1 of the PPL; see, Section 4.3 of this report). In addition, when OSCE becomes aware that a tender requirement or condition may prejudice competition, it can request its removal by the procuring entity (Article 14.1 of the PPL).

OSCE also manages the National Supplier Registry (RNP), with which suppliers interested in participating in procurement processes must register, in accordance with Article 46 of the PPL. Its main purpose is to maintain an updated database of information on suppliers interested in bidding for public contracts.

OSCE is also in charge of SEACE, the electronic procurement portal. Since 2016, SEACE has included CONOSCE, a business intelligence and transparency module with a dashboard featuring different public procurement indicators and information on suppliers and contracting authorities (OECD, 2017^[8]).

OSCE uses SEACE data in its monthly statistical reports on public procurement, which include information on processes declared void, exceptions to open tenders, state suppliers and consortia, administrative appeals, and the duration of procurement processes. These reports are compiled into annual reports, which are also published on OSCE's website. OSCE also uses information on SEACE to carry out economic studies, review public procurement, and suggest improvements. Past economic studies have included analysis of competition levels; the estimated cost of and participation in tenders; duration of preparatory acts and tenders; the participation of micro and small enterprises at the regional level; qualitative assessment of reverse auctions; and access barriers (OECD, 2017^[8]).

OSCE's role and tasks are consistent with that of most central procurement agencies in Latin America and the Caribbean. These agencies are usually responsible for establishing public procurement policies, regulating countries' public procurement systems and monitoring performance, but generally do not make purchases on behalf of other public-sector entities. In OECD member states, central procurement agencies may also carry out purchasing (OECD, 2020^[2]). In Peru, central purchasing is entrusted to Perú Compras.

2.2.4. Perú Compras' standardisation, consolidation and centralised-purchasing role

Peru's central purchasing body, Perú Compras, was created by Legislative Decree No. 1018 in 2008, and began operating in March 2016, after the adoption, in December 2015, of Decree No. 364-2015-EF that approved Perú Compras' Regulation of Organisation and Functions, and the appointment of its director by Resolution No. 053-2015-EF (OECD, 2017^[8]). While part of the Ministry of Economy and Finance, it enjoys technical, administrative and functional autonomy.

In 2018, Decree No. 1439 established the National Supply System (Sistema Nacional de Abastecimiento) and the Ministry of Economy and Finance set up the General Supply Directorate (Dirección General de Abastecimiento, DGA) as the National Supply System's governing body. DGA is mandated to exercise procurement oversight, issue opinions on the interpretation of public procurement rules and regulations, and train public procurement officials.⁷ As part of the National Supply System, Perú Compras must follow the policies decided by DGA. Perú Compras' objective is the optimisation of public procurement through economies of scale, quantity discounts, and reduced transaction costs enabled by centralising purchasing and the use of digital tools.

Certain Perú Compras responsibilities are relevant to EsSalud, and could allow EsSalud to benefit from the body's expertise. First, Perú Compras oversees corporate purchases (*compra corporativa*), a procurement method for the acquisition of standardised goods or services purchased by more than one public-sector entity. Corporate purchases are divided into two categories: compulsory and optional.⁸

Compulsory corporate purchases are conducted by Perú Compras and approved by a Ministry of Economy and Finance-issued decree that establishes the goods and services to be contracted, as well as participating entities. The tender process is carried out by Perú Compras with all public-sector entities, including EsSalud, named in the decree bound to buy the goods and services resulting from the Perú Compras contract.

Optional corporate purchases are based on inter-institutional agreements between Perú Compras and public-sector entities that request these corporate purchases at their discretion. Each inter-institutional agreement establishes the object and scope of the purchase, and each party's responsibilities. Examples of optional corporate purchases are internet access, security, cleaning, courier, photocopying and printing services.

In all corporate purchases, Perú Compras standardises the goods and services and conducts the procurement procedure, but the requesting public entity signs the contract with the selected suppliers⁹ and is financially liable for any purchased goods. EsSalud has participated in neither compulsory nor optional corporate purchases conducted by Perú Compras.

Second, public entities may request that Perú Compras conducts tenders for specific purchases on their behalf and so profit from its expertise in procurement. For these tenders, known as *contrataciones por encargo*, the requesting public entity signs the contract.

Third, Perú Compras is in charge of conducting tenders for framework agreements that provide electronic catalogues of goods and services (Catálogos Electrónicos de Acuerdo Marco) used by a wide range of public-sector entities. The framework agreement with selected suppliers is signed by Perú Compras, while entities that use the framework agreement are responsible for paying for the goods and services bought through the electronic catalogue. Perú Compras' IT systems for the electronic catalogues are interoperable with SEACE, SIAF (Sistema Integrado de Administración Financiera) and SIGA (Sistema Integrado de Gestión Administrativa). EsSalud has been the primary user among public bodies of Peru Compras' framework agreements in previous years (except for 2020), with purchases worth, PEN 10.58 million in 2017; PEN 34.86 million in 2018; PEN 82.37 million in 2019; and PEN 33.67 million in 2020.¹⁰

Procurers that need goods and services included in a framework agreement must buy them using the agreement. For purchases of less than PEN 100 000, the purchaser enters its requirement into the framework-agreement electronic platform, which provides a list of the best offers received from suppliers. Purchasers can then choose the offer that they consider most suitable. Where they do not choose the option with the lowest unit price, they must justify their decision that the chosen option will represent a lower total cost for the entity, such as because the chosen product has a longer lifespan. For purchases of over PEN 100 000, the purchaser enters its requirement and the system itself selects the best offer. At the time of drafting in May 2021, Perú Compras has 17 framework agreements in place, containing 29 electronic catalogues.¹¹ In 2019, EsSalud, for example, used Perú Compras' electronic catalogues to purchase air travel worth PEN 29.87 million and consumables worth PEN 13.48 million.¹²

Fourth, Perú Compras can also standardise technical specifications for common goods and services. Common goods and services are those that are considered standard, either because they are so intrinsically (molecules) or because they have been standardised (for example, syringes or, in the case of the army, underwear). To carry out the standardisation, Perú Compras prepares technical specifications sheets (*fichas técnicas*), using information from or the opinion of other public bodies, as well as trade associations and other bodies. At the end of the process, Perú Compras consolidates and adopts the technical sheets, which procuring entities must then use to buy specific standardised goods or services, regardless of the process that is used. Technical sheets are compulsory, meaning that procuring entities cannot deviate from the characteristics set out in the sheets. This quicker procurement procedure has fewer stages than other methods, such as those detailed in Section 3.2. In the health sector, Perú Compras co-ordinates with MINSa and CENARES, and EsSalud's Health Technologies Evaluation and Research Institute (Instituto de Evaluación de Tecnologías en Salud e Investigación, IETSI), a body within EsSalud that standardises health-related requirements (see, Section 2.3).¹³

Fifth, the technical sheets approved by Perú Compras are usually added to the List of Common Goods and Services (Listado de Bienes y Servicios Comunes), which contains technical specifications for a number of goods and services, and is approved by Perú Compras.¹⁴ Currently, the list includes fuel; electrical appliances; medical and pharmaceutical products and equipment; cleaning supplies and equipment; lighting supplies; components and electrical accessories; and financial services and insurance. During the OECD fact-finding, Perú Compras mentioned that the number of goods and services on the list was 1 020 in 2018; 1 187 in 2019; 1 213 in 2020; and 1 309 in May 2021. EsSalud has purchased products included on the List of Common Goods and Services worth PEN 49.92 million in 2017; PEN 181.42 million in 2018; PEN 256.45 million in 2019; and PEN 8.6 million in 2020.¹⁵

For products and services included in the list, public-sector entities must conduct electronic reverse auctions. In exceptional circumstances when a reverse auction is not possible – such as in an isolated region in Peru where a competitive procedure is not possible – entities can request authorisation from Peru Compras to carry out another type of procedure, such as a direct award. This requirement aims to promote the use of the list and a standardisation of public-sector needs. All the technical sheets approved by Perú Compras are included in the list and are mandatory for procuring entities.

Like OSCE, Perú Compras clearly has a key role in co-ordinating procurement, and ensuring communication with and between different procurement entities, of all sizes. It also has a crucial standardisation role, identifying common needs among entities and consolidating purchases of widely used goods and services into large contracts. In particular, optional corporate purchases and delegation of authority to conduct tenders on behalf of another entity are both likely to act as incentives for Perú Compras to offer high-quality service and value for money to its public-sector "clients" as a way to increase such requests and reinforce its own role and importance in Peru's procurement landscape.

In April 2019, Perú Compras established a registry of digital purchase orders using blockchain technology, an electronic database distributed across a network of designated computers, which guarantees document safety and reduces risks of data manipulation.¹⁶ When a new order is added, it is given a QR (quick-response) code that can be accessed by smartphone. When the QR code is read, the original document appears as a PDF for authentication purposes. For example, a contractor delivering goods to a warehouse carries the purchase order with the quantities and details of the goods to be delivered. The person responsible for receiving the goods can use a smartphone to read the QR code on the purchase order, access the original document to verify its authenticity, and confirm the product quantities and details against the original document. According to Peru Compras, as of May 2021, 377 166 documents had been registered using blockchain technology.

2.2.5. The Public Procurement Tribunal's appeal function

The Public Procurement Tribunal (Tribunal de Contrataciones del Estado) is a dispute-resolution body administratively under the Executive Presidency of OSCE, but operationally and functionally autonomous and independent. It has a tripartite structure:

- 1) four chambers (Salas), each one composed of three members (vocales) appointed for three years after a competitive procedure conducted by a commission of representatives of the Presidency of the Council of Ministers, the Ministry of Economy and Finance, and the Ministry of Justice and Human Rights
- 2) a president (vocal), who is a member appointed by OSCE's board of directors
- 3) a court secretariat responsible for providing technical, legal and administrative support to the Tribunal and reporting directly to the court's president.¹⁷

The Tribunal's core competence is to hear bidder complaints for alleged infringements of the PPL during the tendering procedure and until the contract award. Appeals suspend procurement procedures until the Tribunal renders its decision. It is competent to hear appeals by bidders concerning public procurement procedures organised by EsSalud, but not competent to hear disputes concerning contract performance, which are resolved through arbitration.

The Tribunal is only competent to sit on appeals for procurement procedures with a value greater than 50 tax units or *unidades impositivas tributarias*¹⁸ (in 2021, the equivalent of PEN 220 000), or if the procurement procedure concerns a framework agreement. Other appeals are submitted before the procurement entity itself, such as EsSalud for its tenders.

The Tribunal may impose fines and sanctions on both natural and legal persons (whether bidders, contractors or subcontractors) in breach of the PPL. Article 50 of the PPL describes the different PPL breaches and their corresponding sanctions (Table 2.1). The Tribunal has on average imposed 1 000 sanctions annually under Article 50 of the PPL.

Table 2.1. Violations and sanctions under the Public Procurement Law

Violations	Sanctions		
	1) Fine	2) Temporary disqualification	3) Permanent disqualification
Withdrawal of a proposal without reasonable grounds	X		
Failure to fulfil an obligation to execute a contract or framework agreement	X		
Contract with the government prohibited or suspended according to the law		X	
Subcontracting of services: without authorisation from the procuring entity; in a higher percentage than allowed by law; or by a subcontractor unregistered in the RNP or prohibited or suspended from contracting with the state	X		
Failure to fulfil the obligation to provide full-time services as a resident or construction supervisor, except in cases where allowed by regulations	X		
Cause an entity to terminate a contract, including a framework agreement, unless consented or agreed to after conciliation or arbitration		X	
Not correcting hidden defects recognised by the contractor or declared by arbitration, as required by a contracting entity		X	
Unreasonable refusal to fulfil contract obligations that must be executed after payment		X	
Presentation of inaccurate information to procuring entities, Public Procurement Tribunal, RNP, OSCE and Perú Compras. For entities, this information should be related to a requirement or evaluation factor that gives an (undue) advantage or benefit in the selection process or contractual execution. For information presented to the Public Procurement Tribunal, the RNP or OSCE, the benefit or advantage must be related to the procedure followed in these instances		X	
Presentation of false documents to procuring entities, Public Procurement Tribunal, RNP, OSCE and Perú Compras.		X	X (in cases of recidivism)
Signing contracts or framework agreements when unregistered in the RNP or signing contracts greater than contracting capacity, in specialties or categories other than those authorised by the RNP	X		
Execution of a contract despite notification by SEACE of its suspension, or a recommendation of nullity or imposed nullity of the selection process by OSCE in the exercise of its functions	X		
Submission of technical sheets, studies or technical files with omissions, deficiencies or incorrect information, or lack of supervision of the execution of works that fails to ensure correct technical, economic and administrative execution and so causes economic damage to procuring entities		X (in cases of recidivism)	
Presentation of evidently unfounded questions as part of enquiries and observations.		X (in cases of recidivism)	

Notes: 1) Fines. Fines range from 5% to 15% of the economic proposal or contract amount, as appropriate. If the amount of the economic proposal or the contract amount cannot be determined, any fine will be between 5 and 15 tax units (in 2021, PEN 22 000 and PEN 66 000). As a precautionary measure, the imposition of a fine leads to the suspension of the right to participate in any selection procedure, framework agreement and contract with the government, until it is paid.

2) Temporary disqualification. This consists of debarment from any procurement process and framework agreement and contracting with the state for a period of 3 to 36 months. For the submission of false or fake documentation, disqualification is for no less than 36 months and no longer than 60 months.

3) Permanent disqualification. This consists of the permanent debarment from participation in any procurement process, framework agreement and contracting with the state. This sanction applies to recidivist suppliers that in the previous 4 years have received more than 2 temporary disqualifications (adding up to more than 36 months) or have re-presented fake documents to procurement entities.

Source: OECD, based on Article 50 of the Public Procurement Law No. 30225, <https://portal.osce.gob.pe/osce/sites/default/files/Documentos/legislacion/ley%2030225%20Ley%20de%20contrataciones-julio2014.pdf>.

The Tribunal's decisions are published on OSCE's website¹⁹ and can be appealed before Peru's administrative courts.

2.2.6. Internal and external control, audit and integrity offices

Public-sector entities in Peru must have an Institutional Control Body (Órgano de Control Institucional, OCI), in charge of internal control and audit. Although part of public entities, OCIs report not to their respective entity's head (for EsSalud, the Executive Presidency), but rather to Peru's supreme audit body, the General Comptroller of the Republic (Contraloría General de la República, CGR). The heads of the OCIs are appointed by the CGR.

As internal-control bodies, OCIs supervise and monitor the performance of public-sector entities, particularly their effectiveness, efficiency and transparency in using public resources, and compliance with applicable laws. They undertake three types of audits – ex ante, financial and performance – that can include control and audit of public procurement undertaken by the entity in which the relevant OCI sits. Controls follow OCIs' annual control plans, which should be in line with strategic guidelines for government control planning, issued by the CGR on an annual basis. OCIs also follow-up on CGR findings and recommendations, and report to it twice a year.

The CGR is charged with external control and audit of public-sector entities, and by extension of their public procurement. It defines the legal and regulatory framework of internal control, and evaluates entities' internal-control mechanisms. The CGR undertakes ex ante and ex post, financial and performance audits. Risk assessment (including, presumably, competition risk assessment) is one of the five components of internal control (OECD, 2017^[8]).

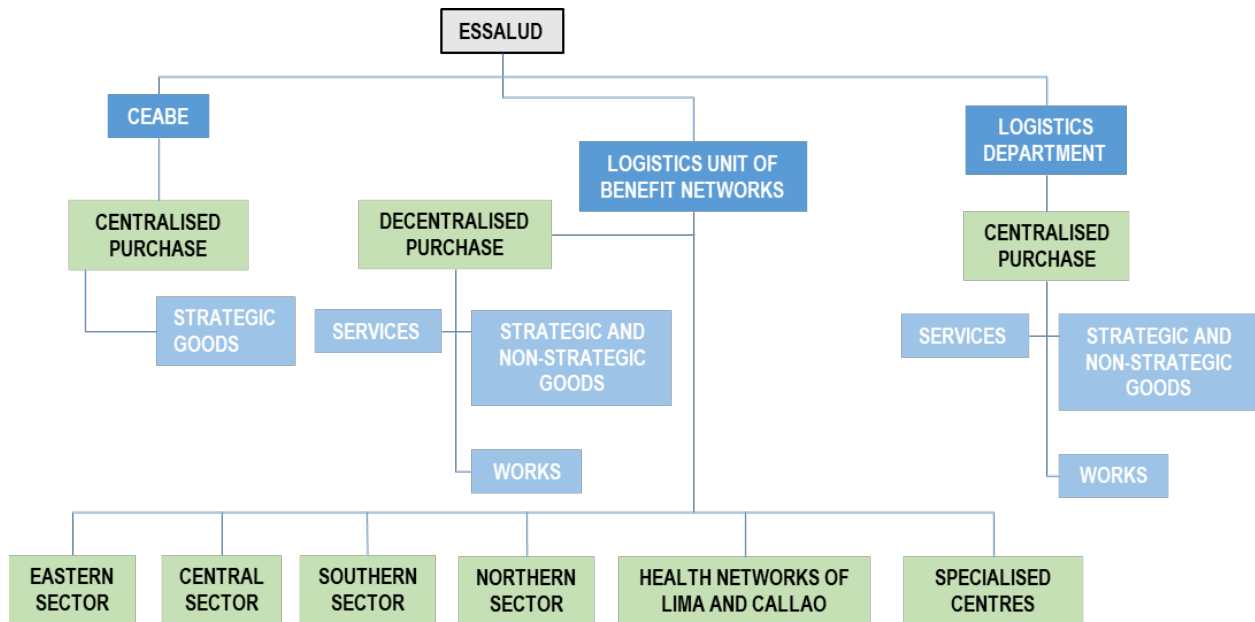
Public-sector entities may also contain an Office of Institutional Integrity (Oficina de Integridad Institucional, OII) that promotes and co-ordinates organisational integrity and anti-corruption policies, strategies and plans, and monitors their implementation. The government department that guides and oversees the implementation of Peru's National Integrity Plan and Fight Against Corruption 2018-2021 (Supreme Decree No 044-2018-PCM), of which the OIIs form part, is the Secretariat of Public Sector Integrity (Secretaría de Integridad Pública, SIP). OIIs can receive technical opinions, advice and support from SIP. In 2019, the OECD published a report analysing the organisational design and the effective implementation of integrity units in the institutions of the public sector.²⁰

2.3. EsSalud's procurement-related units and structure

EsSalud units involved in procurement are the:

- 1) Logistics Department (Gerencia Central de Logística)
- 2) Strategic Goods Supply Office (Central de Abastecimiento de Bienes Estratégicos, CEABE)
- 3) decentralised health networks and specialised medical centres.

Figure 2.1. Organisation of public procurement at EsSalud



Source: OECD, based upon Regulation of Functions and Organisation of ESSALUD (Reglamento de Organización y Funciones del Seguro Social de Salud, ROF), approved by Executive Presidency Resolution No. 656-PE-ESSALUD-2014.

According to information provided by EsSalud, its biggest procurement expenditures for its healthcare networks for the years 2017 to 2020 were 1) medicines; 2) medical material; and 3) food supplies.

Table 2.2. Highest EsSalud procurement expenditures, 2017-2020, PEN

Product	2017	2018	2019	2020
Medicines	921 006 027	967 593 491	1 027 449 456	1 034 314 645
Medical material	458 400 373	484 995 429	585 047 012	897 532 504
Food supplies	25 368 798	26 223 273	26 058 987	29 950 913

Source: EsSalud data supplied to the OECD.

EsSalud's procurement spend in goods and services for the years 2017 to 2020 for amounts higher than eight tax units²¹ is set out in Table 2.3:

Table 2.3. EsSalud procurement in goods, services and works, 2017-2020

	Goods		Services		Works	
	Procurement processes	Total value (millions, PEN)	Procurement processes	Total value (millions, PEN)	Procurement processes	Total value (millions, PEN)
2017	788	682.4	797	357.7	1	8.3
2018	795	939.5	627	1 744.8	3	19.5
2019	665	682.5	497	799	4	21.9
2020	665	842	553	440.1	2	3.8
Total	2 913	3 146.4	2 474	3 341.6	10	53 5

Source: OSCE (2021), "Principales indicadores de: Seguro Social de Salud", <https://public.tableau.com/app/profile/osce.bi/viz/Adjudicaciones6/h>.

The PPL allows public-sector entities to contact accredited international organisations and entrust them with specific procurements. EsSalud has used this option to assign the procurement of ambulances to the United Nations Office for Project Services (UNOPS).²²

During OECD's fact-finding mission, EsSalud noted that public procurement procedures are increasingly complex and require highly qualified personnel to ensure best outcomes for end users – EsSalud's beneficiaries – in line with public procurement rules and regulations. The professional qualifications of all procurement personnel in public-sector entities, including EsSalud, are regulated by OSCE, which certifies procurement professionals.

2.3.1. Logistics Department

The Logistics Department is the EsSalud unit with general oversight for planning the organisation's procurement of goods, works and services. It consolidates EsSalud's procurement needs in co-ordination with user units (*áreas usuarias*) within EsSalud that require goods, works and services, such as hospitals. It also issues the Annual Procurement Plan (Plan Annual de Contrataciones, PAC), as detailed in Section 3.1.

The Logistics Department also manages procurement for non-strategic goods and centralised services and works (those not conducted by decentralised units). It oversees the organisation of warehousing, distribution and verification of non-strategic goods; maintenance of medical equipment and infrastructure; and managing EsSalud's security services and fleet of vehicles.

The Logistics Department includes a Supply Department (Gerencia de Abastecimiento) with two sub-departments: the Planning Sub-department (Sub-Gerencia de Programación) and the Procurement Sub-department (Subgerencia de Adquisiciones).

The Supply Department is responsible for planning the procurement of goods, works and services across EsSalud and developing the PAC; procuring non-strategic goods and their warehousing and distribution, in co-ordination with other central and decentralised units; and conducting procurements for centralised services and works, such as cleaning and security services.

The Planning Sub-department is charged with organising, conducting and controlling procurement planning and carrying out preparatory actions for procurements run by the Supply Department, including the designation of procurement selection committees; preparing tender documents; carrying out market research; and managing the lists of goods and services. It also develops processes and methodologies related to the warehousing and distribution of non-strategic goods.

The Procurement Sub-department conducts the procurements for which the Supply Department is charged; supports procurement selection committees; checks the completion of contracts and contractors' guarantees; issues purchase orders; checks and confirms payments and the fulfilment of contractors' obligations under the procurement contract.

2.3.2. Strategic Goods Supply Office

The Strategic Goods Supply Office (Central de Abastecimiento de Bienes Estratégicos, CEABE) is charged with reviewing and evaluating the needs of different areas of EsSalud, and determining needs for strategic goods, which include pharmaceutical products, medical devices, medical equipment and hospital protective wear.

CEABE is in charge of all procedures for the procurement of strategic goods, including planning their inclusion in the PAC; carrying out all stages of the procedure, including preparing the tender documents and designating the procurement selection committee; choosing the supplier, concluding the contract,

confirming payments, and overseeing fulfilment of contractual obligations or the imposition of penalties; and managing the warehousing and distribution of the goods.

CEABE has a Department of Estimation and Control (Gerencia de Estimación y Control de Bienes Estratégicos) and a Procurement Department (Gerencia de Adquisiciones de Bienes Estratégicos).

The Department of Estimation and Control assesses the needs for strategic goods, consolidating requests at a national level, draws up descriptions of goods and their quantities, determines their estimated value, defines the procurement method, establishes the procurement terms, and checks contract performance.

The Procurement Department develops procurement strategies; reviews the needs consolidated by the Department of Estimation and Control; proposes the inclusion of procurements for strategic goods in the PAC; conducts all preparatory steps for procurement, including market research, setting of reference or estimated values, confirmation of available budget, choice of procurement procedure, preparation of tender terms and appointment of procurement selection committees; carries out the procurement process; checks the conclusion of contracts and the guarantees offered by contractors; issues purchase orders; checks and confirms payments, and the fulfilment of contractors' obligations under the contract.

2.3.3. EsSalud's decentralised units: health networks and medical centres

EsSalud has specialised medical centres in Lima and Callao and nationwide supplier networks (*redes prestacionales* and *redes asistenciales*). These all have their own supply bodies and can carry out their own procurement processes, if these have been included in the PAC. These decentralised bodies can also centralise purchases at their level, but to prevent procurement overlap or duplication, they must co-ordinate with CEABE, which procures strategic goods, and the Logistics Department, which procures non-strategic goods, services and works.

2.3.4. The role of other EsSalud departments

The Institute for Health Technology Assessment and Research (Instituto de Evaluación de Tecnologías en Salud e Investigación, IETSI) is an EsSalud body that standardises health-related requirements. It evaluates technologies and standardises the technical specifications of goods, issuing minimum requirements that EsSalud units must observe. Goods included in EsSalud's PAC follow the technical specifications that IETSI may have approved. The use of the standardised specifications adopted by IETSI is obligatory for EsSalud. If such specifications are homologated by MINSA, they become compulsory across the health sector. EsSalud and MINSA, with the support of Perú Compras, co-operate to work on homologating standardised specifications.

The Integrity Office (Oficina de Integridad, OFIN) is the EsSalud body charged with ensuring integrity and preventing corruption. Reporting to EsSalud's presidency, it receives complaints about corruption and can adopt measures to protect complainants. Where complainants are bidders, OFIN can guarantee their anonymity to avoid retaliation, and remove from a procurement process a public official who has been accused of wrongdoing. OFIN transfers complaints to the Technical Secretariat of EsSalud, which must adopt a preliminary decision on the merits of the complaint, or to its legal department, which can then adopt a final decision to impose a disciplinary sanction on an official for wrongdoing. OFIN is also in charge of adopting and implementing an anti-corruption plan and of ensuring transparency and access to information, and of screening EsSalud's activity for possible acts of corruption. EsSalud also has an OCI.

Both OFIN and OCI are mandated to ensure that procurement processes are free of legal violations; they have been monitoring procurements during the COVID-19 health emergency.

Notes

¹ Article 76, Political Constitution of Peru (1993): “Public works, and acquisition of supplies with public funds or resources, are compulsorily based on contracts and public bidding, as are the acquisition and sale of assets. The contracting of services and projects, whose importance and amount are determined by the Budget Act is done by public bidding. The law sets forth the procedures, exceptions and respective responsibilities.”

² Case No. 020-2003-AI/TC

³Expenses are extracted from EsSalud’s 2020 budget:

www.essalud.gob.pe/transparencia/pdf/presupuesto/presupuesto_modif_2020_ingresos_y_gastos_PIM_final.pdf.

⁴ Entities involved in the health sector that can use CENARES’ services are MINSA, EsSalud, Ministry of Interior, Ministry of Defence, Ministry of Justice and Human Rights, National Penitentiary Institute, regional governments, and other public entities that render health services.

⁵ National health strategies are plans adopted by the Ministry of Health, which include health promotion, prevention and care, through access to information and education on prevention measures aimed at avoiding the negative impact of diseases on the development of people and society. The strategies relate to vaccinations; prevention and control of vector-borne diseases; prevention and control of sexually transmitted infections, including HIV/AIDS; prevention and control of tuberculosis; and prevention and control of non-communicable disease. See, www.gob.pe/institucion/minsa/noticias/42402-ministerio-de-salud-aprueba-los-planes-de-las-estrategias-sanitarias-nacionales.

⁶ In Guideline No. 001-2019-OSCE-CD, OSCE approved 19 compulsory standard tender terms (*bases*) and one compulsory standard invitation for expression of interest (*solicitud de expresión de interés estándar*); see, <https://portal.osce.gob.pe/osce/node/282>.

⁷ Decree No. 143 states that the entities belonging to the National Supply System are: 1) DGA; 2) OSCE; 3) Perú Compras; 4) units involved in supply-chain management in all public entities.

⁸ In addition to Perú Compras, corporate purchasing is only regularly carried out by CENARES for goods and services required by health-sector entities; the National Fund for Financing the Corporate Activity of the Government (Fondo Nacional de Financiamiento de la Actividad Empresarial del Estado, FONAFE) for goods and services required by central government bodies; and the Central Purchasing Body of the Armed Forces (Agencia de Compras de las Fuerzas Armadas, ACFFAA) for goods and services required by entities in the defence sector. However, the legal framework allows any public entity to aggregate demand and conduct optional corporate purchases.

⁹ As an exception, in the case of purchases linked to the COVID-19 pandemic, Perú Compras was entrusted with the responsibility of signing contracts.

¹⁰ See, www.perucompras.gob.pe/observatorio/indicadores-acuerdos-marco.php.

¹¹ See, www.perucompras.gob.pe/observatorio/indicadores-acuerdos-marco.php.

¹² For electronic catalogues see, www.perucompras.gob.pe/observatorio/indicadores-acuerdos-marco.php; and for the reports, www.perucompras.gob.pe/observatorio/boletines-de-acuerdos-marco.php

¹³ For Perú Compras’ standardised technical sheets, see, www.perucompras.gob.pe/homologacion/relacion-fichas-homologacion-aprobadas.php.

¹⁴ For the List of Common Goods and Services, see www.perucompras.gob.pe/subasta-inversa/listado-bienes-servicios-comunes.php.

¹⁵ Based on information available on SEACE's website. These figures do not include CENARES purchases on behalf of EsSalud through electronic reverse auctions.

¹⁶ The purchase order in blockchain contains an URL to a PDF document; a series of SHA-256 hash functions to protect the file; data of the winning bidder; the number of the purchase order; data about the contracting entity; a purchase-request summary (items, quantity, term and place of delivery); and a blockchain stamp or registration. Purchase orders are registered using the stamping.io service.

¹⁷ Article 20, Regulation of Functions and Organisation of OSCE, approved by Decree No. 076-2016-EF, www.gob.pe/institucion/mef/normas-legales/227991-076-2016-ef.

¹⁸ In 2021, the value of a tax unit was PEN 4 400.

¹⁹ See, <https://portal.osce.gob.pe/osce/content/resoluciones-emitidas-por-el-tribunal>.

²⁰ See, OECD (2019), *Offices of Institutional Integrity in Peru: Implementing the Integrity System*, OECD Publishing, Paris, www.oecd.org/gov/ethics/offices-of-institutional-integrity-peru.pdf.

²¹ The value of a tax unit was PEN 4 050 in 2017; PEN 4 150 in 2018; and PEN 4 050 in 2019.

²² UNOPS is a service provider, a technical advisor, and an implementer of projects. UNOPS has worked in Peru since 1995, providing infrastructure, procurement, project management and advisory services; see, www.unops.org/about and www.unops.org/peru.

3 Procurement steps and processes

Section 3.1 of this chapter provides an overview of the pre-tender steps, such as planning, budgeting and market research, which EsSalud carries out. Section 3.2 identifies the tender methods and criteria. Section 3.3 examines the tender steps and process, and Section 3.4 the award of the contract.

3.1. Pre-tender steps

Before a procurement procedure can begin, necessary steps to be taken include establishing the entity's needs at a national level; assessing available supply solutions and the capacity of supplier markets; and deciding the most appropriate tender method.

3.1.1. Issuing the request for procurement

Article 16 of the PPL establishes that user units may send requests for specific procurements. User units at EsSalud are those that will use the goods, services and works.

The request must be precise and objective, specifying the description, product characteristics, quantity and delivery terms, and providing a justification for the procurement. The request may not specify origin, production method, brands, commercial names, patents,¹ designs or other details that may cause the procurement to be earmarked for a specific supplier.

The request for procurement must include specifications (see, Section 3.1.2) and bidder qualification requirements, such as capacity, expertise, experience, education and training of key personnel, specific equipment or infrastructure and evaluation factors. For works procurement, likely contract performance risks must be identified, as well as mitigation plans and step-in measures.

If the good to be procured is on the standardised List of Common Goods and Services (for which differences between goods are mainly price-based), corresponds to a standardised technical sheet (*ficha de homologación*; see, Section 6.3), which sets technical characteristics, qualification requirements, and/or performance terms, or is under a Perú Compras framework agreement, then the product should be procured using the list or technical sheet, or be purchased from one of the selected suppliers under the existing framework agreement.

3.1.2. Setting specifications

The request for procurement must include technical specifications (*especificaciones técnicas*) for goods; the terms of reference (*términos de referencia*) for services; and the technical file (*expediente técnico*) for works.

Technical specifications contain the description of the technical characteristics and functional requirements of the goods to be purchased by EsSalud, and include quantities, quality, and conditions for performance.

Terms of reference contain technical characteristics and conditions for services and consulting services. In the case of consulting services, the description must also include the purpose, goals and expected results of the services, and basic information in order to help service suppliers put together accurate bids.

The technical file must contain a description of the works, technical specifications, blueprints, quantities, budget, work-execution schedule, adjustment formulas and indexes, identification of risks and their probability and likely impact on the works, and mitigation mechanisms. The technical file may be made by the procuring entity, a third party, such as a works consultant, or the contractor that will execute the works.

3.1.3. Conducting market research

Article 32 of the RPPL establishes that, in the case of goods and services (other than works consultancies), the body in charge of the procurement must conduct market research to look at capacity and establish a contract's estimated or reference value. In EsSalud, these bodies are CEABE, the Logistics Department, and decentralised units.

Market research should investigate market capacity, available brands and suppliers, tender methods suitable to the contract, and the factors to be taken into account during bid evaluation, and whether market prices match the budget available for the fiscal year in which the purchase will take place, as defined in the PAC. According to Decision No. 004-2019-OSCE/CD (Disposiciones sobre el contenido del resumen ejecutivo de las actuaciones preparatorias), market research should look at the object of procurement and use methodologies and sources such as price quotations, online information, catalogues, historical prices (including those on SEACE), and cost structures. The body charged with the procurement should research public- or private-sector procurements for goods or services similar to those being tendered out. Public purchasers also need to consider whether the contract can be fulfilled by one single company or needs to be awarded to more than one bidder.

In the case of procurement for public works and works consultancy, Article 34 of RPPL states that the reference value cannot be more than nine months old. If it is, it must be updated before the invitation to tender is published. Reference prices for public works take into account unit prices, quantities, tariffs, variable and fixed overheads, and profit.

Perú Compras can support public-sector entities in conducting market research through training and workshops on market-research methods.

In 2014, EsSalud issued Guidelines No. 03-GG-ESSALUD-2014, on conducting market studies and determining procurement values for goods and services required by EsSalud.² These guidelines state that sources of information for market studies are: 1) price quotes; 2) webpages and web catalogues; 3) past EsSalud procurement prices; 4) information on SEACE about procurements conducted by other public-sector entities; 5) cost structures; 6) sectoral bodies' websites, such as DIGEMID, or the price observatory (Observatorio de Precios) kept by MINSA; and 7) specialised publications, including catalogues such as *Kairos* and trade-association magazines. The market study should also include supply alternatives, volume discounts, availability, possible improvements of sale conditions, warranties or other benefits, and the technological validity of the object of the procurement. Guidance is binding on EsSalud's staff.

As a rule, officials must obtain information from at least two sources. Where officials request quotations from suppliers, they must provide information concerning the goods, services or works to be purchased, including the specifications. Companies that then provide false information may face administrative, civil and or criminal liability.

3.1.4. Setting the Annual Procurement Plan

The annual procurement plan (Plan Anual de Contrataciones, PAC) is a planning document for procurements of goods, services and works. The Logistics Department is in charge of grouping and consolidating the procurement needs of the whole of EsSalud and prepares the PAC based on information provided by user units.

If a user unit identifies a procurement need and confirms that this need is in accordance with EsSalud's draft institutional operation plan (Proyecto de Plan Operativo Institucional), it can add it to the institutional requirements list (Cuadro de Necesidades), which can cover periods up to three years into the future. The list is adjusted, prioritised and consolidated across EsSalud, in accordance with management-set institutional priorities and budgetary goals; it then becomes a consolidated list (Cuadro Consolidado de Necesidades), which the Logistics Department uses to draw up the PAC.

The PAC must be within the initial institutional budget (Presupuesto Institucional de Apertura), which is determined at the beginning of each fiscal year. Not every item on the institutional requirements list can be included in the PAC if the total requirements exceed the allocated budget. EsSalud's institutional operational plan (Plan Operativo Institucional), a management instrument of obligatory activities that will achieve institutional objectives over the following year, determines which items to prioritise and include in the PAC. In essence, the PAC reflects the institutional operational plan.

The Logistics Department approves the PAC, through powers delegated to it by EsSalud's Executive Presidency.³ The PAC determines the procurement budget available for the next fiscal year and includes estimated and reference procurement values. The initial institutional budget and the PAC can be adjusted to include or exclude tenders if new needs arise or those already identified are no longer valid. All PAC modifications must be approved by EsSalud's Executive Presidency or the delegated body, which is the Logistics Department.

The PAC and its modifications are published on SEACE and EsSalud's website. Procurement processes cannot start unless they are included in the PAC. A procurement process conducted without having been included in the PAC is considered void.

3.2. Tender methods, and evaluation and award criteria

3.2.1. Procurement methods

The PPL sets out the criteria for public procurement that may be used by EsSalud; these include the object of a public procurement (goods, services or works) and the estimated or reference value of the contract. The estimated or reference value is the approximate price of the contract decided after the market study and is used to establish both the procurement method and the procurement's budget.

The seven main types of procurement procedures established in the PPL are described below (and summarised in Table 3.1). Corporate purchases conducted by CENARES and Perú Compras, and framework agreements set up by Perú Compras, are described in Section 2.2.

Public bid (*licitación pública*) is a competitive public procurement process to buy goods for amounts equal to and greater than PEN 400 000 and works for amounts greater or equal to PEN 1.8 million. As EsSalud's largest procurements are for medicines, it frequently uses this method.

Public contest (*concurso público*) is a competitive public procurement process to procure services or works consulting for amounts equal to or greater than PEN 400 000.

Simplified award (*adjudicación simplificada*) procurement procedures are abbreviated with shorter periods and stages and used to buy goods, services and works consulting for amounts greater than PEN 35 200 and lower than PEN 400 000, and works worth more than PEN 35 200 and less than PEN 1.8 million.

Selection of individual consultants (*selección de consultores individuales*) procedures are abbreviated public procurement processes used for hiring individuals (*personas naturales*) offering consulting services in accordance with their experience and qualification, for amounts greater than PEN 35 200 or lower than or equal to PEN 40 000.

Price comparisons (*comparacións de precios*) are closed public procurement selection processes under which an entity may choose immediately available goods and services (excluding consulting services) that are easily obtainable in the market or standardised. To be valid an entity must receive and compare no fewer than three offers from registered suppliers for amounts greater than PEN 35 200 and lower than or equal to PEN 66 000. The bidder offering the lowest price wins, with the award published on SEACE.

An electronic reverse auction (*subasta inversa electrónica*) is a public procurement selection process for amounts greater than PEN 35 200, conducted entirely electronically through SEACE for goods and services on the Perú Compras-approved List of Common Goods and Services. Price is the only award criterion as the technical characteristics of the good or service have already been set by Perú Compras, meaning the bidder offering the lowest price wins.

Direct award (*contratación directa*) is an exceptional public procurement process for goods, services and works for amounts greater than PEN 35 200, which can be awarded with a specific supplier without going through a multi-party selection process, if one of the exceptions provided for by the PPL applies. The main exceptions are:

- 1) the supplier is another public entity, but not a state-owned company and not undertaking ordinary business activities and the process will be efficient and technically viable
- 2) one of the emergency circumstances described the PPL, including natural catastrophes and health crises, arises
- 3) there is an imminent shortage of goods, services, or consulting services that may compromise a procuring entity's operation
- 4) the procurement involves military secrets or touches upon public order and security, and has received approval from the CGR
- 5) a certain good, service or consulting service can only be provided in the Peruvian market by a specific supplier or a supplier with exclusive rights
- 6) specialised – professional, artistic, scientific or technological – services rendered by individuals are required and can be objectively justified
- 7) media and broadcast services are required
- 8) consulting services other than works consulting are a continuation or update of a previously executed service by an individual consultant who was duly chosen through a past tender process
- 9) goods or services are required for research, experiments or development of scientific or technological projects
- 10) real estate is acquired or leased
- 11) accounting, legal or financial services are required
- 12) continuity of service is required after a contract is terminated early or declared invalid
- 13) training services of institutional interest are required.

Procurement through a direct award must always be justified by the relevant unit in an entity and it should provide legal and technical reasons for not using competitive bidding. The decision to use the direct-award procurement method must be approved by the head of the procuring entity or a body with delegated power. Approval and justification documents are published on SEACE within ten days of their issuance, except procurement of a secret or military nature, or for reasons of public order.

For EsSalud, direct awards are authorised by the Executive Presidency, which may delegate its power. During the COVID-19 pandemic, both EsSalud and CENARES used direct awards. CEABE in particular used direct awards, given the shortage of strategic goods at the beginning of the pandemic.

Works procurement may also be turnkey in which the contractor offers installation and commissioning or design (working from the Technical File), or installation and commissioning and, if applicable, operational participation in works.

Table 3.1 sets forth the maximum and minimum amounts that decide which type of tender method will be used, in accordance with the type of good, service or works to be procured.

Table 3.1. Maximum and minimum amounts for tenders in goods, services, and works

Type of selection processes	Value, PEN			
	Goods	Services		Works
		General	Works consulting	
Public bid	> = 400 000			> = 1.8 million
Public contest		> = 400 000		
Simplified award	< 400 000 > 35 200	< 400 000 > 35 200		< 1.8 million > 35 200
Direct award	> 35 200	> 35 200		> 35 200
Price comparison	< = 66 000 > 35 200	< = 66 000 > 35 200		
Electronic reverse auction	> 35 200	> 35 200		
Selection of individual consultants			< = 40 000 > 35 200	

Source: OECD, based on Public Procurement Law No. 30225.

Which internal body is responsible for conducting the procurement depends on the procurement method. If the procedure is an electronic reverse auction, a simplified award for goods and services, a price comparison or a direct award, one of CEABE, the Logistics Department or a decentralised unit is in charge. For public bids, public contests, selections of individual consultants or simplified awards for works and works consultancies, a selection committee is appointed by the head of EsSalud or the body with delegated power. The selection committee is made up of three to five members, of which one must belong to the body in charge of procurement and one or more members must be familiar with the object of the procurement. If no specialists are available for the selection committee, the entity can hire independent experts or appoint experts from other public-sector entities.

3.2.2. Procurement with suppliers non-domiciled in Peru

The PPL states that EsSalud can procure pharmaceutical products or medical devices from suppliers non-domiciled in Peru if this is more advantageous, and that in this case, the PPL is not applicable.⁴ EsSalud has issued guidelines on procurement from foreign companies.⁵

EsSalud's Programming and Preparation of Files Department (Sub Gerencia de Programación y Elaboración de Expedientes) carries out market research, based on minimum required technical specifications and conditions. The market research consists of inviting suppliers non-domiciled in Peru to provide price quotes. CEABE has a regularly updated database of non-domiciled suppliers for the acquisition of strategic goods, which has information on the suppliers' legal form, registration, licences, certifications and authorisations that are required by the country of origin. The Programming and Preparation of Files Department uses this database to identify companies from which to request price quotations. A company does not have to be on the database to be invited; according to EsSalud, other providers can be identified through market research.

EsSalud chooses the best proposal from the international bidders based on the following considerations: 1) price; 2) transportation, storage and distribution costs; 3) product history (competition, availability, and any other circumstance that might affect the offer); 4) cost-benefit analysis (quantitative and qualitative comparison of acquiring the product internationally rather than domestically, including opportunity costs and improvements offered by the non-domiciled supplier); 5) delivery conditions and deadlines; 6) product validity; 7) quality; and 8) payment terms.

All these documents must be submitted to CEABE for approval. Once the procurement is approved, the budget is included in the PAC and the procurement registered in SEACE.

The execution of the contract usually through a purchase order (*orden de compra*) must be carried out in accordance with international commitments signed by the Peruvian government, subject to the supervision of OSCE.

3.2.3. Evaluation and award criteria

Evaluation and award criteria, which aim to ascertain the best bids, must be linked to the technical specifications, objective, not favour a particular supplier, and clearly identified in the tender documentation. In Peru, bidder qualification is conducted, in most cases, after the bid with the best score has been designated, and compliance with requirements established in the tender documentation is only checked for the two highest-ranking bids (OECD, 2017^[8]).

Price is the main criterion when awarding a contract, but other criteria may be added, such as commercial and factory warranties and delivery dates (for goods and services), quality improvements, and environmental and social criteria.

The price component of projects may take one of the following six forms.

- 1) **Lump sum (*suma alzada*)**. If quantities and quality are defined in the technical specifications, terms of reference or technical file, and the contractor offers and is paid a fixed amount, it effectively bears the risk of cost variations. The contracting parties may agree on a price-adjustment clause, under specific conditions.
- 2) **Unit prices (*precios unitarios*)**. When quantities and qualities are imprecisely defined, the contractor proposes unit prices based on the quantities to be procured.
- 3) **Mixed (*mixto*)**. The tender procedure may include several systems, such as lump sum, tariffs and unit prices, and is applicable to procurement of services, works and works consulting.
- 4) **Tariffs (*tarifas*)**. Applicable to consulting services and works, where it is not possible to determine the length of the work, so the supplier offers a set tariff.
- 5) **Based on percentages (*en base a porcentajes*)**. Applicable to collections, recoveries or similar services.

- 6) **Fixed or success fee (*en base a un honorario fijo y una comisión de éxito*)**. Applicable to services, the procedure includes a fixed fee and a success fee based upon expected results.

3.3. The tender process

3.3.1. Using electronic procurement

All public entities in Peru are required to use SEACE, the Peruvian electronic procurement platform, in their public procurement regardless of the scope or the size of the contract.

All public procurement steps can be conducted on SEACE, and all public procurement procedure information is registered there, including:

- 1) the PAC
- 2) preparatory action, including general information; applicable rules, tender method, object and items or lots; links to the PAC; estimated or reference value; executive summary of preparatory acts; budget approvals; time schedule; and approval of tender documents
- 3) tender process, including call for tenders; tender documents; registration of participants; queries and observations; answers to queries and observations; OSCE decisions; final tender documents (if amended); tender submission; admission and rejection of bids; evaluation of bids; qualification and disqualification of bidders; award, cancellation or appeal to the entity or the Public Procurement Tribunal; and decisions on appeals, amendments, postponement or extension of steps
- 4) contracts and contract performance, including the contract, contractor, guarantees, advance payments, addenda, reductions, contract termination or nullity, extension, penalties, settlements, disputes, and arbitration judgements.

Framework agreements are available on Perú Compras' platform, which is accessible through SEACE, and tender documents are free to access.

Electronic procurement was until recently mandatory for certain procedures only, such as the simplified award, electronic reverse auction, and price comparison. Recent regulations have established the progressive implementation of e-procurement for all procedures. For example, OSCE's Directive No. 005-2019-OSCE of 18 June 2019 imposed obligatory use of SEACE for public bids and public contests.⁶ During fact-finding, OSCE confirmed that since December 2019 all procurement has been carried out on SEACE and that 82.8% of procurement in terms of value and 88.9% in terms of number of tenders is now conducted electronically. The exceptions are direct awards and price comparisons, for which no prior tender notice (*convocatoria*) is published. However, even in these cases, the procuring entity should publish the contracts after their award.

3.3.2. National Supplier Registry

Suppliers wishing to participate in procurements governed by the PPL need first to register on the National Supplier Registry (Registro Nacional de Proveedores, RNP), which is composed of four registries for each type of item to be supplied: 1) goods; 2) services; 3) works consultancy; and 4) works.

The RNP aims to gather legal and financial information on suppliers interested in contracting with the public administration. The information held on RNP can be accessed by public purchasers, but not by the general public.

Companies must sign up to the appropriate register for their activity and can only bid for tenders for that register. For a fee, a supplier can be registered in one or more than one registry, however. Registration consists of providing legal and financial information, and is done entirely online.

In accordance with Article 46.4 of the PPL, public-sector entities can maintain their own internal databases or lists of suppliers but cannot make registration in them a condition of participating in their tenders.

The RNP centralises information on suppliers and allows contracting entities to check easily whether bidders will be able to execute a contract without the need to request additional documents.

3.3.3. Procurement process

The body in charge of procurement or the designated selection committee reviews the bids to verify if they comply with the minimum requirements, the evaluation and qualification requirements set forth the tender terms. While the steps of the tender process can vary according to the chosen tender procedure, the general procedure is as follows.

The **invitation to tender (convocatoria)** is published on SEACE (and, optionally, on the entity's own website), in accordance with Article 54 of the PPL. The invitation includes the tender terms and schedule for the public procurement process, as well as the estimated or reference amount for the contract, except when such an amount can remain confidential, as provided for by Article 34 of the RPPL. The decision to keep it confidential is taken by the body in charge of public procurement and is attached to the public procurement process file. The reference price is made known to the bidders when the contract is awarded.

Suppliers wishing to participate in the public procurement process must **register**, first on RNP, and then on SEACE (**registro de participantes**). The registration period opens the day after the invitation to tender is published and remains open until the deadline for the submission of tenders.

A stage of participant **enquiries and observations (formulación de consultas y observaciones)** to the tender rules follows, in accordance with Article 72(a) of the RPPL and using a process detailed in OSCE's Directive No. 023-2016-OSCE/CD regarding enquiries and observations. Enquiries are requests for clarification, while observations are alleged violations of public procurement laws and regulations, or any other rules and regulations related to the process. Enquiries or observations are submitted electronically through SEACE within ten working days after the start of the procurement process.

The procuring entity has up to five business days to: a) respond to enquiries and observations; and b) change tender terms to correspond to the answers to the enquiries and observations if necessary. Replies to any requests for clarifications and comments are issued in a document (*pliego de absolución*), which is published on SEACE along with the new version of the tender terms.

As set out in OSCE's Directive No. 009-2019-OSCE/CD regarding guidelines for the issuance of opinions, if participants do not agree with the responses to the enquiries or observations, they can appeal to OSCE, which will issue a binding opinion and publish it on SEACE within 12 working days (**absolución de consultas y observaciones**). OSCE's opinion must be justified and specify if revisions to the tender terms are needed. The opinion cannot be appealed and is mandatory for the procuring entity and the bidders. Tender terms may need to be adjusted to reflect OSCE's opinion.

The procurement process is placed on hold during the enquiries and observations phase.

Bidders **submit their offers (presentación de ofertas)** on SEACE once the enquiries and observations phase is finished, including the resolution of all appeals and OSCE opinions. Bids are then checked for **admissibility** by the procuring entity, with the requirements being: 1) the legal representative of the bidder has due power to submit the bid; 2) the bidder has provided a sworn affidavit that it is not prohibited from participating in the bid, as provided for in Article 11 of the PPL, and that its offer complies with the technical

specifications for the good, work or service; 3) a notarised consortium agreement, if the bid is by a consortium, has been submitted; and 4) the economic offer complies with the requirements set forth in the tender terms. If any admissibility requirement is not met, the offer will be rejected.

Offers that do not meet the required technical specifications are not admitted. In the case of works, offers that are not within the allowed range of the reference value – above a maximum price and below a minimum price – are likewise inadmissible. In procurement processes with a reserved reference price, for which the reference price is not published, offers do not have minimum or maximum prices.

Bids are **evaluated** in accordance with Article 51 of the RPPL, and then ranked. In the event of a tie between two or more offers, the ranking can be done by means of a draw and one is chosen randomly.

Once bid evaluation is complete and offers are ranked, the two offers with the highest scores are checked for compliance with the **qualification** requirements, which are:

- 1) **legal capacity:** existence, operation, ability to carry out the economic activity
- 2) **technical and professional capacity:** strategic equipment and infrastructure, expertise of key staff
- 3) **experience**
- 4) **economic solvency**, in particular for the execution of public works.⁷

Any ranked offer that does not meet the qualification requirements is rejected. In accordance with Article 75 of the RPPL, if the first of the selected bidders does not comply with the qualification requirements, the procuring entity must check other bidders, until at least two are qualified, unless only one bidder remains. In the case of works, the selection committee must identify at least four qualifying bidders.

In the procurement of consulting services, the order of the evaluation and qualification phases is reversed, and compliance with bidder qualification requirements is checked first, and bids evaluated afterwards, presumably because bidders' qualifications are particularly important for such types of services.

During admission, evaluation and qualification stages, a procurer may request that a bidder corrects mistakes or omissions in its offer as long as any corrections do not alter the essence of the offer (Article 60 of the RPPL). The offer remains valid when a correction is requested if it is made within three business days. The correction must be done through SEACE.

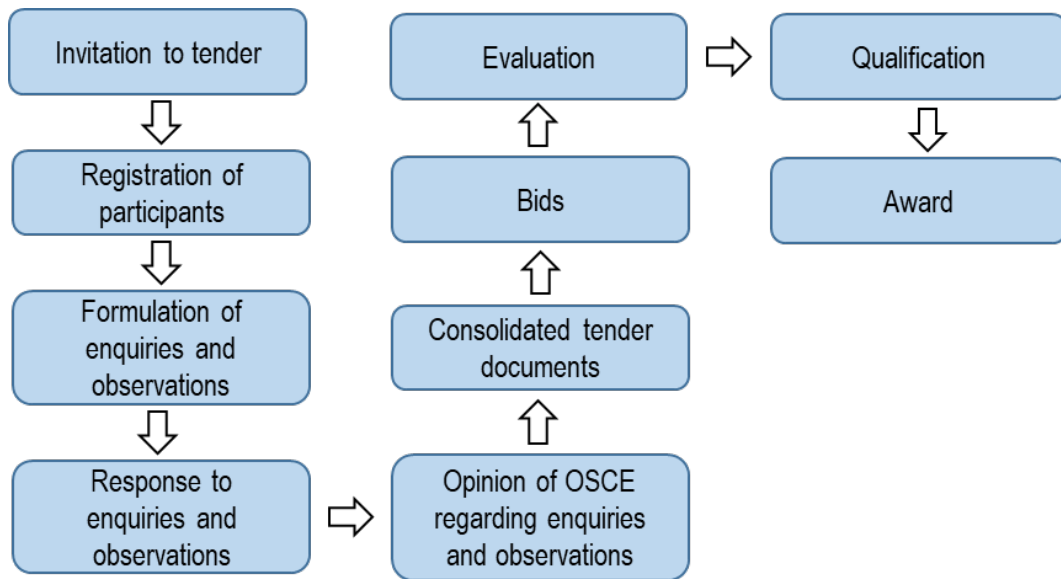
A procurer may reject offers if they:

- 1) are substantially lower than the estimated or reference value, and if, after receiving a detailed description of the offer, it determines that there are objective reasons to believe that the bidder will be unable to fulfil the contract
- 2) exceed the budget established for the selection process (Article 38 of the PPL). In procurements for works and works consulting, a procurer may reject offers that are 90% lower or 10% higher than the reference price.

In simplified awards, the duration of each phase is shorter.

The contract is **awarded**, and the decision published on SEACE.

Figure 3.1. Stages of the selection process



Source: OECD, based on the Public Procurement Law No. 30225.

The following figure is taken from a public bid for the procurement of medicines in the health network of Junin and shows the steps of the process on SEACE.

Figure 3.2. Example of public bid for the procurement of medicines in the health network of Junin, 2020

Cronograma		
Etapa	Fecha Inicio	Fecha Fin
Convocatoria	31/12/2019	31/12/2019
Registro de participantes(Electronica)	01/01/2020 00:01	03/02/2020
Formulación de consultas y observaciones(Electronica)	01/01/2020 00:01	15/01/2020 23:59
Absolución de consultas y observaciones(Electronica)	23/01/2020	23/01/2020
Integración de las Bases RED ASISTENCIAL JUNIN	23/01/2020	23/01/2020
Presentación de ofertas(Electronica)	03/02/2020 00:01	03/02/2020 23:59
Evaluación y calificación de ofertas RED ASISTENCIAL JUNIN	06/02/2020	21/02/2020
Otorgamiento de la Buena Pro RED ASISTENCIAL JUNIN	21/02/2020 08:30	21/02/2020

Source: SEACE, public bid for medicines of general use in the health network of Junin (Licitación Pública LP-SM-4-2019-ESSALUD/RAJUNIN-1).

In certain types of procurement, the stages vary slightly; for example, in the selection of individual consultants, there is no enquiries and observations stage, and qualification (stage 5) and evaluation (stage 6) are a single stage. The selection involves individual interviews, while the price is set by the procuring entity and not the candidates, which compete primarily on their professional expertise.

In price comparison, once an entity decides on this method and justifies the choice in a report, it will contact suppliers to receive a minimum of three price quotations (*cotizaciones*) for the required goods or services. After receiving at least three price offers and sworn statements from suppliers of their eligibility to contract with the public sector, it verifies that the winning supplier is registered in the RNP and awards the contract to the lowest-priced offer.

Electronic reverse auctions only have five stages:⁸

- 1) Invitation to tender
- 2) Participant registration
- 3) Submission of offers through SEACE
- 4) Auction period with pre-announced start and end times and a minimum duration of one hour
- 5) Contract award.

In the event of a tie, the system automatically carries out a draw to rank bidders randomly. If there are not at least two offers, the procedure is declared unsuccessful and a new procedure must be undertaken.

The procuring entity can declare any tender unsuccessful (*declaración de desierto*), where no offers or no valid offers are submitted (except in the case of electronic reverse auctions for which at least two valid offers are needed). Entities must issue a report explaining the reasons why the procurement failed. After an unsuccessful tender, a new procurement process can be launched, using the same tender method. In certain cases, the new procurement process can use a simplified-award procedure, which can allow EsSalud to buy services, works and good in a speedier manner.

The procuring entity may also cancel a selection process at any time prior to award for one of the following reasons: 1) *force majeure* or act of God; 2) if a procurement is no longer needed; or 3) if the budget originally foreseen for the procurement must be used for other purposes due to an emergency, which has been expressly declared (Article 30 of the PPL). The entity is not liable for damages caused to the bidders by the cancellation of the procedure for such reasons.

Once the award takes place, the procuring entity is obliged to grant bidders with access to the documents of the public procurement process (except for confidential information and offers that did not pass the evaluation stage), within a day of the bidder's request of access to information. Part of the information is public on SEACE and available without the need to make a request (Section 3.3.1).

3.4. Contract signature

When the amount of the contract does not exceed PEN 6 million, it is signed by the body in charge of the procurement (CEABE, the Logistics Department or the relevant decentralised unit). When the amount exceeds PEN 6 million, EsSalud's legal department must prepare the contract, which is then signed by EsSalud management. Chosen contractors may be required to provide performance guarantees, such as bank bonds and insurance policies, in accordance with tender documents. Performance guarantees usually amount to 10% of the contract value and must be maintained until the contract is fully performed.

All public procurement contracts must include an anti-corruption clause (Article 32 of the PPL, and Articles 115 and 138 of the RPPL), which is a statement by the contractor that neither it nor any of its partners,

members of the board, representatives, employees, advisors, or any related parties have offered, negotiated or made any payment, or offered any reward or other benefit with regard to the contract, either directly or indirectly. Any breach of the anti-corruption clause allows the procuring entity to terminate the contract, and launch civil, criminal and administrative remedies actions against the contractor. There is no provision for an anti-collusion clause.

Article 147 of the RPPL states that a contractor may seek to subcontract up to 40% of the value of a contract, unless otherwise determined in the procurement process, or for essential services that are linked to the reasons for choosing the specific contractor. For this reason, subcontracting cannot be used in the case of selection of individual consultants. The procuring entity must approve in writing all subcontractors within five business days of receiving a request. The full contract cannot be transferred to another company except in a few determined cases, such as sale of business, merger or spin-off. All subcontractors must be registered in the RNP and not be prohibited or debarred from contracting with the state.

Notes

¹ Where a medicine is protected by a patent, it is not possible to acquire a bio-equivalent, generic or bio-similar version of it.

² "Lineamientos para realizar Estudios de las Posibilidades que ofrece el Mercado y Determinación de los Valores Referenciales en el Seguro Social de Salud – ESSALUD" https://ww1.essalud.gob.pe/compendio/pdf/0000002601_pdf.pdf.

³ The power of adopting the PAC has been delegated to the Logistics Department by EsSalud's Executive Presidency based upon Decision No. 167-PE-ESALUD-2019, which modifies the Decision of EsSalud's Executive Presidency No. 239-PE-ESSALUD-2016.

⁴ According to the 18th final additional provision of the PPL: "Exceptionally, the acquisition of goods by the governing body of the National Health System to satisfy the needs of the users of the system may be carried out with suppliers non-domiciled in Peru, provided that it can be shown that such contracting is more advantageous. Contracting must be carried out in accordance with international commitments in force signed by the Peruvian state and is subject to supervision by the Organismo Supervisor de las Contrataciones del Estado (OSCE). The governing body of the National Health System is obliged to use the Sistema Electrónico de Contrataciones del Estado (SEACE) to register the contracts it carries out. This provision is applicable to Seguro Social de Salud (EsSalud), for the acquisition of pharmaceutical products or medical devices."

⁵ Directiva GG No. 02-CEABE-ESSALUD-2019-UV.01, Directiva para la Adquisición de Productos farmacéuticos o Dispositivos Médicos con Proveedores No Domiciliados.

⁶ Sixth Transitory Supplementary Provision of the RPPL.

⁷ Article 49.2 of the RPPL.

⁸ Directiva No. 006-2019-OSCE/CD, Procedimiento de Selección de Subasta Inversa Electrónica.

4 Competition in procurement and competition-law enforcement in Peru

Section 4.1 of this chapter looks at the importance of competition in public procurement. Section 4.2 provides a brief overview of the main forms of bid rigging. Section 4.3 describes Indecopi's law-enforcement activities and its initiatives to prevent and detect bid rigging.

4.1. The necessity of competition in public procurement

The primary objective of procurement is to achieve value for money either through lower prices or better-quality products. Public procurement can only be considered successful when bidders genuinely compete and set their prices and terms independently.

One of the key risks to the integrity, effectiveness and fairness of public procurement is agreement by bidders or potential bidders that should be competing for the tendered contract to fix prices, allocate markets or customers, and restrict output, increasing profits for themselves and reducing benefits for the public sector.

As a result of collusive agreements, buyers pay higher prices and receive lower-quality goods or services than they would in a market where competition was unrestricted. According to certain economists, conservative estimates of collusive price overcharge – the difference with the price that would have been obtained in a competitive market – is 18.7% to above 20% (Connor, 2014^[9]) (Smuda, 2015^[10]). In a case prosecuted by Mexico's competition authority, COFECE, a cartel led to an estimated overcharge of 57.6% in the price of insulin products bought by the Mexican Social Security Institute (IMSS), with estimated damage amounting to MXN 622.7 million.¹

It is therefore crucial to keep procurement collusion-free and effective through pro-competitive tender design and the detection and punishment of cases of bid rigging.

Box 4.1. IMSS insulin case, Mexico

In 2006, the Mexican Social Security Institute (IMSS) made structural changes in its tender procedures to procure medicines and medical supplies, consolidating its procurement and allowing foreign bidders to participate. As a result, new players entered the tender process and significantly lowered prices for two products: human insulin and saline solutions. This drop drew the attention of IMSS and Mexican competition authority COFECE to earlier patterns of possible bid rigging: winning bids of main bidders had been almost identical, and bidders appeared to have presented cover bids and taken turns in winning contracts. With the collaboration of IMSS, COFECE began an investigation that focused on the tender procedures for human insulin and saline solutions that took place between 2003 and 2006.

COFECE collected economic evidence showing that four pharmaceutical companies rigged bids for human insulin, and that three pharmaceutical companies rigged bids for saline solutions. COFECE's economic analysis confirmed the existence of a collusive pattern: winning and losing bids had oscillated within the same range, with only a variation of a few cents. It was clear that the competitors had taken turns at winning or losing by using cover bids. The competition authority also used documents proving the existence of various communication channels used to rig bids between pharmaceutical companies.

The analysis was supplemented by economic analysis of certain market features that facilitate collusion like homogenous goods, repetitive bidding, multiple supply schemes, exchange of information between competitors, stable tender rules over the time, reference prices, and barriers to entry.

Based on the evidence it gathered, COFECE sanctioned the pharmaceutical companies for entering bid-rigging agreements on these IMSS tenders, and imposed fines of over MXN 21.5 million on each company. Several individuals were also sanctioned for participating in the illegal agreement on behalf of the pharmaceutical companies.

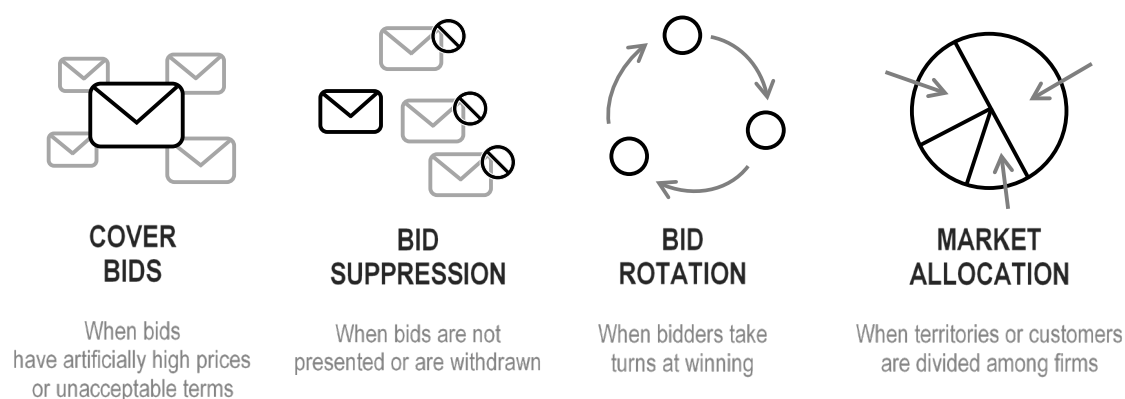
The sanctioned companies and individuals appealed the decisions in several instances, up to the Supreme Court, which confirmed the existence of the illegal agreement and the culpability of the pharmaceutical companies. It also endorsed the validity of the economic analysis performed by COFECE as indirect evidence of anti-competitive behaviour, such as the fact that higher prices were the result of the 72% profit margin obtained by the companies. When a new player entered the market in 2006 and 2007, the pharmaceutical companies' bids were significantly lower than in 2005.

Source: COFECE (2015), "Análisis de Práctica Monopólica Absoluta: Colusión en licitaciones públicas de compra de medicamentos para el IMSS", www.cofece.mx/wp-content/uploads/2017/11/HISTORIA_IMSS_080415.pdf.

4.2. Usual forms of bid rigging

There are multiple ways to rig a bid. While the following are among the most common, they are not mutually exclusive and can occur simultaneously.

Figure 4.1. Different forms of bid rigging



Source: (OECD, 2009^[4]).

Bid-rigging schemes often involve a simulation of competition. For instance, cover bids involve bidders submitting an offer that they know cannot win, because either the bid includes unacceptable terms or the price is known to be too high. In bid suppression, a supplier agrees with its competitors not to submit a bid or, after having participated in the early stages of the tender process, agrees not to submit a final bid. In bid rotation, cartel members continue to bid for different contract opportunities, although they take turns in winning. In a market-allocation scenario, cartel members may divide the market (for example, into geographical areas, subsectors or by customers), and decide in advance which firms should win in each market segment. Other cartel members then decline to participate in the bidding process or submit cover bids. These techniques are not mutually exclusive. For instance, cover bidding may be used in conjunction with a bid-rotation scheme.

Box 4.2 shows a case where several forms of bid rigging were present.

Box 4.2. Bid rigging in the railway electrification and electromechanical equipment markets, Spain

In 2016, following a leniency application by Alstom Transporte, the Spanish competition authority, Comisión Nacional de los Mercados y la Competencia (CNMC), began an investigation of the market for the production, installation, supply and maintenance of railway-electrification systems and electromechanical equipment.

The CNMC carried out three sets of inspections, in July 2016 and January and May 2017, based upon the suspicion that various companies had entered into anti-competitive agreements with the aim of manipulating tenders. The investigation was carried out under the Spanish Competition Act 15/2007 (Ley de Defensa de la Competencia, LDC) and Article 101 of the Treaty on the Functioning of the European Union (TFEU). In May 2017, the CNMC opened proceedings against 25 companies. It found that over 14 years, 15 companies had operated 3 different cartels in tenders organised by state-owned railway infrastructure provider Administrador de Infraestructuras Ferroviarias (ADIF) in the conventional and high-speed national rail network.

The **first cartel** involved **cover bidding**: 13 of the companies agreed to share 24 tenders with a total value of EUR 837 million for the electrification and maintenance of high-speed railway line Alta Velocidad Española (AVE) between 2008 and 2016. One of the agreements was called "Micro-Macro",

in which the companies agreed to share equally several public contracts through different joint ventures created by the cartelists. Under these agreements, the companies awarded a public contract would share out a part of the production and profit margin to the unsuccessful entities that had submitted dummy bids.

The **second cartel** involved **bid rotation**: 10 firms manipulated the tenders for the electrification of conventional railway lines between 2002 and 2016, adopting agreements for at least 239 tenders. Of these, 173 were awarded to companies involved in the collusion with a total cost of EUR 134 million. Executives from the different businesses drafted and signed an agreement, which included the method by which tenders would be shared and the compensation mechanisms for those businesses not allocated a tender contract.

A **third cartel** used **cover bidding**: Alstom Transporte and Indra agreed to share public procurements and one private tender for the building, supply, installation and maintenance of electromechanical equipment for high-speed lines between 2013 and 2015. Both companies agreed to participate in tenders in which one of the companies submitted a dummy bid. In 2015, Elecnor joined the cartel. The firms managed at least 7 contracts with a budget of EUR 84 million.

Key evidence for the case included documents specifying the agreements; spreadsheet files recording the contracts allocated to each firm and their values; and examples of electronic communications between firms.

In March 2019, the authority imposed EUR 102 million in penalties on 14 companies and sanctions of EUR 510 000 on 11 executives for rigging bids in public tenders for rail electrification and electromechanical infrastructure. The CNMC exempted whistle-blower Alstom Transporte, its parent company and executives from penalties totalling EUR 8.9 million and reduced the fine for Siemens and its parent company by 45%.

The CNMC announced that it would ban the cartelists from public contracts and referred its decision to the National Consultancy Board for Administrative Contracting.

Source: CNMC (2019), "Resolución: Expte. S/DC/0598/2016 Electrificación y Electromecánicas Ferroviarias", www.cnmc.es/sites/default/files/2380080_0.pdf.

Companies engaged in bid rigging use different mechanisms to allocate their collusive profit in each bid-rigging scheme. In market allocation, for instance, the sharing of illegal gains is ensured by dividing the market, with each member profiting from its appointed geographic area or customers without competition. When cartel members are involved in cover bids or bid suppression, the losing bidders can be rewarded in different ways, including lucrative subcontracts from the winning bidder for parts of the tender or direct payments, often for fictitious "rendered services".

4.3. Indecopi's enforcement and advocacy role

Competition-law enforcement plays a major role in the prevention, detection and punishment of bid-rigging schemes. In Peru, it is entrusted to Indecopi, a specialised, legally separate public body attached to the Presidency of the Council of Ministers with functional, technical, economic, budget and administrative autonomy. Its objective is to promote free and fair competition, protect consumer rights and safeguard intellectual property rights, in accordance with Legislative Decree No. 1033/2008 and the Legislative Decree No. 1034 or Competition Act.

4.3.1. Indecopi's competition-related structure

Indecopi has three internal bodies that deal with competition: the Directorate for Competition Investigations and Advocacy (Dirección Nacional de Investigación y Promoción de la Libre Competencia), the Commission for the Defence of Free Competition (Comisión de Defensa de la Libre Competencia) and the Competition Division of Indecopi's Tribunal (Sala especializada en Defensa de la Competencia). The Directorate for Competition investigates cases and proposes sanctions for breaches of the Competition Act and conducts market studies. The Commission for the Defence of Free Competition, a collegiate body comprising four members, decides on cases and the imposition of sanctions. The Competition Division of the Tribunal hears appeals against the Commission's decisions. There is also an Economic Studies Office, which advises other bodies on economic issues and participates in market studies (OECD, 2018^[11]).

In 2020, Indecopi's budget was PEN 9 million.² Forty-one employees were working specifically on competition matters: 19 in the Directorate for Competition; 4 on the Commission for the Defence of Free Competition; 18 in the Competition Division of the Tribunal (13 technical staff and 5 tribunal members); and 2 economists in the Economic Studies Office.

4.3.2. Indecopi's enforcement against bid rigging

Bid-rigging schemes are outlawed in Peru under Article 11 of the Competition Act, which states that agreements, decisions, recommendations or concerted practices carried out by competitors, with the purpose or effect of restricting, preventing or distorting free competition, are illegal. It contains a sample list of conducts and practices that can be considered as collusive, with certain, including bid rigging, prohibited outright: their existence is sufficient to justify prohibition and punishment, without examining their effects (OECD, 2018^[11]).

Bid rigging is an extremely serious infringement that can be sanctioned with fines of up to 12% of an infringing company's turnover during the previous year.

Enforcement against bid rigging in public procurement in Peru has been scarce. Indecopi has only issued decisions in three cases: two in the healthcare sector based on complaints by EsSalud about haemodialysis and oxygen supplies, and one concerning textbooks for schools. The oxygen and textbooks cases are described in Box 4.3; the haemodialysis bid-rigging case in Box 5.6.

Box 4.3. Indecopi sanctions against medical-oxygen cartel and textbook-printer cartel, Peru

Medical-oxygen case

In 2010, Indecopi issued a decision declaring that three companies had infringed the Competition Act by allocating markets in EsSalud public procurement procedures for the purchase of medical oxygen between 1999 and 2004.

Indecopi found that in the scheme one company (Aga) had been allocated the northern region of the country, a second (Messer) the central region, and a third (Praxair), Lima and the southern region, despite all three companies being capable of supplying nationally. Indecopi found that the winner for each region had made an offer of approximately 110% of the reference value, while the other companies either did not participate or made offers exceeding 110%. After 2004, the companies started to compete and win other regions by offering prices of approximately 70% of the reference value.

In view of the bid-rigging nature of the infringement and the importance of medical oxygen for public health, among other factors, Indecopi considered that the infringement was extremely serious and

imposed fines of the equivalent of USD 7.4 million. On November 2015, a first instance court confirmed the decision of the Indecopi Tribunal; this was reconfirmed by the Supreme Court in June 2020.

Textbook-printer cartel

In 2021, Indecopi ruled that five companies and eight individuals had infringed the Competition Act by rigging public procurement procedures for textbook-printing services for the Ministry of Education and the National Institute of Statistics and Informatics. The investigation was initiated pursuant to a leniency application.

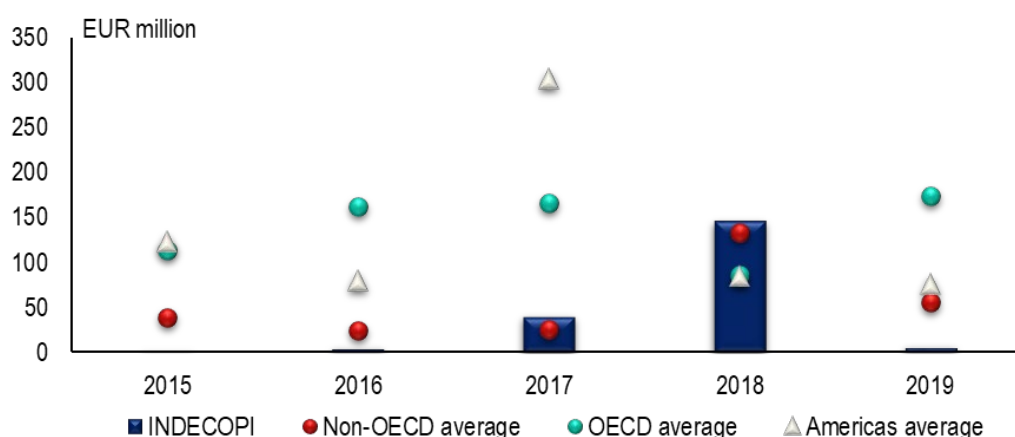
Indecopi found that, between 2009 and 2016, the companies' representatives met to agree the sharing of contracts for the procured items and to allot them to each company. This involved certain companies agreeing to lose by not submitting bids or submitting bids that they knew would not win.

Indecopi imposed fines amounting to over PEN 26 million on the companies and the individuals. Indecopi also ordered the companies to implement a competition-compliance programme, based on the recommendations contained in Indecopi's "Guidelines on Antitrust Compliance Programmes" (Box 9.7).

Source: Indecopi (2010), "Expediente 002-2008/CLC – 051-2010/CLC-Indecopi", www.indecopi.gob.pe/documents/20182/143803/Res051-2010.pdf, and Indecopi (2020), "La corte suprema de justicia ratificó la sanción impuesta por el Indecopi al cartel del oxígeno medicinal", www.indecopi.gob.pe/en/-/la-corte-suprema-de-justicia-ratifico-la-sancion-impuesta-por-el-indecopi-al-cartel-del-oxigeno-medicinal. Indecopi (2021), "Expediente 002-2019/CLC – Resolución 015-2021/CLC-INDECOPI, 5 de mayo de 2021", <https://img.lpderecho.pe/wp-content/uploads/2021/05/Resolucion-015-2021-CLC-Indecopi-LP.pdf>.

Figure 4.2 compares the fines imposed by Indecopi between 2015 and 2019 in cartel cases – bid rigging and other cartel offences – against the average fines imposed by competition authorities in OECD member states and non-member states over the same period.

Figure 4.2. Cartel fines imposed by Indecopi and average fines in OECD, non-OECD and Americas, 2015-2019



Note: Data based on the 50 jurisdictions in the CompStats database that provided data for five years. Fines are in 2015 EUR (non-euro currencies are converted using 2015 official exchange rates on 31 December 2015) to eliminate currency fluctuations distorting fines changes.

Source: OECD CompStats Database, <https://stats.oecd.org>.

After Indecopi has issued a decision concerning a serious infringement and the appeals process has been exhausted making it final, OSCE registers the offender in a debarment list that forbids it from participating in any tender for one year. The PPL did not provide for such a list, and debarment from tenders was only a sanction under the Competition Act, so Indecopi successfully proposed amending the PPL to bring it in line with competition-law enforcement measures (OECD, 2018^[11]). The PPL now includes a provision for the creation and operation of a debarment list of companies convicted of bid rigging and prohibited from participating in public procurement, although no debarment has yet been imposed, as no decision has become final since 2018. During the fact-finding mission, stakeholders pointed out that there are doubts as to whether in practice the debarment would apply automatically or discretionarily. For instance, discretion may be needed to assess how debarment would affect the number of companies in the public procurement market to ensure that it remained competitive and sufficiently supplied

Indecopi has three main tools to detect bid-rigging infringements.

- 1) **Data analysis on past public procurement processes**, in particular, factors such as the number of bids and prices; trends; post-award behaviour by bidders (such as subcontracting); the nature of procured items (homogeneous or not); market structure; and tender design.
- 2) A **leniency programme** under which companies and natural persons that have participated in a cartel can report their behaviour to Indecopi and provide information in exchange for full immunity from sanctions if the cartel has not been detected, or partial immunity, if the cartel has already been detected by Indecopi. The exact reduction of sanctions depends on whether an investigation has formally started, the value of the information provided, and whether any prior leniency applications exist for the same cartel. It is unclear whether successful leniency applicants can be exempted from debarment. Indecopi has issued guidance on its leniency programme, *Guía del Programa de Clemencia*.³
- 3) **Complaints from injured and third parties**. Injured parties for bid rigging are typically public purchasers. Indecopi has a reward programme for third parties through which natural persons providing decisive information during a cartel investigation can be financially rewarded with payments of up to PEN 400 000. Whistle-blowers' identities are kept confidential. The reward programme does not apply to civil servants in relation to information obtained in the context of their work. Indecopi has issued guidance on the reward programme, *Líneamientos del Programa de Recompensas*.⁴ Inter-institutional co-operation between public purchasers, like EsSalud, and Indecopi is addressed in Section 9.2.

Indecopi may also carry out dawn raids, which are unannounced visits to companies' premises, to seize relevant evidence. Dawn raids do not require a warrant, except in rare cases when a company opposes Indecopi's access to its premises, but companies usually do not resist.

4.3.3. Indecopi's advocacy initiatives

Alongside its competition-law enforcement, Indecopi produces advocacy initiatives to promote competition in public procurement and raise awareness of bid-rigging costs, and good practices in the prevention and detection of collusion.

The 2018 report, *OECD-IDB Peer Reviews of Competition Law and Policy: Peru*, recommended that Indecopi should not only prioritise enforcement against bid rigging across the whole public sector, but also engage in wide-ranging advocacy, training and awareness-raising efforts (OECD, 2018^[11]). Since then, Indecopi has indeed engaged in advocacy initiatives (Section 9). Importantly, Indecopi organises training sessions about detecting bid rigging for public procurement authorities, and in 2018, it issued guidelines on fighting collusion in public procurement (*Guía para Combatir la Concertación de las Contrataciones Públicas*), to encourage the prevention, detection and sanction of bid rigging (Indecopi, 2018^[12]).

Notes

¹ See, http://www.cofece.mx/cofece/phocadownload/PlaneacionE/imss_evaluacion_ex-post.pdf.

² The PEN 9 million budget corresponds to Indecopi's competition division. In 2020, the budget for the whole organisation (including the divisions dealing with intellectual property, consumer protection, insolvency, bureaucratic barriers, and competition) was PEN 194.3 million.

³Indecopi (2017), *Guía del Programa de Clemencia*, www.indecopi.gob.pe/documents/20182/438150/Gu%C3%ADa+del+Programa+de+Clemencia/bacfcc6a-4637-6581-e9fd-de2271646a5c.

⁴Indecopi (2019), *Lineamientos del Programa de Recompensas*, www.indecopi.gob.pe/documents/51771/4402954/ESP+Lineamientos+del+Programa+de+Recompensas

Part II – Alignment of EsSalud’s procurement regime with OECD good practices

5

Designing procurement based on good planning and sufficient information

This chapter looks at procurement planning (Section 5.1) and market research (Section 5.2) and provides recommendations to EsSalud based on OECD research and good practices.

5.1. The necessity of public procurement planning

With appropriate public procurement planning, public bodies can establish their actual procurement needs and adopt procurement strategies that will fulfil these needs on better terms, higher quality and lower prices. Transparent procurement planning also gives potential suppliers visibility about the products, services or works that will need to be procured, enabling improved planning.

The planning process at EsSalud is detailed in Section 3.1. EsSalud's core planning instrument is its PAC annual plan, which outlines its needs for goods, services and works over the following year.¹ Each line of the PAC corresponds to a specific type of good, service or work² and indicates the type of procurement procedure that will be used – such as public bid, public contest, simplified award – the estimated value of the procurement, and the estimated date for calling the process. OECD fact-finding noted that EsSalud's PAC for 2021 does not provide complete information for a significant number of goods, services and works, with information about the proposed procurement procedure and date for the process missing.

The PAC is only published as a low-resolution PDF, which makes its analysis a challenge. It should be published in a more user-friendly and searchable format to allow potential suppliers and interested parties, include civil-society actors, to analyse it more easily.

For the period 2019-2021, EsSalud's PAC was only adopted early in January of the year to which it applied; for example, the 2021 PAC was only adopted on 12 January 2021,³ and in previous years, at a significantly later date.⁴ In order to turn the PAC into an effective planning tool, EsSalud should publish it as early as possible, ideally before the start of the year to which it applies.

During the fact-finding, the OECD was informed that EsSalud's PAC – like other public bodies' – is frequently amended during the year. While amending the PAC may be justified in some cases – such as unexpected new needs due to a health emergency, like the COVID-19 pandemic – frequent amendments undermine the benefits brought by procurement planning. Stakeholders contacted during the fact-finding mission pointed out that these amendments are often the result of inefficient planning and mentioned that resulting procurement processes frequently consisted of low-value contracts carried out locally and through direct awards. Disaggregated demand and non-competitive processes are also likely to result in higher prices for EsSalud than competitive centralised tenders.

Good planning (and by extension, effective drafting of annual procurement plans) requires procurement officials to have at their disposal the professional advice, support and resources that allows them to organise projects and estimate their procurement costs, and so ensure projects are time-planned, coordinated and fully funded when they begin (OECD, 2009^[13]). EsSalud should invest resources in planning as any investment is produce better project programming and risk management, and increased budget savings.

The importance of planning is recognised globally, as illustrated by the guidelines issued by the Spanish Competition Authority on this matter (Box 5.1).

Box 5.1. Guidelines on planning from a competition perspective, Spain

Since 2019, Spanish Competition Authority CNMC, has been updating and expanding its *Public Procurement and Competition Guide*, which was first published in 2011. The work plan for this undertaking involves a systematic process that follows the phases of public procurement: planning, preparation, award, execution, and evaluation of the results. The purpose is to focus on the competition concerns that might arise in each of the stages of the procurement cycle.

“Phase I: Planning Public Procurement”, the result of the analysis of the first stage from a competition point of view, was adopted by the CNMC on 16 December 2020 and made public in January 2021. The CNMC acknowledged that a long-standing shortcoming of public procurement in Spain has been a lack of proper planning and guidelines to public entities on the matter, which led to the CNMC deciding to conduct in-depth research on procurement planning.

The CNMC highlighted the significance and advantages of planning when managing public procurement and the benefits of proper planning in terms of enhancing efficiency and competition. Planning promotes transparency and facilitates the access of operators, particularly SMEs, to tenders.

“Phase I: Planning Public Procurement” provides recommendations to public agencies on how to implement a proper planning process through different steps. The guidelines and recommendations released by CNMC are based on the information gathered from two competition-advocacy initiatives: a public consultation about the subject (63 contributions were received and published), and an international conference, “Planning as an essential requirement to promote competition and efficiency in public procurement”, held by the CNMC in December 2019.

Source: CNMC (2020), *G-2019-02 Guide to Public Procurement and Competition – Phase 1: Planning Public Procurement*, www.cnmc.es/sites/default/files/3373875_9.pdf; Conferece “Planning as an essential requirement to promote competition and efficiency in public procurement”, www.cnmc.es/jornada-la-planificacion-como-requisito-imprescindible

5.2. Building market intelligence

Market intelligence is information on the characteristics of specific goods, services or sectors of economic activity. This type of research helps procuring entities understand supply solutions and capacity, and produce technically accurate design tenders that take into account alternative and innovative solutions, and foster competitive bidding, while reducing the likelihood of collusion among bidders (OECD, 2019^[14]).

Decisions that benefit from market intelligence include technical specifications of procurement processes; budgets or reference prices; whether contracts should be tendered in a single for multiple lots; whether demand should be aggregated; and which specific tender procedure to use (OECD, 2019^[14]).

Information that market research should gather includes:

- 1) suppliers present in the market, including new entrants and new potential entrants, their location, size, capabilities, available capacity, and previous performance
- 2) available goods and services, including the latest innovative solutions and international developments, prices, discount policies, delivery conditions and other terms and conditions of sale
- 3) local conditions of supply and demand that might inform the tender design, including composition of lots or contract awards by geographical zones
- 4) market characteristics that could make bid rigging more or less likely, such as levels of transparency in the bidding market, supplier numbers, and barriers to new entry.

The basic elements of market intelligence are detailed in Box 5.2.

Box 5.2. Elements of market intelligence

Supply market analysis provides a **strategic understanding** of:

- 1) how a market functions
- 2) a market's direction, including technological developments
- 3) a market's competitiveness
- 4) a market's capability, capacity and performance
- 5) key suppliers, their market shares, and risks of collusion
- 6) how a market can be developed to meet customer requirements better
- 7) how pricing works in a market, such as its cost structures and recent price trends
- 8) market risks and how to mitigate them
- 9) the probability of market failure.

The **outputs** of market analysis for tender procedures include:

- 1) planning and budgeting procurement activity
- 2) the design of tender documents that match public entities' needs with suppliers' available solutions, including relevant and correct specifications, and evaluation and award criteria
- 3) the choice of the correct procurement procedure and strategy, both in terms of how the market currently operates and its future, in relation to new entrants or innovative technology
- 4) structuring public tenders to obtain healthy competitive bids
- 5) procurement methods that do not negatively affect the supply base.

Key outcomes are:

- 1) improved value for money
- 2) identification and management of supply-related risks
- 3) increased and fairer opportunities for suppliers.

The benefits of supply-market analysis increase in proportion to the degree of business risk and expenditure on goods or services.

Source: OECD (2016), *Improving ISSSTE's Public Procurement for Better Results*, www.oecd.org/publications/improving-issste-s-public-procurement-for-better-results-9789264249899-en.htm

5.2.1. Who conducts market research?

A growing trend in OECD countries is to entrust market research to category managers familiar with specific products and certain sectors of economic activity (OECD, 2016^[15]). The OECD recommends either creating specialised market-research departments inside contracting entities or ensuring that public procurers have sufficient resources and support to conduct thorough market analysis through existing structures. Teams in charge of market research, in whatever structure they belong to, should have staff knowledgeable about market developments and innovations in the market, the necessary budget and IT tools, such as access to specialised industry websites.

The two EsSalud departments entrusted with market research, the Logistics Department and CEABE, are specialised in procurement. Despite there being no specialist career for public procurement officials in Peru (as procurement is not a professional category), all officials dealing with public procurement need to be certified by OSCE. They are assessed and must meet specific standards concerning their experience and education.

Market surveys are carried out by teams of public officials with professional experience, who individually or as a team understand internal needs and requirements and market conditions. There are approximately 30 people working on market research in CEABE. Market research is also carried out by other teams, about which the OECD has no data. It may be useful to centralise market research in a central EsSalud department, like CEABE.

Internationally, hiring external consultants to conduct market research is common practice when public buyers lack the relevant expertise (OECD, 2016^[15]). If EsSalud identifies a necessity for external consultants for specific specialised market research, it should recruit them competitively, require them to sign confidentiality agreements, and report any conflicts of interest, such as current or prior engagements and professional or other relationship with suppliers.

5.2.2. The scope of market research

According to Article 32.3 of the RPPL, the purpose of market research is to establish the reference or estimated value, determine if there are potential suppliers and how many, and consider whether the contract needs to be split among several suppliers.

At EsSalud, when a user unit requests a procurement process, then the Logistics Department, CEABE or a decentralised logistics unit – depending on the item to be procured – carries out market research that is focused primarily on prices. Essentially, market research seeks to determine the estimated value (*valor estimado*) for goods and services and the reference value (*valor referencial*) for works procurement.⁵ The Logistics Department, CEABE or decentralised unit can request support in order to calculate the estimated value from any unit within EsSalud.⁶ The reference value used for the execution of works is then included in the technical file. The RPPL does not specify how this amount should be calculated, noting simply that market research should take into account inputs, quantities and prices, overhead charges and profit.⁷

EsSalud's internal guidelines on how to carry out market research (Section 3.1) were issued under the previous PPL, but remain in force and have not been updated. Currently, neither the legislation nor EsSalud provide methodological guidance on carrying out market research for any market aspects other than price. Perú Compras, in 2018, issued guidelines on market research, which, while focusing mainly on price, also provided some insights on other aspects (see Box 5.3). Neither is there guidance on investigating market solutions and capacity that may lead to better tender structure, specifications and contract award criteria, such as splitting bigger contracts into smaller lots to encourage the participation of SMEs, or the bundling smaller contracts into one larger contract to attract bigger suppliers.

Peru should consider adopting guidelines on market-research methods that take into account future-looking market factors beyond price, including innovation,⁸ market entry, substitute products, security of supply, potential for expansion of existing production and delivery capacity and, in certain cases, possible foreign providers.

EsSalud should also monitor supply-side market developments, in particular, matters such as patent expirations and litigation, and the entry of new suppliers of single-source products. Monitoring would allow EsSalud to design tenders more likely to end with competitive procurement solutions.

Box 5.3. Perú Compras guidance on conducting market research

In 2018, Perú Compras issued a guidance document to help public purchasers conduct market research.

The document focuses on how to determine the reference price, discussing sources that may be used (such as price quotes, budgets, websites, catalogues, historical prices, and cost structures) and providing details on how and when to use each of them (for example, websites that may be used for non-complex goods). In the annexes, it also provides several tools to calculate the reference price (average or median value of the quotes provided by potential suppliers) and recommendations for which to use depending on the nature of the market (for example, in the case of industrial goods, the guidance recommends using, as a rule, the average of the quotes received).

The guidance also provides tips on how to ensure that requests for procurement do not contain any inconsistencies and are accurate. The document encourages officials to look at previous procedures to obtain insights, for instance, on how the technical specifications were drafted, the quantities purchased, the amount of the contract, and the delivery schedule. One of the document's annexes includes specific tips on how to review a request for procurement.

Source: Perú Compras (2018), *Recomendaciones y Buenas Prácticas para la Elaboración de Estudios de Mercado*, https://cdn.www.gob.pe/uploads/document/file/535671/RECOMENDACIONES_Y_BUENAS_PRACTICAS_ALTAS.pdf.

All these elements of market research are crucial to managing supply-related risks (such as low bidder participation), increasing competition, and creating opportunities to obtain value for money. EsSalud should establish an obligation to conduct market research that includes non-price factors and, if appropriate, consider co-operating with OSCE to issue guidelines on how to conduct market research in the health sector in particular.

Certain OECD countries provide contracting entities with guidelines on carrying out structured market analysis. A good example is the guidelines issued by the state government of Queensland, Australia (Box 5.4).

Box 5.4. Guidelines on supply-side market research, State of Queensland, Australia

Supply market analysis, a set of guidelines published by the Queensland state government, emphasises the importance of conducting solid supply-market analysis. It states that resources invested in this type of pre-procurement analysis are always more than offset by the benefits of improved value for money and reduced risk for the agency.

According to the guidelines, the steps for conducting a structured market analysis are the following.

- 1) Planning for supply-market analysis
 - a) Preliminary steps to **understand the need and business requirements for the product or service**, and to check whether a supply-market analysis has been recently conducted within government (or is planned) for the category of product or service under consideration.
 - b) **Development of a research plan** by defining a project schedule that outlines the key activities and timelines for finalising the analysis; clearly establishes the goals, objectives and scope of the analysis; identifies the human, financial and physical resources required to undertake the analysis; establishes a sound framework for undertaking the research; and finally, identifies potential information sources and research methods.

Components of a supply-market analysis

- a) **Market structure:** determining the relevant market or market segments; total market size; key suppliers in the market and their respective market shares; existing ownership structures in the market; and profitability of different suppliers.
- b) **Competition:** analysing how suppliers compete in the market, including the availability and current and future pricing of products and services; future trends; and the likelihood of competitors entering or leaving the market.
- c) **Supply chains:** investigating all parties involved in the process of creating a good or service – from inputs to production, distribution and marketing to end user – to analyse the supply chain and understand the different parties' added value; possible unnecessary costs; dependencies within it and their potential risks, and how they and other risks can be managed.
- d) **Substitute goods and services:** exploring substitute goods or services to investigate alternative ways of realising the agency's requirements.
- e) **A procurer's value as a customer (or buyer power):** understanding the procurer's value to the supply market and to individual suppliers to develop strategies based upon suppliers' willingness or reluctance to meet agency needs; this may identify how a contracting entity might improve its attractiveness as a customer, and so increase competition for its requirements.

Supply market analysis includes many examples to help procurement officials understand each step of the market research.

Source: Queensland Government, Department of House and Public Works (2018), *Supply market analysis*, www.forgov.qld.gov.au/_data/assets/pdf_file/0025/184192/procurementguidesupplymarketanalysis.pdf.

5.2.3. Sources of market research and engagement with suppliers

The SEACE database is the main source of procurement information for public purchasers, such as EsSalud. Free to access, it contains all public procurement processes and a large array of tender-related documents (Section 3.3.1). Unfortunately, documents are uploaded to SEACE in PDF format, which makes their analysis and any compilation of extracted information burdensome.

In general, market research should be based upon as many sources of information as possible. While historical information found in similar government contracts is a good starting point, it requires supplementing with other sources such as specialised publications, or private-sector contracts. Prior contracts may have resulted from non-competitive procedures or been affected by collusive agreements, or simply market conditions may have evolved; this reduces historical data's usefulness in market analysis by not accurately reflecting actual market conditions (OECD, 2019^[14]). Market research should also incorporate information on contract performance, such as product and service quality, and contract modifications.

During the fact-finding mission, certain stakeholders noted that market research lacks thoroughness and that a limited number of sources are consulted, perhaps due to the absence of relevant guidance or a minimum market-research content checklist.

EsSalud should engage with suppliers, early in the procurement planning process, as they often have more information than the procuring entity about costs, prices, market trends, products or services, and their substitutes. Early exchanges with suppliers can also maximise participation in the tender procedure by providing information on future procurement opportunities and allowing potential bidders the time to prepare their offers (OECD, 2019^[16]). Early-engagement mechanisms, which can range from requests for information, one-on-one consultations with suppliers,⁹ information meetings, industry and supplier days, can be extremely helpful to contracting authorities and improve the quality of technical specifications (OECD, 2016^[17]).

According to a 2018 OECD survey of 39 countries that assessed progress of the implementation of the OECD Recommendation on Public Procurement, 73.5% held regular dialogues with suppliers and business associations in a variety of institutional settings (OECD, 2019^[16]). Box 5.5 illustrates a selection of international experiences with supplier engagement.

Box 5.5. International experience with supplier engagement

In certain countries – such as Belgium, Norway or Hungary – business associations or chambers of commerce participate in institutional committees to discuss the overall procurement system.

In Ireland, the Office for Government Procurement engages with suppliers at six annual workshops.

Certain central-purchasing bodies, such as those in Italy and Korea, conduct formal and informal consultations directly with panels of suppliers. In France, “industry days” (*conventions entreprises-acheteurs*) allow buyers to meet directly with suppliers.

In Canada, requests for information are issued prior to tenders, while in Greece, the central purchasing body establishes bilateral dialogue with relevant suppliers selected from the Central Electronic Registry for Public Procurement depending on the goods and services to be procured. In Latvia, contracting authorities advertise pre-tender market consultation meetings on their websites. In New Zealand, “meet the buyers” events are organised for certain categories of suppliers, such as SMEs.

Source: OECD (2019), *Reforming Public Procurement: Progress in Implementing the 2015 OECD Recommendation*, OECD Public Governance Reviews, OECD Publishing, Paris, www.dx.doi.org/10.1787/1de41738-en.

To prevent specific potential competitors from identifying each other and creating the possibility of collusion, meetings with suppliers should include all market players (for example, during an industry day), not simply suppliers interested in a particular opportunity. This is even more important in markets more prone to collusion (see Box 9.1).

During the fact-finding mission, some stakeholders pointed out that EsSalud's technical specifications are sometimes similar to those of products offered by a specific supplier, therefore limiting competition to this specific supplier only. This might suggest that information provided by suppliers to EsSalud during market research has been insufficiently analysed. EsSalud should take care not to tailor tender terms exclusively or too closely to information provided by potential suppliers during the market analysis, but instead use a variety of sources and its own judgement to adapt tender terms to market reality and its own needs. This approach would also be consistent with Article 29 of the RPPL that stipulates technical specifications must not contain brands, commercial names, patents, designs or types that may cause the procurement to be directed to a specific supplier.

Internationally, there have been cases of suppliers co-ordinating information provided during the authority's market research to influence procurement decisions. During the fact-finding mission, stakeholders pointed out that this has occurred in Peru. Box 5.6 describes an investigation by Mexican competition authority COFECE into the manipulation of price quotes during the market-analysis phase of a procurement process and an Indecopi case in haemodialysis services concerns bid rigging at the pre-tender stage of setting the contract's reference value.

Box 5.6. Investigations into manipulation of quotes in market research, Peru and Mexico

Haemodialysis case, Peru

In 2016, Indecopi imposed a fine of approximately PEN 7 million on 34 companies supplying haemodialysis services to EsSalud after it found that they had colluded to manipulate prices in five public procurement processes between 2010 and 2012. It revealed that the companies had coordinated price quotations provided to EsSalud during its market research with the objective of increasing the reference value and ultimately obtaining higher prices in tenders (until 2018, purchasers were obliged to make reference values public). The companies also agreed between themselves not to participate in certain procurement processes, which led to their cancellation.

Indecopi estimated that had the price manipulation not been discovered, EsSalud would have suffered PEN 34.2 million in damages. A final judicial decision is still pending.

Media-monitoring case, Mexico

In 2018, COFECE imposed fines of over MXN 7 million on three companies and several individuals for rigging public-procurement procedures for media-monitoring services provided to a number of public bodies over the period 2012 to 2016.

COFECE found that the companies had agreed to: 1) manipulate the price quotations submitted during the market-analysis stage; 2) co-ordinate bids; and 3) strategically abstain from bidding in certain procurement procedures. When one company was awarded contracts for media-monitoring services, it rewarded the other colluding companies with subcontracts or assignments of related services.

COFECE estimated that the collusion resulted in an overcharge of 14.5%, which translated into damages of over MXN 3 million.

Source: Indecopi (2018), “La Sala Especializada en Defensa de la Competencia del Tribunal del Indecopi confirma sanción a 31 centros de hemodiálisis que concertaron precios en perjuicio de los servicios de EsSalud”, <https://repositorio.indecopi.gob.pe/bitstream/handle/11724/6194/NP%20180417%20SDC%20confirma%20caso%20Hemodiálisis.pdf>. COFECE (2018), “COFECE fines companies and individuals for collusion in public procurement processes in the market for media monitoring services”, www.cofece.mx/wp-content/uploads/2018/02/COFECE-05-2018-COFECE.pdf

Early consultation with suppliers should also be subject to publicity and transparency rules, which may include, for instance, publishing minutes or summaries of the outcomes of supplier meetings (OECD, 2019_[16]). However, the identities of suppliers should remain secret, as publishing them could facilitate collusive agreements by allowing potential bidders to identify their competitors and then attempt to collude. (The correct balance between the policy objectives of transparency and accountability and those of competition policy is addressed in more detail in Section 8.2.)

Box 5.7 shows how Chilean central purchasing body, ChileCompra, uses electronic means to ensure transparency in its consultation process with suppliers. Any dialogue with potential suppliers might also take into account the questions and points illustrated in Box 5.8.

Box 5.7. ChileCompra's supplier consultations

Before issuing a tender, Chile's central purchasing body ChileCompra carries out an open consultation process with suppliers, which it announces online at www.chilecompra.cl and on Twitter. The consultation aims to obtain information about prices, characteristics of required goods or services, necessary preparation time for bidders, and any other information that might contribute to a successful tendering process.

ChileCompra also has an online forum with questions and answers about each tender in advance of bid deadlines. This is particularly practical for possible suppliers who are geographically distant from Santiago, where ChileCompra's offices are located. It also ensures transparency and supports equitable treatment and fair competition.

Source: OECD (2016), "Country Case: Consultation with suppliers by the Chilean central purchasing body ChileCompra", Public Procurement Toolbox, www.oecd.org/governance/procurement/toolbox/search/consultation-suppliers-chilean-central-purchasing-body-ChileCompra.pdf

Box 5.8. Example questions when opening a dialogue with potential suppliers

- 1) Are you interested in this opportunity?
- 2) If not, why not?
- 3) Is the business model realistic?
- 4) Are the business aims realistic? Is the business attractive?
- 5) What do you see as the risks?
- 6) Can you give an early indication of cost, the major cost drivers, and how these might be minimised?
- 7) Can you give a broad indication of likely timescales?
- 8) Are there other, better approaches?
- 9) What added value in terms of sustainability could the potential supplier provide related to the contract's subject matter?
- 10) How can potential suppliers provide added value on sustainability and other issues over and above the regulations' requirements?
- 11) Can you share examples of good or bad practice in terms of how others have tried to secure these products or services?
- 12) What can we do to ensure clarity and improve the tendering process for potential suppliers?

Source: Scottish Government (2021), "Procurement Journey: Supply Market Analysis Example Questions – Route 3", www.procurementjourney.scot/supply-market-analysis-example-questions.

5.2.1. Exchanging information among public-procurement entities

EsSalud is allowed to share information concerning its market research with other public bodies; in practice, however, this seldom takes place. Similarly, EsSalud does not generally receive information from

other public purchasers or from relevant institutions such as OSCE, Perú Compras or Indecopi. During the fact-finding mission, stakeholders pointed out that public bodies rarely interact and co-ordinate.

EsSalud should start co-ordinating and sharing information with other public purchasers and other relevant institutions, such as OSCE and DIGEMID, for market data and analysis, as well as results from differently designed tenders; comparisons of the supplier pool participating in tenders for similar contracts and the prices offered; identification of suspicious bidding patterns across tenders run by different authorities; new products authorised in the market; and patent expirations. EsSalud should consider signing co-operation agreements with these stakeholders, including OSCE and DIGEMID.

Box 5.9 shows how contracting authorities from 17 levels of government in Argentina created a network to share relevant information. This network unites agencies at federal, provincial (regional), and municipal level and allows the sharing of their procurement experiences. It was founded with the aim of professionalising the public procurement function and integrating information to improve, modernise and bring greater efficiency to public procurement.

Box 5.9. Federal Network of Government Procurement, Argentina

In Argentina, each of the three levels of government – national, provincial and municipal – was able to adopt its own contracting regime, which resulted in inefficiencies for suppliers, contracting authorities, and citizens. Suppliers, for example, were faced with different contracting rules and e-procurement systems, and when providing goods, services and works in different provinces, were often required to resubmit the same documents for each procurement procedure. This increased costs for submitting bids and had a negative impact upon competition.

In 2009, contracting authorities from 17 levels of government created the Federal Network of Government Procurement (Red Federal de Contrataciones Gubernamentales). Its main objectives were to: 1) strengthen its members' contracting regimes; 2) share good practices; 3) promote capacity building; 4) establish co-operation and exchange of information mechanisms; and 5) promote law harmonisation.

The network meets regularly and invites officials or experts from other entities (such as the competition agency) to talk on relevant topics. Network members have reported that the meetings are useful and allow them to improve their procurement processes.

Source: OECD (2019), *Fighting Bid Rigging in the Procurement of Public Works in Argentina*, www.oecd.org/competition/fighting-bid-rigging-in-public-procurement-in-argentina.htm

From 2016 to 2018, OSCE published annual reports – *Estudios de Contratación Pública: niveles de competencia en el mercado estatal* – which were available on its website and gave insights into the intensity of competition in public procurement in Peru.¹⁰ The reports mentioned the number of bids submitted in procurement processes, disaggregating the results by procurement type, entity and region. OSCE should consider publishing these reports again and sending them to EsSalud, Indecopi, and other interested institutions.

5.3. Improving procurement data collection and analysis

EsSalud does not have a centralised procurement database that groups all procurement across all its departments. The main procurers, such as CEABE and the Logistics Department, keep their own databases.

EsSalud should set up a comprehensive database and feed it with relevant information concerning all its procurement processes, such as market research, bidder number, procured items, and prices. The information in these datasets should be detailed and reliable to enable different EsSalud departments to conduct analyses of procurement data, including contract-performance data.

OECD's experience in projects fighting bid rigging in public procurement in many different countries shows that reliable and comprehensive databases can improve understanding of the market and so help design procurements that maximise competition and lower collusion risks. Databases can also simplify the detection of bid rigging by giving a long-term overview of procurements and relationships between firms, their officials and shareholders, to detect and corroborate competition violations. These in-country projects have helped establish certain good practices on data collection and quality, usability, protection, storage and access (Box 5.10).

Box 5.10. Good practices to ensure user-friendly and relevant procurement databases

The OECD's in-country projects on fighting bid rigging in public procurement have helped identify certain good practices for data targeting and collection, quality and recording methods, usability, and access.

- 1) **Data targeting.** It is important to identify the purpose of any proposed analysis so that collected data will be fit for purpose. Doing this in advance will better inform the type and format of the data collected. Bodies that will use the data should be consulted, so that their requirements are included. All bid data and contract-performance data should be recorded.
- 2) **Data quality.** Good-quality data are crucial to producing useful and accurate results. Data input should ensure that data are recorded in a standard, consistent and error-free manner; for example, fields should be uniform, and checks for errors or discrepancies should be built into the data-input stage.
- 3) **Data usability.** Information should be stored in a searchable format that allows for easy handling and use (for example, in spreadsheets or databases rather than scanned images of contracts), and easy application of necessary filters and analytical tools.
- 4) **Data interoperability.** Databases kept across public authorities should be interoperable in terms of formatting and cross referencing to enable linking databases and cross-database screening for indicia of bid rigging.
- 5) **Data access.** Databases should have clear access rights for both data inputs and data extraction. In terms of outputs, full access should be granted at no cost to competition authorities for law-enforcement purposes.

Source: OECD (2018), *Fighting Bid Rigging in IMSS Procurement: Impact of OECD Recommendations*, www.oecd.org/daf/competition/IMSS-procurement-impact-OECD-recommendations2018-ENG.pdf.

Indecopi should have access rights to any procurement database that EsSalud establishes, so it can analyse data for suspicious patterns, and uncover and corroborate competition violations. Currently, Indecopi obtains procurement information from SEACE only.

5.4. Recommendations for action

To ensure that procurement is based upon appropriate information, the OECD has the following recommendations.

- 1) To make the PAC an effective planning tool, EsSalud should complete and publish it as early as possible – before the beginning of the year to which it applies – and amend it as few times as possible, as late publication and frequent changes undermine the benefits of procurement planning.
- 2) The PAC should be published in a user-friendly and searchable format, such as spreadsheets, and not as a PDF, to allow for easier and improved analysis of its contents.¹¹
- 3) Market research should be centralised in a single EsSalud department, like CEABE, and given sufficient resources.
- 4) Peru should consider adopting guidelines on minimum market-research content, including forward-looking supply factors beyond price. These factors can include innovation, market entry, foreign providers, the potential for expansion of existing production and delivery capacity. Market research should incorporate information on contract performance, such as delivery and quality, and contract modifications.¹²
- 5) EsSalud could consider updating its own guidelines on market research, which were issued under the previous PPL. New guidelines should include good practices used by other healthcare providers in Peru and abroad. If appropriate, EsSalud should consider co-operating with OSCE for these guidelines, eventually through a co-operation agreement.
- 6) EsSalud should monitor supply-side developments in the market, particularly matters such as patent expirations and litigation and in cases of originally single-source products, the entry of new suppliers. To this end, it could set up a co-operation agreement with DIGEMID or another relevant stakeholders.
- 7) EsSalud should engage with suppliers early in the procurement process, to find information regarding costs, prices, market trends, products or services, and their substitutes.
- 8) EsSalud should take care not to write tender terms that are too similar to information provided by potential suppliers during market analysis. There is a risk of suppliers colluding during market research or, if information is provided by a subset of suppliers only, that tender terms based on that information will favour them unjustifiably. EsSalud should find and use a wide variety of sources to adapt tender terms to market reality.
- 9) EsSalud should consider exchanging procurement-related information and experiences with other public purchasers and relevant institutions.
- 10) EsSalud should set up a comprehensive database and feed it with information from procurement processes across the entity, such as market-research elements, bidder numbers, procured items, and prices.
- 11) OSCE should consider republishing its annual reports on the intensity of competition in public procurement in Peru, *Estudios de Contratación Pública: niveles de competencia en el mercado estatal*, and distributing them to EsSalud and other interested institutions.

Notes

¹ Article 15 of the PPL, and Article 6 of the RPPL. For EsSalud's 2021 PAC, see www.essalud.gob.pe/transparencia/pdf/paac/PAC_ESSALUD_2021.pdf.

² Items are defined in a narrow way. Items of the same category (for example, tables) appear independently in the PAC if they have different specifications (for instance, different sizes).

³ See, www.essalud.gob.pe/plan-anual-de-contrataciones-pac/.

⁴ The 2018 PAC was adopted on 12 February 2018 and the 2017 PAC on 18 April 2017.

⁵ For framework agreements, Perú Compras has created an “electronic quotes system” (Cotizador Electrónico), a tool for obtaining price quotes and allowing public purchasers to estimate the price of products included in the framework agreements. Initially only available to public purchasers in Lima and Callao, it has been available nationwide since February 2020 and can be accessed on the Perú Compras website. According to Perú Compras, public purchasers previously needed 68 days to carry out pre-tender acts, including market research; with Cotizador Electrónico, this has been reduced to 1 day. See, www.gob.pe/institucion/perucompras/noticias/81511-peru-compras-implementa-el-cotizador-electronico-a-nivel-nacional.

⁶ According to Article 32 of the RPPL, a body that receives a request for support must provide assistance.

⁷ Article 34 of the RPPL.

⁸ An innovation is the implementation of a new or significantly improved product (good or service), process, marketing method, or organisational method in business practices, workplace organisation or external relations (OECD/Eurostat, 2005^[29]).

⁹ To mitigate corruption risks, more than one public official should attend these meetings, and written minutes of meeting should be kept.

¹⁰ The last annual report, *Niveles de Competencia en el mercado estado – Año 2018*, was published in December 2018; see, www.gob.pe/institucion/osce/colecciones/986.

¹¹ This recommendation should be implemented by both EsSalud and OSCE, which oversees SEACE.

¹² This recommendation should be implemented by OSCE and Perú Compras, with the participation of procurers such as EsSalud.

6 Maximising participation of genuinely competing bidders

Encouraging the participation of a sufficient number of bidders and the entry of potential competitors increases both competition and the likelihood that a procurement will be collusion-free. This chapter looks at ways that this can be achieved.

6.1. Prioritising competitive bidding

One method of limiting the risks of bid rigging is to ensure that a maximum number of credible bidders take part in public procurement processes. High rates of participation make collusion less likely, as the pool of bidders that would need to agree to a bid-rigging scheme is larger and agreement can be less easily reached (OECD, 2009^[4]).

In Peru, the PPL establishes free competition as one of the principles of public procurement (see Section 2.1), and stresses that public purchasers must promote supplier access and participation in procurement processes, while avoiding unnecessary and costly requirements and formalities. Public purchasers are prohibited from adopting actions that limit supplier competition.

All calls for tenders, as well as the tender terms, must be published on SEACE, except for price comparisons and direct awards. All public purchasers, including EsSalud, are obliged to use SEACE for their public procurement procedures, which creates a transparency of procurement opportunities that should attract bidders. The average number of bidders in EsSalud tenders is relatively low, at between two and three participants for each tender. Table 6.1 and Table 6.2 show which methods EsSalud used in 2019 and 2018, and the average number of bidders in each.

Table 6.1. Procurement methods used by EsSalud, 2019

Year	Regime	Procurement method	Quantity	Amount (millions, PEN)	Average number of bidders
2019	Public Procurement Law No. 30225	Simplified award	1 039	424.7	2.5
		Price comparison	43	2.2	3.2
		Public contest	189	663.5	2.6
		Direct award	144	374.6	1.0
		Public bid	179	476.6	2.2
		Electronic reverse auction	88	255.8	3.1
	Other regimes	Simplified award – Decree No. 1355	1	1.1	1.0
		International contracting	8	1.1	1.0

Source: CONOSCE, "Estadísticas de Contrataciones por Entidad", <https://portal.osce.gob.pe/osce/conosce/indicadores-del-mercado-estatal.html>.

Table 6.2. Procurement methods used by EsSalud, 2018

Year	Regime	Procurement method	Quantity	Amount (millions, PEN)	Average number of bidders
2018	Public Procurement Law No. 30225	Simplified award	838	196.7	2.1
		Price comparison	16	0.8	3.4
		Public contest	168	1 420.6	2.5
		Direct award	108	416.2	1.0
		Public bid	197	549.8	2.1
		Electronic reverse auction	84	181.4	3.5
	Decree No. 1017	Minor amount award	4	6.7	2.2
	Other regimes	Simplified award – Decree No. 1355	1	2.9	3.0

Source: CONOSCE, “Estadísticas de Contrataciones por Entidad”, <https://portal.osce.gob.pe/osce/conosce/indicadores-del-mercado-estatal.html>.

EsSalud should assess the reasons behind low levels of participation in its tender procedures and take measures to increase participation, such as those actions recommended in Section 6.10.

A low number of bids reduces the likelihood that public entities will find the best market solutions, while increasing the likelihood of bid rigging. Also, a higher number of genuine bidders can result in lower prices as evidenced in a competition assessment review carried out by the OECD in Romania (Box 6.1) and in a report issued by the Spanish Competition Authority in 2019 (Box 6.2).

Box 6.1. Correlation between bidder numbers and prices in the construction sector, Romania

In 2015, the OECD undertook a competition-assessment review of procurement rules applicable to the construction sector in Romania and identified certain choices by contacting entities, such as setting short deadlines for the submission of bids, that may lead to fewer bids.

The OECD performed a quantitative analysis and concluded that a higher number of offers led to a larger reduction of the award price compared to the estimated price. Larger contract values and longer time frames for bid preparation correlated to a higher number of submitted offers.

By extrapolating the results of the analysis to all construction procedures in 2014, and incorporating different factors, the OECD estimated that one additional acceptable bid in each of the construction procurement procedures could have produced on average EUR 418 million in total savings to procurers, while two additional bids could have yielded approximately EUR 871 million in savings.

Source: OECD (2016), *OECD Competition Assessment Reviews: Romania*, www.oecd.org/publications/oecd-competition-assessment-reviews-romania-9789264257450-en.htm.

Box 6.2. The Spanish Competition Authority's overview of public procurement in Spain

In 2019, Spanish competition authority CNMC issued a report evaluating the impact of more competitive procurement procedures on economic efficiency in Spain. The CNMC quantified the effect of the procurement procedure on the cost of a government contract.

The report showed that there was weak competition in public procurement in Spain with limited participation in a significant number of procedures: 34% of the procedures conducted by the central administration had a single participant, while 66% had three or fewer participants. Also, contracts for small amounts – which accounted for a significant share of all contracts – were often awarded without a prior procurement notice.

According to the report, the government paid, on average, 9.9% less for contracts tendered using an open procedure (for which all companies meeting the capacity and solvency requirements can submit bids), rather than a less competitive procedure (such as one that allowed only bids from pre-selected companies). The CNMC estimated that had the government used open procedures in all tenders,* it could have saved around EUR 1.7 billion in the 2012-2016 period. The report concluded that with each additional bidder the price paid by the government decreased by 2.1%.

* The report acknowledged that open procedures cannot be used in all procedures, and that there are circumstances in which other procedures may be more suitable. However, the CNMC stressed that non-open procedures should be used only in exceptional circumstances, given their economic cost.

Source: CNMC (2019), *E/CNMC/004/18: Overview of Public Procurement Procedures in Spain*, www.cnmc.es/sites/default/files/2797776.pdf.

The OECD Recommendation on Public Procurement encourages the use of competitive bidding as the standard procurement method and a restricted use of direct awards (OECD, 2015^[3]). Competitive bidding is the most effective way to obtain value for money. Genuine rivalry among participants who bid independently drives efficiencies, fights corruption, allows competitive outcomes, and can generate savings. For example, the use of competitive tendering by the Mexican Institute of Social Security (IMSS) over the period 2013-2017 resulted in prices 11.2% to 11.9% lower than those of direct-award tenders or those restricted to three suppliers only (OECD, 2018^[18]).

The procurement framework in Peru allows a contract to be awarded directly to a specific supplier in a small number of cases, set forth in Section 3.2. The framework for direct awards is clear, and exemptions to public tenders are strictly defined. During the fact-finding mission, several stakeholders pointed out that, in general, not only were direct awards rarely used, but that certain public officials were reluctant to use them even in urgent cases for fear of being accused of having contravened the law.

EsSalud has used direct awards during the COVID-19 pandemic.¹ The pandemic created an unprecedented health and economic crisis in Peru, as in other countries, and EsSalud was heavily involved in the management of the health crisis. Around the world, public purchasers urgently needed specific healthcare goods at dramatically increased volumes, particularly face masks, personal protective equipment, ventilators, beds, medicines, intensive-care material, COVID-19 tests, laboratory supplies and hospital infrastructure (OECD, 2020^[19]). Reduced supply-side capacity and increased demand led public administrations to use direct awards to satisfy emergency needs.

In response to the COVID-19 pandemic, the OECD issued a policy paper outlining its recommendations to public purchasers and competition authorities for the use of direct awards (Box 6.3).

Box 6.3. OECD recommendations for emergency procurement during the COVID-19 crisis

The OECD has the following recommendations for public procurement entities.

- 1) Follow national and international rules and guidelines on emergency and COVID-19 related procurement.
- 2) Use direct awards only to respond to current, urgent and unforeseeable needs.
- 3) Check first whether existing contracts can be renewed or extended before proceeding to a direct award.
- 4) Ensure that a chosen supplier for a contract is the only one able to provide the required goods, services and/or works on time. If there are other possible suppliers, consider whether there is time to conduct a fast-track competitive procurement procedure, such as a simplified award.
- 5) As much as possible, use existing market intelligence to inform decisions on emergency purchases. Existing procurement data on factors, such as observed prices, suppliers, and capacities, can be useful in creating an overall picture of market conditions before the pandemic, and negotiating prices and delivery terms during the crisis.
- 6) Pool with other procurers and consider conducting joint procurements to attract suppliers, achieve economies of process, and limit price spikes through economies of scale and the exercise of purchasing power.
- 7) Phase out direct-award procedures and contracts as needs become foreseeable and begin planning competitive tendering for the medium- and long-term needs resulting from the crisis.

The recommendations for competition authorities are:

- 1) Intensify competition-advocacy initiatives with procurement entities to alert them to the conditions that justify direct awards.

Be vigilant and monitor suspicious selling patterns (such as high prices) in COVID-19 emergency procurements.

Source: OECD (2020), "COVID-19: Competition and emergency procurement", www.oecd.org/competition/COVID-19-competition-and-emergency-procurement.pdf.

EsSalud should monitor the reasons for the use of direct awards, even during the COVID-19 pandemic, checking whether the PPL's conditions are being met and the process is aligned with the OECD policy recommendations. Box 6.4 illustrates a UK investigation into contracts awarded during the first four months of the COVID-19 pandemic that found irregularities in some of the awarding procedures, most of which were direct awards or direct contracts under existing framework agreements.

Box 6.4. Investigation into UK government procurement during the COVID-19 pandemic

On 18 November 2020, the UK's National Audit Office (NAO) issued a report regarding an investigation into government procurement during the COVID-19 pandemic for the period from March 2020 to 31 July 2020.

By that date, over 8 600 pandemic-related contracts worth GBP 18 billion had been awarded. New contracts represented GBP 17.3 billion, of which 60% were awarded through direct contracts; 39% directly using existing framework agreements; and 1% using a competitive tender procedure or a competitive bidding process from a framework agreement.

The NAO investigation found that:

- 1) awarding bodies did not adequately document why a particular supplier was chosen and how any associated risks from a lack of competition were identified and mitigated
- 2) certain contracts were awarded after work had already been carried out
- 3) documentation in certain cases did not support key procurement decisions, such as suppliers with low due-diligence ratings being awarded contracts or uncertainty about the management of conflicts of interests
- 4) many of the contracts were not made public in a timely manner.

While recognising that the COVID-19 pandemic was an exceptional circumstance, the report emphasises that the public sector must always respect certain standards. It concludes with recommendations for the awarding bodies, including:

- 1) publication of basic information on contracts within 90 days of award
- 2) the use of clear documentation for establishing and using contracting procedures other than open tenders
- 3) clearly document how direct awards have taken into account and managed possible potential conflicts of interest or bias in the procurement process.

Source: National Audit Office (2020), *Investigation into government procurement during the COVID-19 pandemic: Report by the Comptroller and Auditor General*, www.nao.org.uk/wp-content/uploads/2020/11/Investigation-into-government-procurement-during-the-COVID-19-pandemic.pdf.

6.2. Reducing procurement time and bidding costs with standardised specifications and tender documents

Using standardised specifications and documents that cover all stages of the procurement procedure, from planning to contract, streamlines the process, reduces procurement preparation time, lowers bidding costs, and encourages participation in tenders.

As explained in Section 2.2, OSCE has adopted standard tender documents for 20 types of procurement procedure using different selection processes, distinguished by procurement categories (supply of goods, services, consulting of works or works) and type of selection process (public bid, public contest, simplified award).² OSCE has also adopted standard tender documents for two specific services (security and cleaning).³ In the future, OSCE should consult with Indecopi when preparing standard tender documents to ensure that they consider competition-related aspects, such as avoiding unnecessary restrictions.

It is compulsory for EsSalud, like all other public bodies, to use these standard documents.⁴ As noted in Section 2.2, the standard tender documents contain a section with general terms on the procurement procedure and the execution of the contract, and a section with special terms to be completed by the procuring entity. The general terms are identical for all procurement procedures, and any change to them can lead to the cancellation of a procurement.

OSCE should consider assessing whether public procurement officials are correctly applying the standard documents. This is crucial not only to avoiding the risk of cancellation, but also to ensuring equality of treatment, with standardised documents being applied identically across the same entity (such as EsSalud), as well as across public-sector entities.

As detailed in Section 2.2, Perú Compras issues technical sheets and compiles the List of Common Goods and Services.⁵ During the fact-finding mission, some stakeholders pointed out that the list may restrict competition by excluding certain companies offering similar but not identical products to those on the list, even if such products could serve the same purpose.

In addition to Perú Compras, ministries like MINSA, through CENARES, may standardise technical specifications, qualification requirements and execution conditions by issuing (total or partial) technical standardisation sheets (*fichas de homologación*).⁶ Perú Compras supports the process and must provide a favourable opinion before the standardisation is approved. Once a standardisation sheet is adopted, it is published on Perú Compras' website and must be used by all public purchasers. In the case of total standardisation, public purchasers may buy the item through a simplified-award process.

At EsSalud, standardisation sheets are prepared by IETSI. They may end up being included in the List of Common Goods and Services (in which case the goods and services must be purchased through an electronic reverse auction) or in the electronic catalogue of a framework agreement (in which case, the goods and services must be bought from one of the suppliers under the framework agreement).

Perú Compras indicated that standardisation (homologation) sheets dramatically reduce the number of suppliers' requests for clarification and comments (enquiries and observations) in procurement processes, increase participation and allow for shorter processes, as the technical specifications of products are already defined.

IETSI has developed sheets for more than 600 items, and their use is mandatory for EsSalud.

The standardisation efforts carried out by Peru should continue and be reinforced. Nevertheless, during the OECD's fact-finding mission, stakeholders pointed out that certain standardisation sheets can be too detailed or impose unnecessary requirements. Entities that prepare standardisation sheets and Perú Compras, which supports this process, should pay attention that standardisation does not inadvertently restrict access to tenders, and that sheets are clear and not overly burdensome for bidders. To ensure that requirements included in the standardisation sheets are relevant, Perú Compras publishes the sheets in draft form and, before they are adopted, holds technical roundtables with academia, associations, main buyers and vendors, and civil society.

6.3. Identifying anti-competitive joint bidding

Public purchasers in Peru may allow companies to bid jointly and in consortia. The tender terms can be tailored to limit the number of companies that can participate in any consortium, a minimum participation percentage for each, and a requirement that the company in the consortium with the most proven experience has a participation percentage below which it cannot go.⁷ Companies cannot bid in consortia in tenders for framework agreements.⁸ The companies that participate in a consortium cannot submit individual bids or be part of another consortium in the same procurement process.⁹

The OECD Recommendation (OECD, 2012^[5]) lists practices at odds with a competitive market and that suggest the possibility of bid rigging. Among these are cases when “two or more businesses submit a joint bid even though at least one of them could have bid on its own” and states that “joint bids can be a way to split profits among bid riggers”.

During the fact-finding mission, stakeholders pointed out that, in practice, the costs and risks of joint bidding are not sufficiently considered by public procurement entities, and consortia may be accepted even if the companies participating in them could have bid separately. As indicated in Box 6.5, this can be anti-competitive.

Box 6.5. Criteria for determining whether a joint bid is pro- or anticompetitive

Pro-competitive	Anticompetitive
Suppliers are active in different (product) markets.	Each firm has the economic, financial and technical capabilities to fulfil the contract on its own.
Co-operators provide a single integrated service that none could supply independently.	Joint bidders are the strongest competitors in the relevant market.
Two or more providers active in different geographical areas submit a single bid for the whole of the contract area, producing efficiencies.	A joint bid does not produce any efficiencies, or the efficiencies are not passed on to the buyer in terms of lower price, higher quality or better delivery.
Two or more providers combine their capacities to fulfil a contract too large for either individually.	A consortium allows its members to exchange sensitive information that might harm competition in future tenders.

Source: OECD (2018), *Fighting Bid Rigging in IMSS Procurement: Impact of OECD Recommendations*. www.oecd.org/daf/competition/IMSS-procurement-impact-OECD-recommendations2018-ENG.pdf.

EsSalud should be explicit in calls to tender that joint bids are only allowed when they are justified and pro-competitive, and should request information from bidders to assess whether a joint bid is pro-competitive, such as explanations from bidders about why they are not bidding separately, particularly when it seems possible.

Procurement officials need clear and specific criteria for determining the pro-competitive nature of joint bids (Box 6.5 and Box 6.6). The Danish Competition and Consumer Authority published guidelines in 2018 (updated in 2020) that provide a good example of guidance that can help contracting authorities distinguish whether a joint bid is pro- or anticompetitive (Box 6.6). The Danish guidelines also contain advice on issues related to information exchange in joint tenders (Danish Competition and Consumer Authority, 2020^[20]).

Box 6.6. The Danish Competition and Consumer Authority's guidelines on joint bidding

The Danish Competition and Consumer Authority (DCCA) guidelines indicate that when considering whether to bid jointly in a procurement process, companies must pay attention to competition rules, in addition to public procurement rules. The DCCA considers that, as general rule, joint bidding is competitive where the parties:

- 1) are not direct competitors for the contract
- 2) can carry out together the tendered contract for the contracting authority significantly better and/or cheaper than they could individually, provided that the companies do not exchange more information than necessary to fulfil it.

On the contrary, joint bidding is in principle anticompetitive where:

- 1) parties can each bid for the contract individually and are therefore direct competitors
- 2) the collaboration is not beneficial for the contracting authority
- 3) there are more parties in the consortium than necessary to carry out the tender contract.

Importantly, the DCCA indicates that companies considering whether their capacity, know-how and/or financial resources are sufficient for a procurement process need to take into account whether they are part of a group.

Companies can ask for informal guidance from the DCCA as regards joint bidding.

In the guidelines, the DCCA also refers to how information exchanges among consortia members may harm competition. Companies should assess whether they can bid alone before they begin exchanging sensitive information, as if they can, any subsequent information exchange becomes illegal. Companies can only exchange sensitive information to the extent that it is strictly necessary and limited. Even when the consortium agreement is active, it is unlawful to exchange sensitive information that goes beyond what is necessary to carry out the contract. For instance, information exchanges concerning future prices, production or sales, or concerning companies' future strategies are illegal.

Source: Danish Competition and Consumer Authority (2020), *When companies bid jointly – guidelines for joint bidding under competition law*, www.en.kfst.dk/media/t11mhwt/20201211-guidelines-on-joint-bidding.pdf.

Indecopi should consider issuing guidance to procurement agencies on the conditions for pro-competitive joint bidding and undertaking advocacy initiatives, including capacity building to public procurement officials to raise awareness of the effects that joint bidding may have on competition in a tender, and to answer public purchasers' ad hoc questions on the topic. Indecopi and OSCE should co-operate in delivering guidelines and advocacy, as Indecopi is aware of competition, OSCE understands other aspects of the procurement process, such as technical complexity and the need for joint work. Box 6.7 shows an example of a case where consortia were used to reduce competition and allocate markets.

Box 6.7. Bid-rigging case in the market for fire-prevention services, Italy

In 2019, the Italian competition authority, Autorità Garante della Concorrenza e del Mercato (AGCM) imposed fines of EUR 67 million on seven companies and one professional association for taking part in collusive bidding in the market for the provision of fire-prevention services and for agreeing on bid prices in tenders run by regional and local authorities in charge of forest-fire prevention. The Administrative Tribunal of Latium upheld the decisions upon appeal.

The AGCM found that, between 2005 and 2018, the parties co-ordinated their bids in the tender procedures by dividing up the market and allocating the contracts among themselves to maintain their respective historical contracts and market shares. They offered negligible or insignificant rebates (below 5%) in 72% of the tenders, while 79% of the total value of tenders was awarded following a tender with a single bidder.

The AGCM first assessed internal evidence on parallel behaviour and found that, despite the high number of regional authorities and public contracts, and tenders being organised at staggered times, the parties made no overlapping bids. Each party (individually or in association with other suppliers) only made a bid for a specific tender and eventually obtained the contract by offering insignificant rebates.

Second, AGCM assessed external evidence consisting of exchanges among the parties to allocate the contracts and jointly determine the prices of the selected winning bid.

These tenders required the winner to offer firefighting helicopter services at several heliports, so that in case of fire it could quickly intervene. Given that no single company had the required heliports, personnel and helicopters to bid alone, companies were used to bidding jointly by forming a temporary association of undertakings, a form of consortium. The AGCM found that, rather than a competitive instrument to allow higher participation and allocate costs based on the number and type of helicopters provided by each company, the parties used the temporary-association structure as a mechanism to allocate revenues generated by the awarded contract, ensuring that each participant could enjoy an appropriate level of profitability.

The AGCM assessed a counterfactual scenario, using tender procedures not covered by the bid-rigging behaviour, which found that temporary associations that were not party to the cartel agreement offered significantly higher rebates than cartel members.

Source: AGCM (13 February 2019), "Case I806 – Affidamento appalti per attività antincendio boschivo, Provvedimento n. 27563", [www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/5F57ADB103AA9703C12583B3004E9F7F/\\$File/p27563.pdf](http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/5F57ADB103AA9703C12583B3004E9F7F/$File/p27563.pdf).

6.4. Allowing only pro-competitive sub-contracting

As seen in Section 3.4, subcontracting parts of a procurement contract to third parties is allowed in Peru if not prohibited in the tender terms. When allowed, sub-contracting cannot exceed 40% of the original amount of the contract,¹⁰ and is not allowed for deliverables that were decisive in the selection of the contractor and in the case of individual consultants. Specific subcontracts must be authorised by the public purchaser. According to EsSalud, the identity of subcontractors must be disclosed in the bid, which helps avoid future anti-competitive subcontracts.

The pro- and anticompetitive effects generated by subcontracting are similar to those of joint bidding. Companies that can fulfil a contract alone should bid individually against each other, not tender as contractor and subcontractor. The OECD Recommendation lists subcontracting as one of the practices that might indicate bid rigging, particularly in cases where a “winning bidder repeatedly subcontracts work to unsuccessful bidders” or “does not accept the contract and is later found to be a subcontractor” (OECD, 2012^[5]). Box 6.8 explains how subcontracts can function as a bid-rigging compensation mechanism.

Box 6.8. Rail-track cartels, Germany

In 2012, 2013 and 2016, the German Federal Cartel Office or Bundeskartellamt imposed fines of EUR 225 million on producers of rail track, switch points and sleepers, who had cartelised these markets for the period 2001-2011.

The bid-rigging scheme had affected all public buyers other than Deutsche Bahn and was an example of how a cartel can ensure compensation for its members by “fairly” sharing markets between its members.

In the scheme, all cartel members had a shared understanding that certain customers “belonged” to certain suppliers. When tendering for each contract, other suppliers would prepare cover bids with pre-agreed prices. This was facilitated by a widespread practice of purchasers involving their main suppliers in the preparation of the technical documents. This led to narrow technical specifications, which in practice allowed only for one supplier to bid successfully.

So that all cartel members were rewarded, losing bidders were usually compensated with subcontracts by the winning bidder. At times, they would also receive contracts for planning studies or expert opinions, which in some cases would be compensated, but not even be delivered.

To reduce the risk of detection, cartel members would occasionally assign a contract to another supplier than the procurement authority’s “regular” supplier.

Source: Bundeskartellamt (6 September 2013), “Fallbericht B12-16/12, B12-19/12”, www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2013/B12-16-11_B12-19-12.pdf?__blob=publicationFile&v=7; Bundeskartellamt (14 December 2012), “Fallbericht B12-11/11”, www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2012/B12-11-11.pdf?__blob=publicationFile&v=4.

EsSalud might consider requiring bidders to disclose not only whether subcontracting will take place and the identity of the subcontractor, but also the reasons why subcontracting is necessary for the performance of the contract.

Information gathered, especially the reasons for subcontracting, may prove useful in establishing whether subcontracting generates efficiencies or, on the contrary, is likely to have anti-competitive effects. EsSalud should also be vigilant about any subcontracting that takes place during the execution of the contract.

Box 6.9 describes a case where consortia and subcontracts were used in the same procurement procedures as mechanisms for implementing bid rigging.

Box 6.9. Subway construction bid-rigging scheme, Brazil

In July 2019, Brazilian competition authority Conselho Administrativo de Defesa Econômica (CADE) imposed fines of up to BRL 535 million upon 11 companies and 42 individuals for participating in a bid-rigging conspiracy for a subway-construction contracts.

The bid rigging, which affected 26 tenders and 12 projects in the states of São Paulo, Distrito Federal, Minas Gerais and Porto Alegre, saw cartel participants divide the tenders among themselves and simulate competition in the procedures by, for example, agreeing on bid prices.

The bid-rigging scheme included participation in consortia and subcontracting. Cartel members defined which companies would take part in a given consortium and which would bid individually; which companies or consortia would present cover bids; which consortium would win the tender and the compensation mechanisms for losing bidders; and which bidders would withdraw offers or not bid at all. Compensation included direct payments and subcontracting.

Source: CADE (2017), “Pesquisa Processual: 08700.003241/2017-81”, https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5UuJ6rLqPEJuTUu08mg6wxLt0JzWxCor9mNcMYP8UAjTVP9dxRfPBccOzZBOKbRxPo3tFq1hYGVET6kGfNjzb81bHaTHhs8mS.

6.5. Streamlining consolidation and centralisation

Peru has several mechanisms to consolidate and centralise purchases.

As described in Section 2.3, CEABE is charged with evaluating EsSalud’s internal needs and plans, purchases and distribution for strategic goods including: 1) pharmaceutical products; 2) medical devices; and 3) medical equipment. The Logistics Department does the same preparatory work for non-strategic goods, services and works. Procurement can also be carried out by EsSalud’s specialised medical centres in Lima and Callao, and nationwide supplier networks, as well as individual hospitals.

At a nationwide level in the healthcare sector, CENARES has powers to purchase and distribute strategic goods to healthcare actors, including EsSalud. MINSA issues an annual list of the items that can be purchased through CENARES. Healthcare providers, including EsSalud, choose which products they would like to purchase, CENARES carries out the procurement process centrally and awards the contract, and each purchaser (for example, EsSalud) buys under the contract. Participation in this type of CENARES corporate purchasing is optional (see Section 2.2.2 for more details).

Currently, EsSalud mainly purchases vaccines through CENARES. EsSalud and CENARES acquire certain similar products separately. During the fact-finding mission, stakeholders remarked that CENARES’ procurement planning is not carried out sufficiently in advance, which results in suppliers having only a short time to prepare tenders.

Also at a national level, Perú Compras’ electronic catalogues of framework agreements (Catálogos Electrónicos de Acuerdo Marco) are centralised procurement solutions (Section 2.2.4) that include medicines, medical equipment, accessories and supplies. According to Perú Compras, it is important to follow a specific order in procurement processes and choose procurement methods in accordance with the intended purchase. Critical procurements, such as complex and high-value procurements for non-standardised items, should set minimum quality standards and aim to meet criteria for higher quality, not simply lowest price. Leverage items, which are simple, high-value procurements, should be bought through electronic reverse auctions, where all technical specifications are standardised and the auction is aimed

at finding the lowest price. For example, standardised molecular medicines can be bought through electronic reverse auctions. All routine items should be part of the electronic catalogues to minimise procurement duration and effort. During the COVID-19 pandemic, Perú Compras set up electronic catalogues of medical devices, like diagnostic devices and personal protection equipment.

Likewise, Perú Compras centralises procurement through compulsory corporate purchases, which are approved by a decree issued by the Ministry of Economy and Finance, and optional corporate purchases, based on discretionary inter-institutional agreements between Perú Compras and public-sector entities (both detailed in Section 2.2.4). In both cases, Perú Compras carries out the tender process, and public-sector entities that are either mentioned in the decree or have agreed to the corporate purchase through an agreement must use the Perú Compras' contract to buy the goods and services it covers. Perú Compras does not conduct corporate purchases for items for which other bodies, such as CEABE or CENARES, use corporate purchases.

Corporate purchasing is open to national suppliers only. This contrasts with the rule allowing EsSalud to procure pharmaceutical products or medical devices from suppliers non-domiciled in Peru if it is more advantageous. Limiting the suppliers that can participate in procurement processes may lower the number of bidders, and so reduce competition, while, at the same time, facilitating bid rigging by reducing the pool of competitors. Peru should consider removing restrictions on foreign bidders participating in corporate purchases.

In OECD countries, central purchasing bodies such as Perú Compras are gaining strategic importance as efficiency enablers. Centralisation and aggregation of purchasing often increase value for money, enabling governments to reduce administrative red tape and costs, while increasing bargaining power and obtaining better terms and conditions (OECD, 2019^[16]). The case of Chile, explained in Box 6.10, illustrates how framework agreements can generate savings from the consolidation of demand.

Box 6.10. Savings from framework agreements, Chile

In 2003, Chile introduced framework agreements that its central purchasing body, ChileCompra, implemented, awarded and managed. The same year, Chile's public procurement act (Law No. 19 886 of 30 July 2003) mandated the use of framework agreements within the national e-procurement system, ChileCompra Express. From 2014 onwards, its use has consistently risen for certain product categories, such as data centres and associated services. As a result, Chile has achieved substantial savings from both centralisation and the introduction of framework agreements. ChileCompra calculates price savings based on the difference between prices proposed by bidders awarded under framework agreements, and the average price proposed by at least three suppliers outside the contract.

Increasing framework-agreement coverage for goods and services has additionally generated process savings. These are estimated from the difference between costs borne by contracting authorities after the issuance of a purchase order from one of ChileCompra's framework agreements, and the costs generated by the issuance of a public tender or direct-award procedure. According to ChileCompra, process savings amounted to USD 18.6 million in 2017, or 0.62% of the overall transaction amount.

Table 6.3. ChileCompra savings, 2015-2017, USD, millions

	2015	2016	2017
Average savings	11.7%	19.5%	21.2%
Total transaction amounts	2 197	2 661	2 999
Total savings	257	518	635

Source: OECD (2019), Reforming Public Procurement: Progress in Implementing the 2015 OECD Recommendation, OECD Public Governance Reviews, OECD Publishing, Paris, www.dx.doi.org/10.1787/1de41738-en

Other benefits of centralisation are the professionalisation of civil servants exclusively dedicated to the procurement of aggregated needs and increased control over the execution of contracts (Sánchez Graells and Herrera Anchustegui, 2014^[21]).

Centralised purchasing may, however, have certain negative consequences on competition in the market over the medium to long term as aggregation of purchases at a central level can result in supply-side concentration and increases in market power (Box 6.11). The greater the volume of the goods or services procured, the smaller the number of suppliers with the necessary production and financial capacity. As centralised contracts also tend to be infrequent, less resilient companies may have to exit the market, particularly if the public buyer is the dominant purchaser of goods or services (Sánchez Graells and Herrera Anchustegui, 2014^[21]). This may result in a reduced number of suppliers, which in turn increases risks of collusion. In the long term, market concentration has the potential to increase prices and have a negative impact on variety and innovation,¹¹ as companies have fewer incentives to compete against each other. In addition, a limited number of suppliers may also affect adversely the security of supply.

Box 6.11. KL-Kuntahankinnat case, Finland

In 2014, KL-Kuntahankinnat, a Finnish central-purchasing body, ran a tender for a four-year framework agreement for health supplies on behalf of three municipalities and a district hospital. The call for tender established that other entities using KL-Kuntahankinnat – which could include all Finnish municipalities – would be able to join the framework agreement in the future.

The procurement terms set out that the framework agreement would be awarded to one company. Bidders were not able to tender for separate lots and were required to submit a global bid that covered stock management, home-delivery services, and a minimum of 5 000 items in each of the 12 health-product categories. The requirements imposed by KL-Kuntahankinnat effectively excluded all potential bidders except two.

Four excluded bidders challenged the bidding procedure before the Finnish Market Court, which rejected the claims. That decision was appealed before the Finnish Supreme Administrative Court, which found that the call for tender's requirements did restrict competition; it also ruled that the possibility for other bidders to joint bid through consortia or subcontracting did not remove the tender procedure's discriminatory, disproportionate and competition-restricting features. The negative effects of the single-provider framework agreement were considered particularly serious due to the four-year duration of the contract.

Source: Kirsi-Maria Halonen (2016), "Framework Agreements Should Not Be Used Improperly or in Such a Way as to Prevent, Restrict or Distort Competition", www.howtocrackanut.com/blog/2016/12/8/framework-agreements-should-not-be-used-improperly-or-in-such-a-way-as-to-prevent-restrict-or-distort-competition-guest-post.

Peru should simplify its current system of centralisation in the health sector. This system is currently comprised of Perú Compras' health-related corporate purchases and framework agreements; CENARES' corporate purchases; regional governments and other public entities that buy healthcare goods and services; and within EsSalud, CEABE and the Logistics Department. This can result in an unnecessary fragmentation of purchases, as illustrated by the fact that EsSalud and CENARES purchase the same goods separately. EsSalud should consider working more closely with CENARES and Perú Compras, perhaps through co-operation agreements, to assess whether consolidation and centralisation of healthcare purchases are beneficial, and which purchases the processes should concern.

Procurement planning, as described in Section 5.1, can also help in assessing whether centralisation would be beneficial. Well-designed PACs, issued in a timely manner, help public bodies define their future needs and enable them, where appropriate, to co-ordinate centralised purchasing.

Peru's health-related procurement bodies should consider the competition risks in centralised tenders, monitoring participation and looking for indications that suppliers are being discouraged from bidding for certain tenders. Adequate market research, including comprehensive databases (Section 5.3), can help public bodies assess the impact of consolidation and centralisation on procurement processes and allow them to address barriers to participation; for example, by removing requirements to cover the whole Peruvian territory or incumbency advantages. Similarly, Peru should continue to follow market developments so that its practices do not lead to unnecessary supply-market concentration or market exit.

6.6. Dividing contracts into lots

The OECD Recommendation stipulates that procurement authorities should “whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof, rather than bids on the whole contract only. For example, in larger contracts look for areas in the tender that would be attractive and appropriate for small and medium sized enterprises” (OECD, 2012^[5]). Division of contracts into lots can promote participation by smaller suppliers that might not have the capacity to bid for a single large contract and is a tool to prevent market concentration (Sanchez Graells, 2020^[22]).

The PPL allows public purchasers to divide contracts into lots (goods of the same type) or into sections (part of a public work that has utility in itself).¹² EsSalud can consider splitting contracts if it considers that this may increase bidder participation, which is currently relatively low.

Decisions on whether and how to split a contract into lots requires relatively complex analysis. Public procurement officials need to consider the market conditions and the object of the contract, as well as the risks of bid rigging, choosing lots so as not to facilitate market allocation among bidders.

Indecopi’s *Guidelines on Public Procurement* does not provide guidance on when to use lots and how to define them. Indecopi should consider providing advice to public procurement officials on protecting competition when splitting contracts into lots, relying on OECD’s relevant guidance (Box 6.12).

EsSalud may also rely directly on OECD’s guidance on splitting contracts into lots (Box 6.12).

Box 6.12. OECD checklist for protecting competition when splitting contracts into lots

When to split contracts into lots

A decision on splitting contracts into lots may be taken when the contracting authority is concerned about the risk that large bundled contracts may reduce competition. This could be because:

- 1) efficient SME or specialist firms are unable to provide the full bundle of goods or services that the procurer is purchasing
- 2) awarding the contract to a single firm when public purchases account for all or most of the market for a certain good or service may increase the market power of the chosen supplier and reduce the number of bidders in future tenders.

Before splitting the tender into lots to address these two concerns, procurers should conduct market analysis to consider, given the type of product or service that they are procuring, whether tendering smaller lots is the best solution.

For 1: Are there no other methods to encourage participation by smaller specialist firms? For example, could simplifying the bidding procedure help them bid for the contract? Might they be able to form a joint-bidding consortium?

For 2: Would losing bidders exit the market and so not participate in future procurements, or would they and others bid again for the next tender? Similarly for future procurements, would the strength of rival bids be limited by their lack of experience or would they be able to strengthen their bids and demonstrate their experience by hiring staff from the incumbent contractor?

How to split a contract into lots without reducing competition

At the pre-tendering stage, the contracting authority should:

- 1) provide all potential bidders with clear tender documentation that includes all available and relevant information about the product or service to be procured to minimise any advantage to the incumbent supplier; this can be done electronically and should be free of charge
- 2) consider dividing a contract into lots when it is understood that small or specialist firms will not otherwise participate in the bidding; for example, an additional lot should not be carved out if that lot is expected to have fewer competitors than there would be for a bundle of lots
- 3) allow package bidding when a bidder can make bids for different combinations of lots to obtain any cost synergies available from providing a larger bundle of goods or services; obtaining these synergies may, for example, encourage non-local bidders to bid for packages even if they are unwilling to bid for individual lots
- 4) use award limits rather than participation limits to prevent all lots being awarded to a single firm, but only if the benefits will clearly outweigh the reduced competition for the contract
- 5) consider making the number of lots fewer than the number of expected bidders, provided it does not create inefficiency; this can make it more difficult for colluding bidders to agree a division of lots, and so improve achieved value
- 6) consider creating lots that are differently sized to bidders' market share, provided this does not create inefficiency, to make it more difficult for colluding bidders to agree a division of lots, and so improve value achieved
- 7) consider in repeated procurements making the division into lots unpredictable (for example, by changing the size or composition of the lots), provided it does not create inefficiency to reduce the risk of lot division facilitating collusion.

At the **tendering stage**, the contracting authority should:

- 1) refer to the competition authority any suspicious actions taken by incumbents to obstruct rivals' abilities to put together an attractive bid, which can then determine whether this constitutes anti-competitive exclusionary conduct
- 2) refer to the competition authority any suspicious actions taken by bidders to rig the bidding
- 3) be aware that joint bidding may be anti-competitive in cases where bidders can submit separate bids.

Source: OECD Public Procurement Toolbox (n.d.), "Checklist for protecting competition when splitting contracts into lots", www.oecd.org/governance/procurement/toolbox/search/checklist-protecting-competition-splitting-contracts-lots.pdf.

6.7. Continuing the extensive use of e-procurement

Adopting e-procurement helps to reduce the risks of collusion by eliminating the risk that bidders meet in the same place when submitting their bids or participate physically in other stages of the tender process. E-procurement is also likely to lower tendering costs for potential bidders – in particular, foreign bidders or bidders operating in parts of the country other than the seat of the awarding authority – and so encourage participation and increase competition in procurement.

E-procurement may also generate savings for the public administration thanks to reduced procurement time, staff resources, space for events and storage of physical documents, and lower organisational and hosting costs for the presentation and opening of bids and contract awards.

E-procurement is widespread in Peru. All public entities in Peru are required to use SEACE, regardless of the amount or source of funding or whether the PPL or another law applies. As detailed in Section 3.3.1, SEACE has the following modules:

- 1) PAC
- 2) pre-tendering activities
- 3) tendering process
- 4) contracts and contract performance and records of purchase orders.

Direct awards and price comparisons are published on SEACE only once they have been awarded.

Any person can search on SEACE for information about all public procurements, national and sub-national.

Recent decisions (see, Section 3.3.1) mandating that public bids and public contests should be conducted through SEACE are welcome. Peru should continue its progress in using e-procurement, for all procurement stages of all procurement types.

6.8. Ensuring simple registration in the National Supplier Registry

As explained in Section 3.3.2, suppliers wishing to participate in procurements governed by the PPL need first to be registered with the National Supplier Registry (RNP), an electronic platform composed of four registries: 1) goods; 2) services; 3) consultancy for works; and 4) works. Suppliers can be registered in one or more registry.

Requirements for registering for consultancy for works and works are onerous. Registration requires providing information on experience in works supervision or the elaboration of technical work files, with the potential supplier required to submit copies of documents to prove experience. If a supplier cannot show evidence of experience, it will be assigned to the lowest category in the RNP, allowing it to participate only in lower-value procurement procedures (where less or no experience is required). Requirements for registration should be reviewed and, if appropriate, made easier.

In principle, companies non-domiciled in Peru may register in the RNP, provided that they first appoint a local legal representative and register the relevant power of attorney in the Peruvian Public Records (Registros Públicos). This legal representative must submit an official document to OSCE showing that the company (or equivalent document for natural persons) is operational, issued in the country of origin, with an official translation into Spanish. If the document submitted meets all the requirements, the legal representative can register the required information on the RNP website and submit it to OSCE.

However, the RPPL lays down a reciprocity rule according to which foreign companies must be treated as Peruvian companies are treated in their country of origin.¹³ Foreign companies may therefore face certain restrictions or not be allowed to participate in tenders if their country of origin does not permit Peruvian companies to bid for public contracts in its territory.

6.9. Analysing bids from related companies

Public purchasers may receive bids from related companies, for example, are part of the same group of companies, are parent and subsidiary, or share board members or legal representatives (European Commission, 2021^[23]). It is important, however, that purchasers are aware of links between bidders, as this could be an indication of possible distortions of competition. Comprehensive databases, mentioned in Section 5.3, are useful in detecting such links.

Nevertheless, purchasers should not assume that bids from related companies have necessarily been coordinated. They should, instead, provide companies with the opportunity to show that their tenders are independent and then determine whether corporate ties among bidders have had any influence upon their bidding conduct and whether competition is genuine or not (European Commission, 2021^[23]).

In Peru, according to OSCE Opinion No. 256-2017/DTN, companies from the same economic group or those otherwise related cannot bid in the same procurement process. The OECD recommends that, in the future, Peru considers introducing case-by-case basis assessment of whether related companies have prepared their bids independently, based on evidence provided by the companies. As this assessment of the independence of bids will be conducted by public purchasers, Peru should first build the assessment skills of the officials carrying out this analysis. Peru should be careful not to unduly limit competition in practice by reducing the number of genuinely independent price quotes and bids.

Box 6.13 illustrates how the Court of Justice of the European Union has addressed this issue.

Box 6.13. Bids submitted by related companies and the Court of Justice of the European Union

Assitur case, Judgment of 19 May 2009

In 2003, the Milan Chamber of Commerce (Camera di Commercio, Industria, Artigianato e Agricoltura di Milano) in Italy awarded a courier-service contract to SDA Express Courier. A competitor, Assitur, challenged the decision on the grounds that, based on Italian law, SDA was linked to another participant and should have been excluded from the tendering procedure. The Court of Justice of the European Union (EU) was asked to determine whether the Italian law that forbade linked undertakings from participating in the same tendering procedure was compatible with the EU public procurement framework.

The Court of Justice stated that it would be contrary to EU law to prevent automatically linked undertakings from participating in the same tender procedure, since it would reduce participation in tenders. The Court considered that an irrebuttable presumption that tenders submitted for the same contract by affiliated undertakings would necessarily have involved mutual influence breached the principle of proportionality by not allowing the undertakings an opportunity to demonstrate that they posed no risk of competition-distorting practices. The Court pointed out that businesses within the same group can have different forms and objectives that do not preclude autonomy in their commercial and economic activities, including participation in public procurement. Besides, relationships between undertakings in the same group may be governed by specific provisions – for example, of a contractual nature – that guarantee independence and confidentiality of different tenders in the same procedure.

The Court determined that contracting authorities must assess the facts in each case to determine whether the relationship between companies might influence the content of submitted tenders. A finding of such influence is sufficient to justify their exclusion from the procedure.

Lloyd's of London case, Judgment of 8 February 2018

In this case, the Court of Justice analysed whether the same person signing different tenders undermines the independence and confidentiality of the tenders, and therefore distorts competition.

In 2015 and 2016, the Agenzia Regionale per la Protezione dell'Ambiente della Calabria (Arpacal) excluded two Lloyd's syndicates from the tender procedure for an insurance-cover service contract, on the ground that the tenders were attributable to a single decision-making centre: the tenders had been signed by the same person (the Lloyd's representative for Italy), used identical forms, had official stamps with consecutive numbers and included identical statements and declarations. Lloyd's declared

that that it is a collective legal person with multiple structures that include separate syndicates, which operate independently from one another. The Lloyd's representative has formal signing power for them.

The Court of Justice stated that the mere fact two separate tenders have been signed by the same person cannot justify their automatic exclusion from the tendering procedure if the same signature is the sole basis for exclusion. The Court determined that even assuming that the Lloyd's representative in Italy was aware of the content of the tenders, this did not prove that the syndicates consulted one another and that, as a result, the relationships between them, together with the involvement of the representative, influenced their tenders. The contracting authority should allow participants the opportunity to prove that their tenders have been drawn up independently.

Sources: Judgment of the Court (Fourth Chamber) of 19 May 2009, Case C-538/07 *Assitur v. Camera di Commercio, Industria, Artigianato e Agricoltura di Milano*, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62007CJ0538>. Judgment of the Court (Sixth Chamber) of 8 February 2018, Case C-144/17 *Lloyd's of London v Agenzia Regionale per la Protezione dell'Ambiente della Calabria*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62017CA0144&qid=1624268427731>.

6.10. Recommendations for action

To maximise the participation of genuinely competing bidders, the OECD has the following recommendations.

- 1) EsSalud should assess the level of participation in its tenders and remove any barriers that it finds.
- 2) EsSalud should monitor the reasons for direct awards, including those made during the COVID-19 pandemic, to ensure that the PPL's conditions are met.
- 3) When preparing standard tender documents, OSCE should consult with Indecopi to ensure that it considers competition-related issues. OSCE might also consider assessing whether public procurement officials apply the standard documents correctly.¹⁴
- 4) Standardisation sheets should be clear, complete and not include requirements that inadvertently restrict access to tenders, such as conditions that are unnecessary or favour certain suppliers.¹⁵
- 5) EsSalud should clarify in calls for tenders that joint bids and subcontracting are allowed only when justified and pro-competitive, and should request information from bidders justifying their choices, such as explaining why they are not bidding separately if that seems possible.
- 6) Indecopi in co-ordination with OSCE should provide increased guidance and advocacy on suitable conditions for joint bids and subcontracting.
- 7) Peru should consider allowing participation by foreign bidders in corporate purchases.¹⁶
- 8) Peru should consider simplifying its system of consolidation and centralisation of healthcare procurement. The current structures involving Perú Compras, CENARES, regional governments and other public entities and, within EsSalud, CEABE, the Logistics Department and decentralised units, can result in unnecessary fragmentation of purchases.¹⁷
- 9) EsSalud could consider tightening co-operation with CENARES and Perú Compras, eventually through co-operation agreements, to assess in which cases centralisation of healthcare purchases might be beneficial and would not create risks of supply-market concentration.
- 10) EsSalud might consider splitting contracts into lots to increase bidder participation, which is relatively low. It could rely on existing OECD guidance about how to split a contract into lots.
- 11) Peru should analyse whether the requirements for RNP registration for consultancy for works and works can be less onerous.¹⁸
- 12) Peruvian entities should continue using e-procurement for all procurement stages of all procurement types.

Notes

¹ For instance, through Direct Award No. 09-2020-ESSALUD/GCL-1, authorised by EsSalud Executive Presidency Decision No. 328-PE-ESSALUD-2020, EsSalud acquired non-strategic goods for COVID-19 patients in the Villa Panamericana care and isolation centre.

² For OSCE's standard tender documents, see, www.gob.pe/institucion/osce/normas-legales/288481-001-2019-osce-cd.

³ Both adopted by OSCE's Directive No. 018-2012-OECD/CD.

⁴ Article 47.3 of the RPPL establishes that public purchasers must use the standard documents approved by OSCE.

⁵ For standard medical products, Perú Compras works with CENARES. At the time of drafting in May 2021, there were 738 technical sheets for the electronic auction of medicines and 125 technical sheets for the electronic auction of medical devices.

⁶ Article 30.1 of the RPPL. For a list of all homologation sheets, see, www.perucompras.gob.pe/homologacion/relacion-fichas-homologacion-aprobadas.php.

⁷ Article 49.5 of the RPPL.

⁸ Article 13 of the PPL.

⁹ Article 52(e) of the RPPL.

¹⁰ Article 147 of the RPPL.

¹¹ Innovation is defined as the implementation of a new or significantly improved product (good or service), or process, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations (OECD/Eurostat, 2005^[29]).

¹² Article 39.2 of the PPL.

¹³ Article 46.3 of the RPPL.

¹⁴ This recommendation should be implemented by OSCE and Indecopi, eventually with the participation of procurers such as EsSalud.

¹⁵ This recommendation should be implemented by entities that prepare standardisation sheets and Perú Compras, which supports this process.

¹⁶ This recommendation should be implemented by OSCE and legislators.

¹⁷ This recommendation should be implemented by Perú Compras, OSCE, procuring entities and legislators.

¹⁸ This recommendation should be implemented by OSCE and legislators.

7

Improving tender terms and contract-award criteria

This chapter looks at ways in which tender design can be improved for clarity, completeness and choice-of-award criteria.

7.1. Ensuring clear and complete tender terms

Tender terms should be as clear as possible, as this makes it easier for potential suppliers to make an informed decision on whether to bid for the tender. If tender terms are unclear, serious bidders may not risk participating.

In Peru, the selection committee or body in charge of the procurement prepares the tender documents. OSCE has adopted standard tender documents that EsSalud, as well as all other public bodies, must use. As already noted, the general terms of these standard tender documents, which include provisions concerning the procurement procedure and execution of the contract, cannot be changed. The special terms of the standard tender documents, which are the specific details of each procurement, must be completed by the procuring entity.

OSCE checks the most important procurement processes and can issue a report, which may indicate, for instance, that certain tender terms are unclear. Although this report is not binding, if an infringement concerning that term is found at a subsequent stage, it constitutes an aggravating factor.

During the fact-finding mission, several stakeholders pointed out that there is room for improvement in tender terms designed by procurement entities in Peru, including EsSalud. In particular, they pointed out that terms are sometimes not tailored to each procurement process and do not define clearly what exactly needs to be purchased. However, stakeholders also pointed out that tender terms have improved recently.

To ensure that tender terms are clear and complete, it is important that purchasers provide potential bidders with the opportunity to comment and ask questions. In Peru, the enquiries and observations phase of the procurement process (detailed in Section 3.3.2) allows bidders to ask for clarifications and provide comments, if they consider that the terms infringe legislation. If participants disagree with the replies to a request for clarification or comments, they can challenge them before OSCE, which must issue a binding opinion and publish it on SEACE.

Peruvian legislation requires that technical specifications be defined in objective and accurate terms and based on market research. However, as explained in Section 5.2.1, market research often focuses solely on pricing and, in many cases, is not thorough. As a rule, EsSalud's unit requiring goods, works or services drafts the technical specifications and may ask for the support of the Logistics Department or delegate the specifications to it. The involvement of the Logistics Department in the drafting of the technical specifications is positive, given its expertise in public procurement.

As explained in Section 2.2.4 and Section 6.2, Perú Compras standardises the technical specifications of common goods and services by preparing and adopting technical specifications sheets (*fichas técnicas*). In addition, with the support of Perú Compras, ministries may standardise technical specifications, qualification requirements and execution conditions by issuing standardisation sheets (*fichas de homologación*). These documents, if well designed, contribute to the clarity of tender terms.

To make sure that specifications are clear, Perú Compras publishes drafts before adopting them, consults widely with stakeholders from the public and the private sector as well as civil society, and considers and responds to all comments before adopting the sheets. The drafts of standardisation sheets for ministries are also published for comment on the website of the ministry carrying out the homologation, and on SEACE for at least 10 working days. The concerned ministry has 10 working days to assess and, if appropriate, modify the draft. Before approving it, the ministry must request Perú Compras' favourable opinion. Perú Compras carries out a study and verifies that the draft sheet generates competition and is technically valid.

All such initiatives that lead to higher procurement clarity foster participation by credible bidders and are likely to reduce the number of bidder complaints challenging unclear tender notices.

7.2. Prioritising functional requirements and allowing for substitutes or alternative solutions

The OECD Guidelines (OECD, 2009^[4]) recommend that public bodies define tender specifications in terms of performance-based requirements that focus on objectives, rather than implementation methods. In this way, they can encourage alternative or innovative solutions, boost competition and, through competitive pressure, make bid rigging less likely.

Performance-based contracting spells out the targets of the contract leaving the specific manner to achieve such results to the winning bidder's discretion. Good performance may be measured by commonly accepted outcome measures that are appropriate to the product in question such as timeliness, reliability, and meeting the contract's targets. Performance-based contracts generally contain a scheme of penalties or rewards for performance throughout the contract period. As a contractor's remuneration is tied to its ability to meet the targets, such agreements provide an incentive for the contractor to improve its performance and efficiency (OECD, 2014^[24]). Rewards or penalties can be financial or include extensions of contracts for particularly good service. For example, in the United Kingdom, Transport for London's bus tendering introduced performance incentives to invest in quality by means of extensions to concessions (Box 7.1) (OECD, 2014^[24]).

Box 7.1. Quality incentives in London bus tenders, UK

In the United Kingdom, contracts for the provision of bus services in Greater London are awarded through a tender process managed by transport authority Transport for London that aims to improve service quality. Each year, around 15-20% of the network is subject to tender with private bus operators bidding for contracts to run specific routes for five-year periods. The award criterion for the tenders is “best value for money”, which includes price, quality and safety. Automatic two-year extensions are granted if performance meets a number of qualitative indicators.

Quality incentives were introduced in 2001 and have been progressively expanded. These are mainly gross-cost contracts with a scheme of incentive payments and disincentive penalties related to mileage and reliability; they are based on observed quality. Further performance-payment schemes were introduced in 2008 with service quality measured through criteria including mileage-operated reliability (regularity on high-frequency services, punctuality on low-frequency services); driver and vehicle quality; engineering quality; customer satisfaction; safety, and passenger and staff security. A number of monitoring systems are used for evaluation, including consumer and mystery-traveller surveys and inspections.

Source: OECD (2014), “Hearing on the Use of Tenders and Auctions – Issues Note by the Secretariat, Working Party No. 2 on Competition and Regulation”, DAF/COMP/WP2(2014)15, [https://one.oecd.org/document/DAF/COMP/WP2\(2014\)15/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2014)15/en/pdf).

According to the RPPL, functional requirements can be used in tenders. Specifications must not require a specific type of manufacturing or origin, indirectly limit the options to a single supplier, favour specific suppliers or exclude others, or require specific brands or patents.¹ In practice, however, several stakeholders pointed out that EsSalud’s tender terms are sometimes tailored to specific suppliers (not necessarily on purpose, but rather due to incomplete market research), and are product-specific and not performance-oriented.

7.3. Contract award (bid evaluation) criteria and use of non-price factors

The RPPL provides a set of bid-evaluation criteria (Section 3.3.2 and detailed in Table 7.1) that must be reasonable and proportional to the object of the procurement. If OSCE’s standard tender documents are applicable, their evaluation criteria must be used, which prevents purchasers from using other evaluation criteria.

The specific criteria for each process are determined by the selection committee, which will apply them to score and rank each bid. The criteria and the weight attributed to each are stated in the contract notice including the tender terms published on SEACE. Price can be the sole criterion.

Public entities can change the criteria following bidders’ enquiries and observations. If a bidder comments that the evaluation methodology is not in line with the RPPL, the selection committee may adjust the methodology. If there is a further appeal before OSCE (Section 3.3.2 and Section 7.1), OSCE will evaluate the legality of the methodology and adjust it to the provisions of the RPPL, requesting a change of the tender terms.

Table 7.1. Evaluation criteria in the Public Procurement Law (PPL)

Category	Evaluation criteria
Goods	<ol style="list-style-type: none"> 1) Price (mandatory) 2) Commercial guarantee 3) Delivery timetable 4) Specific features required for the object of the procurement, such as environmental and social sustainability, and improvements 5) Contracting workforce with disability 6) Others established in the standardised tender documentation approved by OSCE: <ul style="list-style-type: none"> – availability of services and replacements – training of an entity's workforce – improvements to technical requirements or conditions
Services	<ol style="list-style-type: none"> 1) Price (mandatory) 2) Delivery timetable 3) Commercial guarantee 4) Specific features required for the object of the procurement, such as those involving environmental and social sustainability: <ul style="list-style-type: none"> – contracting workforce with disabilities – work safety-management system – environmental-management system 5) Other features established in the standardised tender documentation approved by OSCE: <ul style="list-style-type: none"> – training entity's workforce – improvements to the technical requirements or the conditions established in the tender documentation – quality-management system
Consultancy	<ol style="list-style-type: none"> 1) Proposed methodology 2) Experience and qualification of key workforce 3) Criteria related to object of the procurement, such as equipment and infrastructure 4) Other features established in the standardised, OSCE-approved tender documentation
Works	<ol style="list-style-type: none"> 1) Specific features required for the object of the procurement, such as environmental and social sustainability and improvements: <ul style="list-style-type: none"> – work safety-management system – environmental-management system 2) Other features established in the standardised, OSCE-approved tender documentation: <ul style="list-style-type: none"> – training
Selection of individual consultants	<ol style="list-style-type: none"> 1) Specific experience 2) Qualifications 3) Interview

Source: Article 51 of the RPPL and OECD (2017), *Public Procurement in Peru: Reinforcing Capacity and Co-ordination*, OECD Publishing, Paris, www.doi.org/10.1787/9789264278905-en.

Price-only criteria are suitable for more standardised goods, works or services for which cost is the main issue for the contracting authority. Price is an objective and clear criterion that limits the risk of a contracting authority's impartiality being questioned and the award decision being challenged in court.

Non-price criteria are better suited to tenders in which price alone is insufficient to provide a good response to the contracting authorities' requirements (OECD, 2015^[3]). This is the case of technical, complex and innovative projects for which award criteria based on quality rather than price can yield better procurement outcomes and reduce the risk of collusion, since quality is more difficult to rig than prices. In Mexico, for instance, non-price criteria, such as cost-benefit evaluation criteria, are mandatory when the procured goods or services are technically highly specialised or innovative. Quality criteria may relate to technical performance and track record, aesthetic and operation characteristics, maintenance service, technical assistance and staff expertise.

During the fact-finding mission, some stakeholders pointed out that EsSalud generally uses price as the criterion to select the winner. Some complex products, such as pharmaceutical products to treat cancer, are purchased through reverse auctions, in which price is the only criterion.

EsSalud should consider using non-price award criteria, when quality and innovation are relevant dimensions of the procured goods, services and works. This is particularly the case for non-standard pharmaceutical products. Quality-based award criteria could reward innovation, as well as cutting costs.

In Peru, scoring rules that measure the relative importance of each criterion should be stated clearly in the call for tender. This is consistent with the practice in OECD member states and non-member states. In Spain, the law stipulates that award criteria should be translatable into figures or percentages, through formulas included in the tender terms. Some procurement systems allow for a descending ranking of the criteria (for example, in Sweden, Spain, Bulgaria and the Czech Republic). In Switzerland, case law has set that price should be given a weight of at least 20% in scoring. In Ukraine, the relative weight of the price or aggregate life-cycle cost in the scoring cannot be lower than 70%. In Brazil and Costa Rica, price must be given a greater weight than non-price criteria (OECD, 2015^[25]).

Box 7.2 provides an example of transparent and objective award criteria.

Box 7.2. Transparent and objective award criteria

To ensure that award criteria are clearly and objectively defined:

- 1) use what is economically most advantageous as a basis for evaluation, unless a commodity purchase, for which the lowest price may be used
- 2) specify the relative weightings of each criterion and justify each one in advance
- 3) specify the extent to which economic, social or environmental criteria are taken into account
- 4) include and record any action that a procuring agency is entitled to make with regard to the criteria, such as negotiations and specific conditions.

Source: OECD (2009), *Principles for Integrity in Public Procurement*, OECD Publishing, Paris, www.oecd.org/gov/ethics/48994520.pdf.

7.4. Limiting post-award contract modifications

Contracts may be modified at the request of suppliers if the public purchaser approves, for the following reasons:

- 1) the execution of additional deliverables
- 2) the reduction of deliverables
- 3) extensions of deadlines

- 4) other reasons permitted by the PPL or RPPL, including when a supplier offers goods or services of similar or better quality, if this is accepted by the purchaser.

In addition, public purchasers can unilaterally increase or decrease the procured goods, services and consultancy work by up to 25% of the contract value, if this is indispensable to achieving the aim of the contract and so duly justified. In the case of public works, purchasers may unilaterally increase deliverables by 15% of the contract value.² Any modifications must not affect the financial balance of the contract; if it does, the beneficiary must compensate the impacted party.

The possibility of contracts being modified post-award, particularly unilaterally, may discourage the participation of more risk-averse bidders. Besides, firms that expect to have to renegotiate the contract and feel confident about their bargaining position with the public administration may act strategically by placing low bids to win and then increasing them through negotiation. This might lead to contracts being awarded to bidders most confident of their ability to renegotiate rather than the most efficient (OECD, 2014^[24]).

In most jurisdictions, when a public contract needs to be substantially modified, the starting assumption is that the modification will trigger a new competitive public tender process to give all potential bidders the chance to submit offers that meet the altered circumstances (SIGMA, 2016^[26]).

Limited modifications to an existing public contract are often allowed when they are necessary and justified, such as in situations where genuinely unforeseeable circumstances occur. Box 7.3 shows how the European Union Directive on Public Procurement regulates modifications.

Box 7.3. Modification of contracts under the EU Directive on public procurement

EU Directive 2014/23/EU on public procurement permits the modification of a contract without the need to conduct a new procurement procedure only within strict boundaries and in specified situations. In general, contracts may be modified when any changes are not substantial.

The directive sets out six non-substantial modifications permitted during the term of a contract.

- 1) **Modifications expressly provided for in the initial procurement documents.** Review clauses in procurement documents must be clear, precise and unequivocal; they must specify the scope and nature of possible modifications or options, as well as the conditions under which they may be used. Review clauses must not alter the overall nature of the contract.
- 2) **Additional works, services or supplies** that become necessary, but were not included in the initial procurement. These are only possible where a contractor cannot be changed for economic or technical reasons such as interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, and changes would cause significant inconvenience or substantial duplication of costs for the contracting authority. Any increase in costs due to modifications should not exceed 50% of the original contract's value. Contracting authorities that use this provision to modify a contract must publish a modification notice in the Official Journal of the European Union (OJEU).
- 3) **Modifications due to unforeseen circumstances** that a diligent contracting authority could not have foreseen, and which do not alter the contract's overall nature. Any increase in costs from modifications should not exceed 50% of the original contract's value. Contracting authorities that use this provision to modify a contract must publish a modification notice in the OJEU.

- 4) **Replacement of a contractual partner** is allowed in three situations: a) when it is the consequence of a clear, precise and unequivocal review clause that sets out the scope and nature of the replacement, as well as the conditions under which it may be used; b) when a contractor faces structural changes during a contract, such as an internal reorganisation, takeover, merger, acquisition, or even insolvency; c) when the contracting authority itself assumes the main contractor's obligations towards its subcontractors.
- 5) **Low-value, non-substantial modifications**, which must be: a) below the relevant EU financial threshold for the contract; and b) less than 10% of the initial contract value for a services-supply contract or less than 15% for a works contract.
- 6) **Other non-substantial modifications**. Modifications are considered as substantial and to require a new procurement procedure when they render the contract "materially different in character from the one initially concluded". According to the Directive, this is the case when the modification: a) has an impact on the initial procurement procedure; b) changes the economic balance in favour of the contractor; c) extends the scope of the contract considerably; and d) sees the contractor replaced in other situations than those mentioned above as non-substantial changes to the contract.

Source: 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>

7.5. Recommendations for action

To improve tender terms and contract-award criteria, the OECD has the following recommendations.

- 1) EsSalud should consider using quality award criteria, in addition to price when quality and innovation are relevant dimensions of the procured goods, services and works. For example, this may be the case for non-standard pharmaceutical products.
- 2) EsSalud should also consider using award criteria that reward savings in contract delivery .
- 3) EsSalud should try not to modify awarded contracts and to be vigilant about renegotiation. Post-award contract modifications, in particular unilateral ones, may discourage the participation of risk-averse bidders. They also lead to bidders strategically submitting bids that are not genuine with the expectation of renegotiation.

Notes

¹ Article 16.2 of the PPL

² Article 34 of the PPL. Exceptionally, for public works, purchasers may increase deliverables by up to 50% in the case of issues resulting from deficiencies in the technical file or from unexpected circumstances. In these cases, the payment must be authorised by the CGR.

8 Transparency, disclosure and sharing of information

From the perspective of competition law, while transparency regarding procurement opportunities is necessary to attract private-sector interest and increase participation in procurement procedures, excessive information sharing during and after the tender process is deemed risky as it can facilitate bid rigging (OECD, 2009^[4]). Specifically, suppliers with easy access to detailed procurement information, as well as to the identities of interested bidders and the contents of their bids, may use this information to reach out to competitors and organise a price-fixing and market-allocation scheme. This chapter recommends measures to strike a balance between transparency and competition-policy objectives.

8.1. The published PAC and details of volumes, costs and time schedules

The publication of a PAC has pro-competitive effects as it informs suppliers of procurement opportunities, allowing them to prepare and submit offers. However, if the PAC contains too much detail – of volumes, costs, delivery locations and schedules, for example – it could facilitate the formation of bid-rigging schemes.

The type and level of information that goes into the PAC is not decided by EsSalud, as all public entities follow the same rules when drawing up their PAC. Peruvian procurement policy regulators, like OSCE, and legislators might carefully consider the exact information to include in the PAC so that it becomes a useful planning tool, while avoiding public procurement predictability.

Peru's public procurement law should allow for the publication of a redacted, simplified version of the PAC, with the full detailed version retained for internal purposes only. In Mexico, for example, power utility Comisión Federal de Electricidad produces two annual procurement plans: an edited version for a wider audience and the full non-public version for internal use (Box 8.1).

Box 8.1. Comisión Federal de Electricidad's two annual procurement plans, Mexico

Regulations require Mexico's power utility Comisión Federal de Electricidad (CFE) to have an annual procurement programme listing the goods and services to be acquired during the year in accordance with its needs and projects. This programme is created in two versions: public and internal. The public version contains aggregated information and excludes sensitive commercial and detailed information that could facilitate bid rigging. For example, the public version of CFE's 2019 annual procurement programme contains the number of works required and their overall budget for each CFE department, but does not contain detailed descriptive information about the exact nature of the works, their budgets or information on the timeline of the procurement processes.

Source: OECD (2018), *Fighting bid rigging in Mexico: a review of CFE procurement rules and practices*, www.oecd.org/daf/competition/OECD-CFE-report-2018.pdf.

A consistent OECD recommendation for projects about bid rigging in public procurement is that the reference values for each tender should not be included in the PAC, to prevent them serving as a focal point for collusion and as a price reference upon which suppliers might be tempted to collude and fix prices. In Peru, making the estimated and reference value of procurements public is no longer compulsory (Box 9.2) and Indecopi recommends not publishing them, including in the PAC.

8.2. Non-disclosure of full details of bidders and non-winning bids

Under the PPL, EsSalud publishes not only the invitation to tender and tender documents on SEACE, but also the registry of participants, the names of bidders participating in the enquiries and observations phase, comparative tables of bid evaluation as a basis for the contract award, as well as bidder complaints against the tender process and contract award. SEACE also includes all information related to contract performance, like guarantees, price adjustments, performance extensions, contract-change orders (additions and reductions), eventual penalties and payment. In short, all important procurement actions are published on SEACE, except for business secrets and personal information.

There are legitimate public-policy considerations in deciding the type of procurement information disclosed and at which level of detail, including the accountability of public officials, transparency of allocation of public bodies' budgets, the fight against corruption, and the facilitation of bidders' access to legal redress in case of perceived harm by a public authority's procurement-related decision.

Nevertheless, detailed information on bidders and bids can facilitate collusive agreements by, first, allowing potential bidders to identify their competitors and so aid any attempts to collude. Second, once a collusive scheme has been agreed, detailed information on bidders and bids allows cartel members to monitor compliance with agreed terms, such as whether the other cartel members have indeed refrained from bidding or provided agreed cover bids, or any other form of bid rigging. If the cartel agreement has not been respected, "loyal" cartel members may decide to punish others that have deviated from the agreed terms. Punishment may consist of, for example, price wars to discipline the cheating company.

It is possible to find a balance between transparency and accountability objectives and competition-policy objectives, so as to achieve both without major risks. If the public release of information about bids and bidders is delayed until a certain time after the conclusion of the tender, and bidders' information is anonymised throughout the tender process (including withholding publication of the RNP), transparency would be served and competition maintained. For immediate public-information purposes, the name of the winning bidder could be released as soon as the contract is awarded.

8.3. Recommendations for action

To balance the policy objectives of integrity, transparency and competition, the OECD has the following recommendations.

- 1) Procurement policy regulators, like OSCE, and legislators in Peru, should consider which information should be included in the PAC to make it useful for planning, while avoiding public procurement predictability.
- 2) Peru's public procurement law should allow the publication of a redacted, simplified version of the PAC, with the complete version of the PAC accessible only to public procurement staff.
- 3) Peru's public procurement law should allow delaying the public release of information about bids and bidders until a set time after the conclusion of the tender. To enhance accountability, the name of the winning bidder should be released as soon as the contract is awarded.

9

Raising bid-rigging awareness among bidders and procurement officials

Competition advocacy is an effective tool in the prevention and deterrence of bid rigging. It raises awareness about the risks of bid rigging both for public purchasers, who may lose funds, and for companies, which may face fines, and helps public officials design better tenders and improve cartel detection. This chapter provides an overview of advocacy in Peru, and suggestions on how to enhance it.

9.1. Advocacy by Indecopi: guidelines, opinions and legislative reform

The OECD's fact-finding mission established that awareness among officials and in the private sector of anti-competitive practices related to public procurement is relatively low, despite Indecopi's active advocacy. In 2018, the competition authority published *Guía para Combatir la Concertación en las Contrataciones Públicas* (Box 9.1), guidelines on fighting bid rigging that aim to provide public purchasers with the knowledge to identify bid rigging and the tools to maximise competition in tenders (Indecopi, 2018^[12]).

The guidelines benefitted from comments provided by OSCE and Perú Compras. Indecopi also organised a presentation of the guidelines in collaboration with these two entities in March 2019, and released a video explaining them.

Box 9.1. Indecopi's guidelines on fighting bid rigging, Peru

Indecopi's guidelines outline a set of market characteristics that make bid rigging more likely, including a limited number of companies, few or no recent entrants, homogeneous goods or services, or few substitutes.

The guidelines recommend the following measures to promote competition in public procurement.

- 1) Encourage the centralisation and consolidation of purchases among various public purchasers.
- 2) Avoid tender terms and technical specifications that favour certain bidders, such as large companies or companies offering specific products, and avoid disproportionate requirements.
- 3) Choose pro-competitive evaluation factors in line with the needs of the public purchaser.
- 4) Maintain a close relationship with Indecopi.

In addition, the guidelines identify a number of signs that can suggest the existence of bid rigging.

Stage	Warning sign
Preparatory stage	Joint replies from bidders or identical or similar replies. Companies not replying or delaying replying to requests for quotations.
Participant-registration stage	Unexpected absence of certain companies. Participation of unusual companies that might suggest the presence of a scheme to monitor a bid-rigging agreement.
Enquiries and observations stage	Identical or similar questions and comments. A question or comment that seems aimed at obtaining a reply from the public purchaser favouring another bidder.
Post-qualification stage	Unexpected withdrawals or disqualifications. Consortia between separately qualified companies.
Bid-submission stage	Economic or technical offers with identical or repeated patterns. Repeat losing or disqualified bids. Sudden or unusual reductions in prices offered. Sudden or unusual increases in prices offered. Striking and sustained differences between certain bids offered and the winning firm's bid price. Bids and contract awards following a geographical pattern. Suppliers withdrawing from the selection procedure or desisting from submitting a tender. Rotating tender winners. Unusual consortia. Offers containing identical or similar content or formats.
Post-award stage	Winner subcontracting former competitors. The winner not signing the contract.
Others	Suspicious contacts, such as competitors meeting on dates close to crucial moments in the procurement process. Spoken or written references to an agreement between bidders. Shared instruments, such as same bank account or e-mail account.

Source: Indecopi (2018), *Guía para Combatir la Concertación en las Contrataciones Públicas*, www.indecopi.gob.pe/documents/51771/2961200/Gu%C3%ADa+de+Libre+Competencia+en+Compras+P%C3%BAblicas.

The Competition Act provides Indecopi with the power to issue, at its discretion, opinions and recommendations addressed to other public bodies aimed at the implementation of measures that promote competition, such as lifting barriers to competition.¹

The recipient of the recommendation must reply to Indecopi's opinion or recommendation within 90 days. Indecopi's opinions and recommendations are also sent to the presidency of the Council of Ministers and the Ministry of Economy and Finance.

Indecopi has issued several recommendations, including recommendations to amend the PPL (Box 9.2).

Box 9.2. Indecopi's recommendations to amend the public-procurement rules, Peru

In August 2018, Indecopi issued a recommendation to the Ministry of Economy and Finance and OSCE concerning the modification of the Public Procurement Law (PPL) and the Public Procurement Regulation (RPPL). Indecopi held meetings with the Ministry and OSCE to explain the recommendations in detail.

Pursuant to this recommendation, four amendments to the PPL and the RPPL were adopted in 2018.

- 1) To intensify competition and limit bid-rigging risks, it became no longer compulsory to make the estimated and reference value of procurements public.
- 2) It was stipulated that closer co-operation between Indecopi and public purchasers was needed to support investigations concerning potential competition infringements. Indecopi is now in contact with public entities to provide capacity building and reply to queries.
- 3) The debarment of suppliers convicted of bid rigging was clarified. It is foreseen for very serious law violations and after the decision finding the violation becomes final (that is, unappealable). In such cases, OSCE will register the offender on its debarment list. The legislation also specified that debarment lasts one year.
- 4) Bidders were obliged to submit a certificate of independent bid determination (CIBD), a sworn statement indicating that they had not reached an agreement with competitors concerning their bid.

Recommendations concerning a procurement process in Machu Picchu

In December 2016, Indecopi published a report analysing the competition conditions in the market for tourist transport services between Aguas Calientes and Machu Picchu. The 30-year concession granted in 1995 to the company Consettur Machupicchu had been declared void by Peruvian courts.

In its report, Indecopi recommended that the contracting public authority call a procurement process laying down clear technical specifications and transparent rules, including, among others, that none of the bidding companies be formed by civil servants or companies related to Consettur. The authority informed Indecopi that it would incorporate the recommendations.

Recommendations to the Peruvian Navy

In August 2019, Indecopi published a report concerning a public procurement process by the Peruvian Navy to purchase evaporated milk (Procurement Process No. 21-2018-MGP/DIRCOMAT-1). Indecopi identified and analysed requirements that restricted competition and recommended, among other measures, avoiding the use of excessively specific requirements – such as specific weight of the items – that could restrict the number of companies bidding. The navy incorporated the recommendations and modified the technical specifications by, among other things, broadening the weight range of items.

Source: Indocepi (2016), *Abogacía de la competencia en el mercado de servicio de transporte turístico de acceso a la Ciudadela Inka de Machupicchu*, www.indecopi.gob.pe/documents/51771/1304314/ABOGACIA_1-2016.pdf; Indocepi (2019), *Abogacía de la competencia en los procedimientos de selección de la Marina de Guerra del Perú para la adquisición de leche evaporada*, <https://bit.ly/2RzLqUH>.

Members of Congress can also request information they deem necessary from public bodies, including Indecopi.² Congress has requested Indecopi's opinion concerning laws under discussion on several occasions. These, like all Indecopi reports, are available on its website.³ None of the opinions issued concern laws relevant to public procurement.

Peruvian law does not require public purchasers to request advice from Indecopi when preparing a tender. They may do so at their discretion, however. EsSalud could consider requesting that Indecopi analyses draft tender documentation for high-value procurement processes or processes that take place in markets in which competition seems limited or which Indecopi has investigated or is investigating.

9.2. Inter-institutional co-operation

In 2018, according to *OECD-IDB Peer Review of Competition Law and Policy: Peru*, OSCE seemed unaware of both the costs of collusion in public procurement and of Indecopi's work to prevent collusive behaviour. The report recommended that OSCE and Indecopi improve their co-operation (OECD, 2018^[11]).

Since then, this co-operation has become closer. In December 2019, Indecopi, the Ministry of Interior and OSCE signed an inter-institutional co-operation agreement to promote better public procurement. It encourages the signatories, each acting within its own mandate, to develop joint mechanisms to prevent irregularities in public procurement processes. OSCE and Indecopi have also co-operated to allow specific Indecopi officials to have access to OSCE's public procurement database.

The PPL stipulates that where a public purchaser, OSCE or the Public Procurement Tribunal discovers indicia of possible anti-competitive conduct in a public procurement process, it must provide all relevant information to Indecopi. To safeguard the effectiveness of the investigation, information sent to Indecopi is confidential and not notifiable to any supplier suspected of having participated in a bid-rigging cartel. Indecopi has discretion for decisions about whether to open the case. Both of Indecopi's bid-rigging cases (medical oxygen and haemodialysis) were based on notifications sent to Indecopi by EsSalud.

Co-operation between Indecopi and procurement bodies regarding law enforcement against bid rigging could still improve. Indecopi receives relatively few complaints from procurement bodies about potential bid-rigging cases. During the OECD fact-finding mission, stakeholders reported that Indecopi's processing of procurement-related complaints is perceived as slow and this may deter public procurers from contacting Indecopi. This is probably explained by the fact that the ex post investigation of cartel cases takes a long time, while public procurement timelines are much shorter. Indecopi could explain the lack of alignment between investigation and procurement timelines when it conducts capacity building for procurers, to clarify what what can be asked and expected from Indecopi.

The OECD's experience with in-country projects shows that formal co-operation agreements between competition and procurement authorities are useful in clarifying what can be required and expected from each body. Such agreements set the terms of inter-institutional co-operation and mutual support, and the conditions and channels of communication, including for exchanging information, sharing of evidence and providing investigation support (OECD, 2020^[27]). Indecopi has signed memoranda of understanding (MoU) with Perú Compras; the Supervisory Board for Investment in Public Transport Infrastructure (Organismo Supervisor de la Inversión en Infraestructura de Transporte de Uso Público, Ositran); and the Ministry of Interior-National Police and OSCE.⁴

One result of this OECD project is a model co-operation agreement between EsSalud and Indecopi. Its goal is to foster a partnership between the two entities both to promote competition and prevent bid rigging in EsSalud procurements, and to improve Indecopi's detection and investigations of bid rigging. The model agreement is based on international good practice and was peer reviewed by the competition authorities

of Brazil, Colombia, Mexico and Spain. EsSalud should also consider adopting a co-operation agreement with OSCE, to exchange good practices in public procurement.

Box 9.3. Key points of the Memorandum of Understanding between EsSalud and Indecopi, Peru

The purpose of the memorandum of understanding (MoU) is to foster co-operation between EsSalud and Indecopi, promote competition in EsSalud's procurement, and improve the prevention, detection and investigation of bid rigging by EsSalud and Indecopi.

The MoU covers the following areas of co-operation: assistance in law enforcement; information and resources exchange; joint training and outreach to increase expertise in areas of mutual interest; and co-operation in the implementation of the OECD recommendations included in this OECD-EsSalud project on fighting bid rigging in the Peruvian health sector.

Source: Draft MOU between EsSalud and Indecopi.

9.3. Capacity building for public procurement staff

Training officials about the risks, costs, prevention and detection of bid rigging is extremely useful. Procurement officials are often in the best position to detect signs of collusion in public tenders, as they have access to tender data and documents, opportunities to observe patterns of behaviour in the bidding process, and comprehensive knowledge of the relevant market. By acquiring appropriate knowledge, public officials can also design tenders that make bid rigging difficult. The OECD Guidelines recommend that procurement agencies regularly train their staff in bid-rigging prevention and detection (OECD, 2009^[4]).

Ensuring that high-quality public procurement training is accessible is important. This requires making training available for public procurement officials at central and sub-central level, at no or low cost (including scholarships), using digital training, and advertising training opportunities in advance.

Between April and August 2019, Indecopi carried out capacity-building sessions about its public procurement guidelines with more than 400 officials in Lima, Huancayo, Iquitos, Cusco, Arequipa, and Chiclayo. Indecopi has also delivered capacity-building workshops on the same topic for over 300 CGR officials and 25 OSCE officials.

Perú Compras and OSCE have also carried out capacity building across Peru. EsSalud has benefitted from Perú Compras' assistance and workshops. All training programmes on public procurement offered by Indecopi, OSCE and Perú Compras are free of charge. Perú Compras' annual capacity-building planning is available on its website.

The use of online and digital options to deliver or support education may reduce time and geographical constraints and improve access to training. E-learning allows for a more personalised learning experience with courses adapted to learners' time constraints and particular needs (OECD, 2016^[28]). Indecopi has delivered online capacity building during the COVID-19 pandemic; in July 2020, for example, it provided capacity building for 60 Perú Compras officials about the design of competitive procurement processes and detection of anti-competitive conduct. The workshops were carried out as part of the MoU between Indecopi and Perú Compras.

Norway provides a good example of a systematic approach to e-learning courses (Box 9.4). Mexico and Brazil also use e-learning to build public officials' capacity in the fight against bid rigging (Box 9.5).

Box 9.4. E-learning for public procurement, Norway

In light of the need for capacity building and personnel training in the public sector, and the costs involved in traditional methods, in 2014, Difi, the Norwegian Agency for Public Management and eGovernment, was given the task of developing digital-training programmes and establishing a common platform for the distribution and sharing of such programmes.

The resulting online learning platform (læringsplattformen.difi.no) was launched in June 2016 and has since provided all public entities and their employees with free e-learning courses, as well as allowing them to share their own digital-learning resources with other public entities. They can be easily accessed by anyone on computers, tablets and smartphones with simple Internet access, and are compatible with the most popular web browsers. Once users register and log in, they are given an overview of the courses available and those they have started and completed; they can also download certificates from courses taken. Most courses come with downloadable course material. The most effective learning is thought to come from mixed forms of learning, blending solo online study with participation in seminar groups. Surveys have shown that 80% of participants appreciated this way of learning.

In establishing the learning platform, the government was seeking to achieve several goals, including increased learning efficiency, and increased flexibility and access to new and relevant knowledge. E-learning was chosen because it can be carried out regardless of time and place. By replacing local courses with joint training, facilitating content sharing, creating holistic learning pathways, and ensuring consistency between course development and actual needs, training quality has been improved. Handling a large part of the digital learning through a central unit has allowed for better skills management, while economic benefits have included better use of resources, reduced purchases of course-development assistance, fewer overlapping courses, and reduced licensing, administrative and operating expenses for administration and implementation.

Courses in public procurement

Since June 2016, Difi has released four different courses in public procurement on its learning platform. Courses last between 30 and 60 minutes, and are normally divided into modules or short episodes, often short videos, that can be taken independently. Modules are a combination of practical examples, multiple-choice questions, and information and tips from experienced buyers and managers. Target groups are both new and experienced buyers, as well as managers, and may include university students.

Source: OECD (2017), *Public Procurement in Peru: Reinforcing Capacity and Co-ordination*, OECD Public Governance Reviews, OECD Publishing, Paris, [www.dx.doi.org/10.1787/9789264278905-en](https://doi.org/10.1787/9789264278905-en).

During the fact-finding mission, stakeholders pointed out that no specific strategy exists for capacity building in public procurement. It would be useful if Indecopi, OSCE and procurers such as EsSalud and Perú Compras, designed a joint strategy on the correct topics and frequency of public procurement and competition training. They might also consider the development of a joint electronic platform on which online and real-life training opportunities for public officials can be advertised and digital capacity building be delivered, similar to the Norwegian example described in Box 9.4 or that of Mexico and Brazil (Box 9.5).

Box 9.5. E-learning on fighting bid rigging in Latin America

CADE and ENAP course on the detection of cartels in public procurement

In October 2019, Brazil's competition authority CADE launched an online course in partnership with Brazilian National School of Public Administration (Escola Nacional de Administração Pública, ENAP) about prevention and detection of cartels in public procurement. While primarily aimed at officials in charge of public procurement (although it is not mandatory), the programme is also open to the public and accessible through the government education platform, Escola Virtual do Governo (EVG). The programme takes 30 hours to complete and, by 2021, 6 100 people had registered and, approximately, 2 500 people had completed it. The programme aims to prepare procurers to identify indicia of collusion between competitors and report such behaviour to the appropriate authorities, in order to prevent, detect and suppress cartels in procurements.

COFECE course on the design of competitive public procurement procedures and detection of collusion

Mexico's competition authority COFECE also offers an online course on the prevention and the detection of bid rigging. This course is aimed at public officials, has a duration of four hours and is available on COFECE's website. The course introduces officials to Mexico's competition law and COFECE's role; offers recommendations and good practices to design more competitive procurement procedures and to detect potential bid-rigging conducts; and mentions the most relevant bid-rigging cases investigated by COFECE.

Source: OECD (2021), *Fighting Bid Rigging in Brazil: A Review of Federal Public Procurement*, www.oecd.org/daf/competition/Fighting-Bid-Rigging-in-Brazil-A-Review-of-Federal-Public-Procurement-2021.pdf; COFECE (n.d.), *Diseño de procedimientos de contratación pública competidos y detección de colusión*, <https://cursos.cofece.mx/local/staticpage/view.php?page=diseño-de-procedimientos-de-contratacion-publica>.

To provide a co-ordinated national response to bid rigging in government procurement, including training, the US Department of Justice set up a Procurement Collusion Strike Force in November 2019 (Box 9.6).

Box 9.6. US Procurement Collusion Strike Force: a co-ordinated national response to bid rigging

Founded in November 2019 by the US Department of Justice, the Procurement Collusion Strike Force (PCSF) is a partnership between prosecutors of the Antitrust Division of the Department of Justice and law enforcement, including prosecutors from Offices of the US Attorneys and investigators from the Federal Bureau of Investigations, Department of Defense Office of Inspector General, US Postal Service Office of Inspector General, US Air Force Office of Special Investigations and Department of Homeland Security Office of Inspector General.

The PCSF seeks to deter bid rigging before the procurement process starts, as well as detect, investigate, and prosecute bid rigging if it occurs. The deterrence objective is served by the creation and announcement of the PCSF (considered to have a dissuasive effect), as well as outreach to and training with both procurement officials – for the design of procurement processes – and suppliers, about competition violations and penalties.

The detection objective is served by outreach to procurement officials and suppliers that may lead to reports by officials on possible collusion in their procedures, and reports and leniency applications by suppliers. On PCSF's website, the public can review information about competition laws and training programmes, and report suspected anti-competitive conduct affecting public procurement.

During the COVID-19 pandemic, the PCSF delivered virtual training to groups of varying sizes about competition offences and collusion risks with thousands of federal agents, criminal investigators, and data scientists, as well as federal, state, and local procurement personnel.

More than two dozen active grand-jury investigations were opened during the PCSF's first year.

Source: United States Department of Justice (2021), "Procurement Collusion Strike Force", www.justice.gov/procurement-collusion-strike-force.

9.4. Raising private-sector awareness of the risks of bid rigging

Improving awareness of competition risks in public procurement for the private sector, including SMEs, was identified as a subject for future work in the 2016 *Fighting bid rigging in public procurement: Report on implementing the OECD Recommendation* (OECD, 2016^[6]). Informing and training the private sector on the risks of cartels is an important step in the fight against bid rigging. Companies should know which conducts may constitute a competition offence; that rigging bids is always illegal and can never be justified or excused; and that collusion is punishable with severe sanctions, has negative effects on commercial reputations, and may preclude access to future procurement opportunities.

During the fact-finding mission, it was pointed out that several pharmaceutical manufacturers in the private sector have internal legal-compliance policies, including a compliance officer and annual capacity-building sessions, and such policies cover competition-law obligations. The National Association of Pharmaceutical Laboratories (Asociación Nacional de Laboratorios Farmacéuticos) has an ethics code and internal-compliance policies, and conducts capacity building for its board, on subjects including Indecopi's leniency programme and hub-and-spoke agreements. The Chamber of Commerce of Lima has a compliance officer and a code of conduct, and provides capacity building for its members; it also has memoranda of understanding with Indecopi and CGR.

Since 2018, Indecopi has imposed the adoption of a compliance programme on a company found guilty of anti-competitive conduct in 11 cases (all of them concerning horizontal agreements).⁵ Indecopi-imposed compliance programmes have two parts: the first establishes a programme to detect, stop and report anti-competitive conduct, while the second mandates capacity building in competition law for key company

staff. In 2020, Indecopi produced *Guidance on Competition Compliance Programmes (Guía de Programas de Cumplimiento de las Normas de Competencia)*⁶ to assist companies that wish to set up a compliance programme (Box 9.7). The *Guidance* is consistent with decisions taken by Indecopi to impose the adoption of a compliance programme.

Box 9.7. Indecopi's Guidance on Competition Compliance Programmes, Peru

Indecopi's guidance on compliance programmes is for companies and aims to promote a compliance culture that reduces the likelihood of anti-competitive conduct.

It provides a definition of compliance programmes; includes a list with the benefits of implementing this type of programmes; and outlines the costs for companies infringing the Competition Act.

While acknowledging that no single template for an effective compliance programme exists, the programme outlines the factors that Indecopi considers relevant.

- 1) **Genuine commitment from senior management** to comply, as evidenced through resource allocation and empowerment of the programme committee.
- 2) **Identification and management of current and potential risks** to allow a company to recognise the necessary actions or remedies.
- 3) **Internal procedures and protocols** designed to prevent the occurrence of the identified risks.
- 4) **Training for employees** that generates spaces for discussion and increases motivation to comply.
- 5) **Constant updating and monitoring of the compliance programme** to allow for improvements to the programme and the achievement of its objectives.
- 6) **Audits on compliance programmes** undertaken by external consultants.
- 7) **Procedures for consultations and complaints** that employees can use in case of queries or potential infringements.
- 8) **Designation of a compliance officer** or committee who must be independent from management and oversee the programme's implementation.

In addition, the guidance refers to certain complementary components that may increase the effectiveness of compliance programmes.

- 1) **A competition manual** for staff that outlines a company's strategy for competition compliance.
- 2) **Incentives for employees** to promote participation in identifying risks and infringements.
- 3) **Disciplinary measures** that follow a pre-determined and known process.

The guidance also includes a section focusing on the application of compliance programmes to SMEs.

Source: Indecopi (2020), *Guía de Programas de Cumplimiento de las Normas de Competencia*, www.indecopi.gob.pe/documents/1902049/2501877/Gu%C3%ADa+de+Programas+de+Cumplimiento+de+las+Normas+de+Libre+Competencia+%281%29.pdf/f74e17e1-9409-07db-fffd-eeac122dbbda.

Indecopi has also provided capacity building to the private sector, particularly in the context of infringement decisions in which it has imposed the adoption of a compliance programme. Indecopi could also provide capacity building at the request of any interested company.

OSCE's standard tender documents require that companies participating in a procurement process must share any indicia of anti-competitive conduct during the procurement process with OSCE and Indecopi.

Companies must provide all information requested by OSCE or Indecopi, testify and reply to any clarification request, and co-operate in any way necessary.

Any company participating in a procurement process must submit a certificate of independent bid determination (CIBD), a sworn statement that it is participating in the procurement process independently, without communication with other suppliers, and confirming that it is familiar with competition-law requirements.⁷ The OECD Recommendation suggests the CIBD as a tool for discouraging communication among bidders; a template version is included in OSCE's standard documents. Bidders must also acknowledge that they are aware of the relevant provisions in the Competition Act.

Overall, advocacy with and raising awareness in the private sector appears to be moving in the right direction. It would be reinforced if Indecopi, OSCE and relevant stakeholders, such as procurers like EsSalud and central purchasing body Perú Compras, design a joint strategy on the correct topics and training frequency for the private sector and public officials (Section 9.2.).

9.5. Recommendations for action

To raise awareness on the risks and costs of bid rigging, the OECD has four recommendations.

- 1) EsSalud and Indecopi should co-operate based on the model memorandum of understanding that the OECD has prepared, and jointly develop a long-term action plan to implement it.
- 2) Indecopi, OSCE, EsSalud and Perú Compras should consider designing a joint training strategy on public procurement and competition for public procurement officials and the private sector, and be given resources to implement this strategy.
- 3) Digital training opportunities for public officials are useful, easy to access and often free of cost, and should be encouraged.⁸
- 4) EsSalud should engage in an ex post evaluation to assess the implementation of the recommendations of this report and evaluate their impact.

Notes

¹ Article 14.2(e) of the Competition Act.

² Article 96 of the Constitution and Article 87 of the Regulation of the Congress.

³ See, www.indecopi.gob.pe/en/informes-para-el-congreso-de-la-republica.

⁴ See, <https://repositorio.indecopi.gob.pe/bitstream/handle/11724/7612/NP%20200818%20Capacitaci%C3%B3n%20a%20Per%C3%BA%20Compras.pdf?sequence=1>.

⁵ Article 49 of Competition Law.

⁶ See, www.indecopi.gob.pe/documents/51771/4663202/Guía+de+Programas+de+Cumplimiento+de+las+Normas+de+Libre+Competencia.

⁷ Article 52 of the RPPL.

⁸ This recommendation should be implemented by OSCE, Perú Compras, EsSalud and Indecopi.

Annex A. Laws and Regulations applicable to public procurement at EsSalud

Public procurement

Supreme Decree No. 082-2019, Updated Text of Law No. 30225, Public Procurement Law (Texto Único Ordenado de la Ley de Contrataciones del Estado).

Supreme Decree No. 344-2018-EF, Regulation of Law No. 30225 (Reglamento de la Ley de Contrataciones del Estado).

Directive No. 02-CEABE-ESSALUD-2019 V.01, Directive for the acquisition of pharmaceutical products or medical devices with non-domiciled providers (Directiva para la adquisición de productos farmacéuticos o dispositivos médicos con proveedores no domiciliados).

Directive No. 001-2019-OSCE/CD, Standardised tender rules and expression of interest requests under Law No. 30225 (Bases y solicitud de expresión de interés estándar para los procedimientos de selección a convocar en el marco de la Ley No. 30225).

Directive No. 006-2019-OSCE/CD, Selection procedure for reverse electronic auction (Procedimiento de selección de subasta inversa electrónica).

Directive No. 007-2017-OSCE/CD, Provisions applicable to the Electronic Catalogues of Framework Agreements (Disposiciones aplicables a los Catálogos Electrónicos de Acuerdo Marco).

Directive No. 016-2016-OSCE/CD, Procedure for the registration, renewal of registration, increase of maximum contracting capacity, extension of speciality and categories and registration of subcontracts of constructors and work consultants in the National Registry of Suppliers (RNP) (Procedimiento para la inscripción, renovación de inscripción, aumento de capacidad máxima de contratación, ampliación de especialidad y categorías e inscripción de subcontratos de ejecutores y consultores de obra en el Registro Nacional de Proveedores, RNP).

Directive No. 011-2019-OSCE/CD, Provisions on the content of the optional corporate purchase agreement (Disposiciones para el contenido de los acuerdos de compra corporativa facultativa).

Directive No. 009-2019-OSCE/CD, Guidelines for the issuance of opinions (Emisión de pronunciamiento).

Directive No. 005-2019-OSCE/CD, Participation of consortium suppliers in public procurement (Participación de proveedores en consorcio en las contrataciones del Estado).

Directive No. 012-2017-OSCE/CD, Risk management in planning of the execution works (Gestión de riesgos en la planificación de la ejecución de obras).

Directive No. 023-2016-OSCE/CD, Provisions on the formulation and response to enquiries and observations (Disposiciones sobre la formulación y absolución de consultas y observaciones).

Directive No. 022-2016-OSCE/CD, Provisions applicable to corporate purchases (Disposiciones aplicables a las compras corporativas).

Directive No. 002-2019-OSCE/CD, Annual Procurement Plan (Plan Annual de Contrataciones).

Directive No. 011-2016-CG/GPROD, Prior Control Service for Additional Works (Servicio de Control Previo de las Prestaciones Adicionales de Obra).

Specific EsSalud regulations

Law No. 27056 of 1999, Law Creating Social Health Insurance (EsSalud) (Ley de Creación de EsSalud).

Resolution of the Executive Presidency No. 656-PE-ESSALUD-2014, Organisation and Functions Regulation of EsSalud (Reglamento de Organización y Funciones de EsSalud).

Resolution of the Executive Presidency No. 226-ESSALUD-2015, Organisation and Functions Regulation of the Strategic Goods Supply Centre (CEABE) (Reglamento de Organización y Funciones del CEABE).

Manual of Processes and Procedures of the Central Logistics Management of EsSalud (Manual de Procesos y Procedimientos de la Gerencia Central de Logística de EsSalud).

Directive Council Agreement No. 04-03-ESSALUD-2019, Code of Ethics for EsSalud (Código de Ética de EsSalud).

Other regulations

Supreme Decree No. 004-2019-JUS, Updated Text of Law No. 27444 on General Administrative Procedure (Texto Único Ordenado de la Ley del Procedimiento Administrativo General).

Supreme Decree No. 021-2019-JUS, Updated Text of Law No. 27806 on Transparency and Access to Public Information (Texto Único Ordenado de la Ley de Transparencia y Acceso a la Información Pública).

Supreme Decree No. 072-2003-PCM, Regulation of Law No. 27806 on the Transparency and Access to Public Information (Reglamento de la Ley de Transparencia y Acceso a la Información Pública).

Law No. 27785 of 2002, Organic Law of the National Control System and the General Comptroller of the Republic (Ley Orgánica del Sistema Nacional de Control y de la Contraloría General de la República).

Law No. 28716 of 2006 on Internal Control of State Entities (Ley de Control Interno de las Entidades del Estado).

Law No. 27815 of 2002 on the Ethics Code of the Public Service (Ley del Código de Ética de la Función Pública).

Supreme Decree No. 033-2005-PCM, Regulation of Law No. 27815 of the Ethics Code of the Public Service (Reglamento de la Ley del Código de Ética de la Función Pública).

Law No. 1034 of 2008 on the Repression of Anticompetitive Conducts (Ley de Represión de Conductas Anticompetitivas).

References

- Connor, J. (2014), *Cartel Overcharges*, Purdue University. [9]
- Danish Competition and Consumer Authority (2020), *When companies bid jointly - guidelines for joint bidding under competition law*, <https://www.en.kfst.dk/media/t1lmhwkt/20201211-guidelines-on-joint-bidding.pdf>. [20]
- European Commission (2021), *Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground*, http://dx.doi.org/2021/C_91/01. [23]
- Indecopi (2018), *Guía para Combatir la Concertación de las Contrataciones Públicas*, <http://www.indecopi.gob.pe/documents/51771/2961200/Gu%C3%ADa+de+Libre+Competencia+en+Compras+P%C3%bablicas/>. [12]
- OECD (2021), *Government at a Glance 2021*, OECD Publishing, Paris, <https://dx.doi.org/10.1787/1c258f55-en>. [1]
- OECD (2020), *COVID-19: Competition and emergency procurement*, <https://www.oecd.org/competition/COVID-19-competition-and-emergency-procurement.pdf>. [19]
- OECD (2020), *Government at a Glance: Latin America and the Caribbean 2020*, OECD Publishing, <https://dx.doi.org/10.1787/13130fbb-en>. [2]
- OECD (2020), *Note on the Revision of the Recommendation on Fighting Bid Rigging*, [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2020\)24/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2020)24/en/pdf). [27]
- OECD (2019), *Fighting bid rigging in the procurement of public works in Argentina*, <https://www.oecd.org/daf/competition/Fighting-bid-rigging-procurement-public-works-Arentina-EN-web.pdf>. [14]
- OECD (2019), *Report on the Implementation of the Recommendation of the Council on Public Procurement*, [https://one.oecd.org/document/C\(2019\)94/FINAL/en/pdf](https://one.oecd.org/document/C(2019)94/FINAL/en/pdf). [16]
- OECD (2018), *Fighting Bid Rigging in IMSS Procurement: Impact of OECD Recommendations*, <https://www.oecd.org/daf/competition/IMSS-procurement-impact-OECD-recommendations2018-ENG.pdf>. [18]
- OECD (2018), *OECD-IDB Peer Reviews of Competition Law and Policy: Peru*. [11]
- OECD (2017), *OECD Reviews of Health Systems: Peru 2017*, OECD Publishing, <http://dx.doi.org/10.1787/9789264282735-en>. [7]
- OECD (2017), *Public Procurement in Peru: Reinforcing Capacity and Co-ordination*, <http://dx.doi.org/10.1787/9789264278905-en>. [8]

- OECD (2016), *Checklist for Supporting the Implementation of the OECD Recommendation of the Council on Public Procurement*, [17]
<http://www.oecd.org/governance/procurement/toolbox/search/checklist-implementation-oecd-recommendation.pdf>.
- OECD (2016), *Fighting bid rigging in public procurement: Report on implementing the OECD Recommendation*, [6]
<https://www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf>.
- OECD (2016), *Improving ISSSTE's Public Procurement for Better Results*, [15]
<https://www.oecd-ilibrary.org/docserver/9789264249899-en.pdf?expires=1614765612&id=id&accname=ocid84004878&checksum=50894CDE7DF9599EDC6FAC32792BE6F2>.
- OECD (2016), *Preventing Corruption in Public Procurement?*, [28]
<http://www.oecd.org/gov/ethics/Corruption-in-Public-Procurement-Brochure.pdf>.
- OECD (2015), *Hearing on Auctions and Tenders: Further Issues*, [25]
[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp2\(2015\)1&doclanguage=en](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp2(2015)1&doclanguage=en).
- OECD (2015), *Recommendation of the Council on Public Procurement*, [3]
<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0411>.
- OECD (2014), *Hearing on the Use of Tenders and Auctions - Issues Note by the Secretariat*, [24]
<http://www.oecd.org/daf/competition/tenders-and-auctions.htm>.
- OECD (2012), *Recommendation of the Council on Fighting Bid Rigging in Public Procurement*, [5]
<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0396>.
- OECD (2009), *Guidelines for Fighting Bid Rigging in Public Procurement*, [4]
<https://www.oecd.org/daf/competition/cartels/42851044.pdf>.
- OECD (2009), *Principles for Integrity in Public Procurement*, [13]
<http://dx.doi.org/10.1787/9789264056527-en>.
- OECD/Eurostat (2005), *The Measurement of Scientific and Technological Activities: Guidelines for Collecting and Interpreting Innovation Data: Oslo Manual*. [29]
- Sanchez Graells, A. (2020), *Public Procurement by Central Purchasing Bodies, Competition and SMEs: towards a more dynamic model?*, [22]
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3610180.
- Sánchez Graells, A. and I. Herrera Anchustegui (2014), *Impact of public procurement aggregation on competition..* [21]
- SIGMA (2016), *Public Procurement: Contract Modifications*, [26]
<http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-38-200117.pdf>.
- Smuda, F. (2015), *Cartel Overcharges and the Deterrent Effect of EU Competition Law*, [10]
<http://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf>.

www.oecd.org/competition

