

Chapter 12

IMSS' review and remedy system: A tool to improve procurement activities

This chapter describes the mechanisms in place in Mexico and in the Mexican Institute of Social Security (IMSS) to address formal complaints of suppliers on the tendering procedures. It assesses the nature of the complaints against IMSS and identifies opportunities to reduce their number.

Introduction

Review and remedy mechanisms contribute to increase the overall fairness, lawfulness and transparency of the procurement procedure and support its integrity. They also build confidence among businesses and facilitate competition in local public contract markets.

Review and remedy systems serve a procurement oversight function by providing means to scrutinise the activities of government procurement officials, to enforce their compliance with procurement laws and regulations, and to correct their improper actions. They provide an opportunity for bidders to contest the process and verify the integrity of the award.

To guarantee an impartial review, a body with enforcement capacity independent of the procuring entity needs to rule the review decisions. Complaints must be resolved in a fair manner whilst ensuring administrative efficiency through timely resolutions and adequate remedies (OECD, 2007).

In order to be effective, a review and remedy system needs to:

- provide timely redress;
- be effective in correcting (and thus preventing) instances of unlawfulness on the part of economic operators and/or contracting authorities;
- be transparent and clear (i.e. understandable and easy to use by economic operators); and
- non-discriminatory and available to all the bidders wishing to participate in a specific contract award procedure.

This chapter provides an overview of the review and remedy system applying to the Mexican Institute of Social Security (*Instituto Mexicano del Seguro Social* – IMSS). It focuses on the current system, following amendments in 2009 to the Procurement Laws, the Law on Acquisitions, Leases and Services of the Public Sector (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* – LAASSP) and the Law on Public Works and Related Services (*Ley de Obras Públicas y Servicios relacionados con las Mismas* – LOPSRM). These amendments modified the timeframe and conditions for filing formal complaints against procurement procedures (*inconformidad*).

Review and remedy mechanisms of procurement procedures in the Mexican Federal Government

Mechanisms for review and remedy of procurement procedures in the Mexican Federal Government are independent and efficient

Mexican procurement laws provide a mechanism to challenge the key acts in the pre-award stage, such as the call for tender, opening of the proposals, and the award decision. That system has precise conditions and timeframes for raising a formal complaint, as well as defined enforcement authorities and mechanisms – a snap-shot of which is provided in Table 12.1. Acts outside those outlined by the procurement laws are not subject to the complaint recourse and are therefore not considered.

Complaints can be raised by any supplier who has a manifest interest to participate in a procurement process. They can be submitted either in writing directly to the Ministry of Public Administration (*Secretaría de la Función Pública* – SFP) or electronically through Compranet, the e-procurement system of the Mexican Federal Government.

Table 12.1. Snapshot of review and remedies system for the procurement processes of federal government entities in Mexico

If the complaint relates to:	Who has right to submit a complaint?	When must a complaint be filed?*	Which body can consider complaints?	What costs are placed on claimant?	What are the possible outcomes of the complaint?	What remedies are available against the resolution of the formal complaint?
Tender invitation and clarification meeting	Suppliers with interest to participate	Within six business days following the last clarification meeting				
Call for invitation to at least three suppliers	Only suppliers who received an invitation	Within six business days following the clarification meeting				
Submission and opening of proposals and announcement of contract award	Only suppliers who submitted proposal	Within six business days following award/ notification	The Ministry of Public Administration through the Organ of Internal Control within each public entity	If the suspension of the procurement procedure is requested, a financial warranty equivalent to between 10% and 30% of the economic proposal or (when such amount cannot be established) of the approved budget is to be provided	The resolution of the objection may: Nullify the entire procurement procedure Invalidate the irregular act and order its replacement Reject the complaint Order the signing of the contract	Revision recourse Court action to nullify the decision Formal court complaint for infringement of Constitutional Rights (<i>juicio de amparo</i>)
Cancellation of the tendering procedure by the contracting entity	Only suppliers who submitted a proposal	Within six business days following notification of cancellation				
Act and omissions by the tendering entity that prevent contract signing under terms of invitation to tender under the (LAASP and LOPSRM)	Only the supplier who was awarded contract	Within six business days after expiration of the deadline to formalise the contract				

* If the tendering procedure is under the scope of a Free Trade Agreements of which Mexico is party, the time period changes from 6 to 10 days business days. This is applicable for all stages of the procurement process for which challenges can be raised. If the procedure includes a clarification meeting, claims can be filed within six business days after it.

Source: Adapted from articles 65-75 of the LAASP and articles 83-93 of LOPSRM.

The decision-making process results in remedies that are relevant to correcting any irregularity in the procurement process. To ensure the impartiality of review mechanisms, authorities independent from the buying entities rule the review decisions. Complaints are therefore addressed to the Internal Control Office (*Órgano Interno de Control* – OIC), an operational extension of the SFP located within each federal public entity, but independent from it. As described in Chapter 4, the OICs are also in charge of performing internal audit and of receiving and evaluating reports on the integrity of the procurement procedure. They must resolve each formal complaint within 40 working days of its submission. Moreover, the decision of the OIC can be subject to higher-level review.

Requests to suspend the procurement process are expensive, but are not a condition for presenting a formal complaint

Suppliers challenging a procurement procedure can request its suspension until a decision is rendered by the OIC. However, the 2009 amendments to the federal procurement laws sought to avoid prior abuses of that suspension mechanism, which may inappropriately delay or hinder the procurement process. As such, a financial warranty equivalent is now necessary when a supplier requests a suspension. That warranty is of an amount between 10 and 30% of the economic proposal of that supplier. If that amount cannot be established, the warranty is of an amount between 10 and 30% of the approved budget for the procurement procedure. Furthermore, a party wishing to avoid the suspension may also offer a counter-warranty equivalent to the same amount given by the supplier requesting the suspension.

This new requirement can increase the cost for suppliers to file a complaint. Yet, complaints can be filed without requesting suspension and the procedure then remains inexpensive. However, it is important to note that the OIC may also suspend the procurement procedure without any request or warranty from the objecting supplier if it finds flaws or irregularities in it when assessing a complaint.

Information on formal complaints is not regularly made public and is incomplete

According to article 73 of the LAASSP, once a complaint has been resolved, the decision must be made public in Compranet. Significant divergences can be found on the level of information available from the version recently implemented (5.0) and the previous one (3.0).

Compranet 3.0 provided statistics on the resolved complaints and disaggregated the information by governmental entity, by type of bid, by object of the complaint, by stage of the procedure when it was raised, and by resolution. Furthermore, it included a search engine to facilitate investigations. However, it did not publish the details of the resolutions issued by the OICs. The last entry of information in that version for complaints filed against procurement procedures undertaken by IMSS dates back to 2003.

Positively, the OIC resolutions of formal complaints are now made public through the new portal of Compranet 5.0. This enables interested parties to be better informed of the legal reasoning of the authority when resolving a complaint, and enhances the consistency, transparency as well as fairness of the process. It also enables future claimants facing a similar situation to understand the elements considered for the analysis and the methodology followed by the authority to reach its conclusion. However, only a few of the most recent resolutions can be found in Compranet 5.0. Moreover, data and statistics are no longer

available under it, nor any search engine allowing users to rapidly identify the resolved complaints for a specific entity.

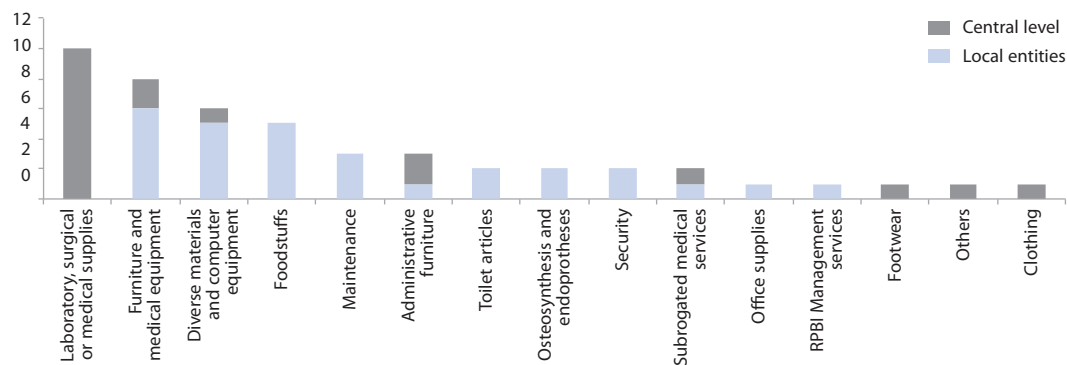
Keeping public information updated increases transparency and ensures compliance with the applicable procurement legal framework. However, such information will only allow interested parties and the general public to be better informed if it is presented in a user-friendly and effective manner. As such, IMSS could engage with SFP in order to explore ways of increasing transparency by committing to make public on Compranet, in a regular, user-friendly manner, the resolutions of the formal complaints and by implementing an effective search engine.

Formal complaints against IMSS procurement procedures

IMSS receives the highest number of complaints against its competitive procedures

Over the period 2007 to 2010, IMSS received the largest share (21%) of the formal complaints of the Mexican federal government, with a total of 1 732 complaints against its competitive procurement procedures. They concerned mostly procedures associated with goods (66%), services and public works accounting respectively for 31% and 3%. As indicated in Figure 12.1, 60% of the complaints arise from procurement activities performed by local entities.

Figure 12.1. **Complaints against IMSS procurement procedures by level of centralisation (central and regional level) and type of good or service in 2010**



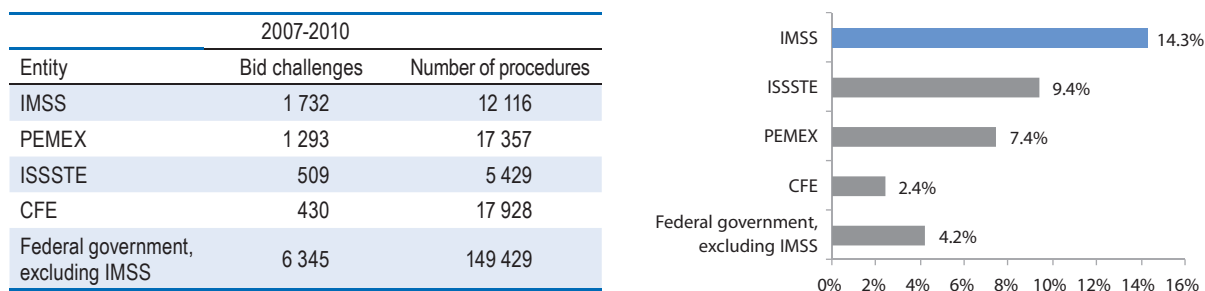
Source: Data provided by IMSS.

The complaints received by IMSS represent 14.3% of all its competitive procedures, well above the average of 4.2% for the rest of the federal government. It is, however, closely followed by SFP who has a total of 1 729 complaints (SFP, 2011) (Figure 12.2).

A downward trend can be observed in the number of complaints against IMSS competitive procedures over the period, dropping from 508 in 2007 to 352 in 2010. However, a similar trend is not observed in the ratio of complaints versus the number of competitive procedures (SFP 2010, 2011).

According to information publicly available from SFP (Figure 12.3), 34% of these complaints against IMSS procurement procedures over the period 2007 to 2010 were dismissed by the OIC without analysis of their merits. This dismissal was due to procedural deficiencies, e.g. inadequate documentation or information being submitted. Another 35% of the complaints were rejected as not valid, while 31% were sustained.

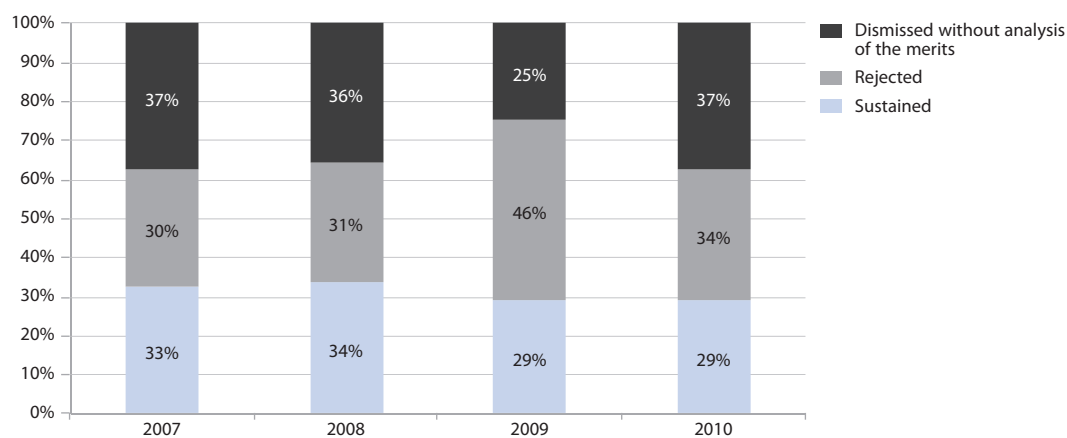
Figure 12.2. Share of complaints made against IMSS' competitive procedures in comparison with other federal government entities, 2007-10



Note: Information on the number of procedures of SFP is unavailable. PEMEX procedures do not include public tendering of PEMEX Gas y Petroquímica Básica as well as 2007 public tendering of PEMEX Petroquímica. IMSS procedures do not include restricted invitations for 2007.

Source: SFP (2011), "Quinto Informe de Labores" [Fifth Activities Report], www.funcionpublica.gob.mx/web/doctos/temas/informes/informes-de-labores-y-de-ejecucion/5to_informe_labores_sfp.pdf, accessed 7 April 2013.

Figure 12.3. Number of complaints against IMSS procurement procedures by type of resolution, 2007-10

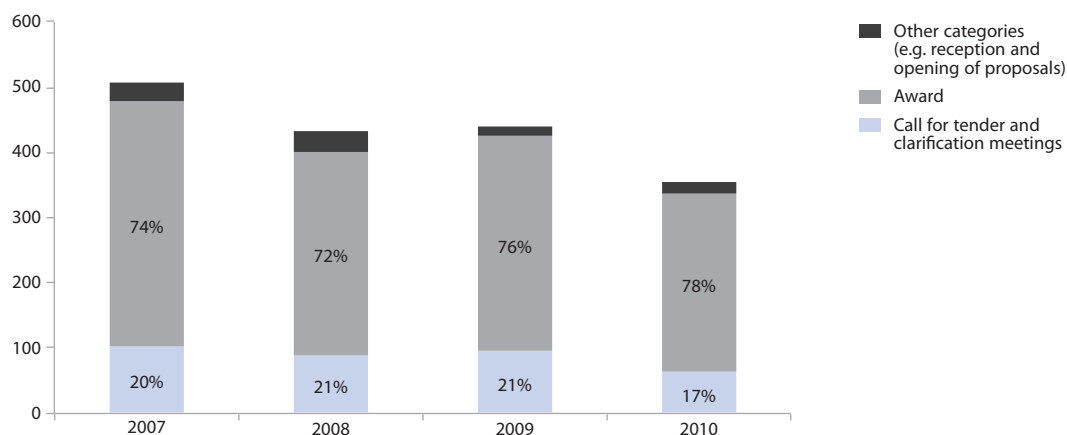


Source: SFP (2011), "Quinto Informe de Labores" [Fifth Activities Report], www.funcionpublica.gob.mx/web/doctos/temas/informes/informes-de-labores-y-de-ejecucion/5to_informe_labores_sfp.pdf, accessed 7 April 2013.

Most complaints against IMSS procedures relate to the award phase

Between 2007 and 2010, the procurement stage for which the highest number of complaints was raised was the award phase (75%), highlighting the perception of some suppliers that the bid evaluation and winning bidder selection processes are not always undertaken in strict accordance with the legal framework and the relevant solicitation documents. Challenges on public tender notices and clarification meetings accounted for another 20% (Figure 12.4).

Figure 12.4. Number of complaints against IMSS procedures by stages of the procedure, 2007-10



Source: SFP (2011), “Quinto Informe de Labores” [Fifth Activities Report], www.funcionpublica.gob.mx/web/doctos/temas/informes/informes-de-labores-y-de-ejecucion/5to_informe_labores_sfp.pdf, accessed 7 April 2013.

Opportunities to reduce the number of complaints

Various mechanisms are available for IMSS to reduce the number of complaints on its procurement procedures

IMSS could benefit from decreasing the number of complaints on its procurement procedures. Various actions can be taken by the organisation to this end. First, IMSS could implement the proposals suggested in Chapter 10 to increase the integrity of the evaluation process by ensuring compliance with the requirement and rules established in the solicitation documentation. In support of that activity, IMSS could perform a detailed analysis of the resolutions of the complaints sustained by the OIC in the last years, especially in relation to the award phase. This would allow identifying areas of opportunity to improve the relevant procedures and mechanisms.

Furthermore, IMSS could also strengthen communication with the suppliers through the verbal debriefing procedure suggested in Chapter 10. This would assist suppliers in understanding the results of the evaluation of their proposal and demonstrate them that the process has been carried out in accordance with the rules of procurement and probity. IMSS could also maximise the participation of civil society in public tendering, and particularly social witnesses (further discussed in Chapter 14), to identify and correct potential deficiencies in the process and ensure that all stages of the procurement procedure are managed in accordance with the legal framework and the applicable solicitation documentation.

Mexico could benefit from performing regular *ex ante* analysis. By taking the lead in revising the procurement procedure in order to find deficiencies and irregularities, IMSS can detect and resolve them in a timely manner, reducing substantively the number of complaints. The Polish experience (see Box 12.1) has demonstrated the positive outcomes of such analysis. Since its implementation, the number of infringements has been significantly reduced, as well as the number of recommendations to cancel the procedure or to re-evaluate a proposal.

Box 12.1. *Ex ante* control of the award of major public contracts in Poland

With the 2004 Public Procurement Law, the *ex ante* control of the award became mandatory for public contracts of high value in Poland. The mechanism is used for contracts above EUR 20 million for public works and EUR 10 million for public supplies and services.

The aim of this preventive mechanism is to avoid improper spending of public money and reveal possible infringements before the conclusion of contracts, such as:

- negligent preparation of contract award procedures;
- incorrect evaluation of submitted bids or requests to participate in award procedure;
- defining the terms of participation in the award procedure in a way obstructing fair competition;
- failure of demand to submit documents necessary to evaluate whether an economic operator satisfied the conditions for participation in the award procedure;
- failure to exclude economic operators from a procedure in a situation when the premises for exclusion existed;
- failure to reject a bidder in a situation when the premises for rejection existed.

Awareness-raising and training activities were also carried out to reinforce the professionalism of procurement officials. In case of major infringement of public procurement that influenced the results of the procedure or the selection of the bidder, the Public Procurement Office may recommend the re-evaluation of the bidders, or cancellation of the whole procedure. When infringements of the Public Procurement Law are neither substantial nor influence the result of the procedure, the recommendations may concern future proceedings in the scope of confirmed infringements.

As a result of these reforms, the statistics below indicate the decline of the number of infringements:

Results of *ex ante* controls carried out by the Public Procurement Office (in %)

	May 2004-January 2005	January-July 2006
No infringements found	14	23
Recommendation to cancel procedure	18	3
Recommendation to re-evaluate bid	5	2
Minor infringements	63	72
Total	100	100

The findings of the *ex ante* controls are published in periodic reports every six months and are widely distributed (e.g. on the website of the Public Procurement Office). The information included in those reports has a preventive effect as it highlights to the awarding entities the scale, type and weight of infringements found and, as a result, enables them to avoid similar errors in future procedures.

Source: Case study provided by Poland for the OECD Symposium: "Mapping out Good Practices for Integrity and Corruption Resistance in Procurement," Paris, 29-30 November 2006.

IMSS could consider implementing this good practice for large or sensitive contracts. For example, it could co-ordinate *ex ante* analysis with SFP, the procurement laws entitling its OIC to intervene and review the procedure without any party request if it considers it appropriate. Through *ex ante* analysis *proprio motu*, possible infringements can be identified and resolved in a timely and efficient manner. Disputes can thus be avoided, as well as the obligation to cancel and restart whole procedures. In addition to increasing the fairness and competitiveness of the procedure, such activities are helpful in avoiding similar errors in future procedures.

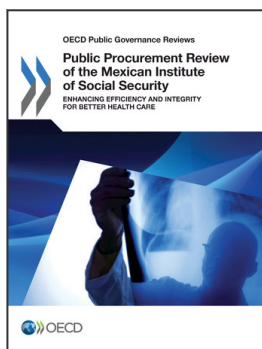
Proposals for action

In addition to the proposals identified in Chapter 10 on the subject of verbal debriefings and proposal evaluations, IMSS could consider the following actions. Doing so would enhance the transparency of the review and remedy system in place and reduce the number of formal complaints against its procurement procedures:

1. Regularly performing analysis of past complaints sustained by the OIC so as to identify areas of opportunity to improve the procurement procedures and mechanisms.
2. Implementing self-correcting actions to identify and resolve in a timely and efficient manner potential infringements to the procurement legal framework and to the solicitation document. This could be achieved, for example, by maximising the participation of civil society in public tendering, particularly social witnesses. *Ex ante* analysis for large or sensitive contracts could also be implemented, with potential co-ordination with the SFP and its OIC located in IMSS.
3. Engaging with the SFP in order to explore ways of increasing transparency by publicising on Compranet – in a timely and user-friendly manner – the resolutions of the complaints and relevant statistics. An effective search engine could also be provided to facilitate investigation.

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