Public Procurement World - Mexico

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# 1. The Laws

## a. What is the applicable legislation?

The applicable legislation for public procurement in Mexico will depend on the kind of project and the agencies or entities that form part of the Mexican government. As a general public procurement principle, Article 134 of the Mexican Constitution provides that the acquisition of goods and assets, the lease of movable/fixed property, receiving services of any nature, and the procurement of public works and related services called by the Mexican federal government, the States, Mexico City and the municipalities, will be awarded through public bidding processes, by means of a call for proposals in order to guarantee the best available conditions in connection with price, quality, financing, opportunity and other applicable circumstances. Although Article 134 serves as cornerstone for the entire public contractual regime, there are certain special laws deriving from said Article that regulate federal general public contracting, public works and public-private partnerships, among which the most relevant are the following:

the Law of Acquisitions, Leases and Services for the Public Sector (the “Acquisitions Law”) and its Regulations;

the Law of Public Works and Related Services (the “Works Law”) and its Regulations; and

the Public Private Partnerships Law (the “PPP Law”) and its Regulations.

Moreover, as of August 2014, the Mexican government published, as part of the Constitutional energy reform enacted on December 2013, certain secondary laws, regulations and procurement provisions which regulate public procurement related to the energy sector. For purposes of implementing said reform, Petróleos Mexicanos, Mexico’s National Oil Company (“PEMEX”), and the Federal Electricity Commission (“CFE”), were transformed into productive state-owned companies. In turn, in order to perform under this new structure, PEMEX and CFE now have their own laws and regulations. As mandated under this new framework deriving from the stated reform, certain procurement criteria and contracting procedures related to acquisitions, leases, services and public works were published, among which, the most relevant are:

The Hydrocarbons Law (the “Hydrocarbons Law”), its Regulations and the Administrative Provisions in connection with tenders regarding the exploration and extraction of hydrocarbons (upstream activities);

The Electric Industry Law (the “Electric Law”) and its Regulations;

The PEMEX Law (the “PEMEX Law”), its Regulations and the General Procurement Provisions applicable to PEMEX and its Subsidiary Productive Companies;

The Regulations of the Activities referred to in the Third Title of the Hydrocarbons Law (the “Third Title Activities Regulations”); and

The CFE Law (the “CFE Law”), its Regulations and the General Provisions in connection with the acquisitions, leases, services procurement and public works applicable to the CFE and its Subsidiary Productive Companies[[1]](https://resourcehub.bakermckenzie.com/en#_ftn1) (laws referred in items 1-8 above, will be jointly referred the “Procurement Laws”).

Please note that the States, municipalities and Mexico City also have their own procurement framework that in many cases reflects the principles and provisions of the Procurement Laws and regulations set forth in items 1-3 above.

Finally, also note that we have other special laws to award federal concessions related to roads, railroads, ports and airports.

[[1]](https://resourcehub.bakermckenzie.com/en#_ftnref1) Please note that the General Provisions in connection with the acquisitions, leases, services procurements and public works (the “General Provisions”) were published on June 23, 2015, and since then they have been amended from time to time. However, the entry into full force and effect of the General Provisions is subject to the fulfillment of three requirements based on the last amendment to the General Provisions published on December 30, 2016 that consist of: (i) implementing a training program for officers in charge of the contracting procedures, (ii) approving the operating rules of the CFE’s Advisory Council and of the subcommittees of: (a) exceptions to open tenders, (b) social witnesses, and (c) IT, and (iii) implementing a mechanism allowing electronic contracting procedures. The first two requirements have been met; however, the CFE is still working towards implementing the mechanism to allow electronic contracting procedures. Therefore, the General Provisions will come into full effect when the CFE announces the implementation of such electronic contracting mechanism, and therefore at present, the CFE must continue conducting its contracting procedures under the current Acquisitions Law or the Works Law.

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

Mexico is a party to an extensive network of free trade agreements (each a “FTA”). Specifically, when procurement provisions or chapters are agreed in FTAs, they typically include, among others, the following subjects:

entities of a government that may call for a bid under the terms of the specific FTA;

types of works, services or goods that are covered by the corresponding FTA;

nationality of the bidders and shareholders controlling the bidder;

rules for assessing the origin of goods (either rules of origin or marking rules of origin); and

specific requirements provided in the respective FTA.

Even though, each FTA may establish different rules that serve to qualify or disqualify a bidder, there is a general principle provided in the Procurement Laws whereby such legislation prevails without prejudice to the provisions set forth in the FTAs.

Two of the most important FTAs entered by Mexico are: (**i**) the Economic Partnership, Political Co-ordination and Co-operation Agreement between the European Community and its Member States and Mexico (“MEXICO-EU FTA”), and (**ii**) the North American Free Trade Agreement (“NAFTA”).

Both MEXICO-EU FTA and NAFTA include several provisions on government procurement. These provisions set forth certain rules that should be met to have a bidding process covered under such FTAs.

For instance, Exhibit VI to the MEXICO-EU FTA lists the federal government entities and the government organizations that may call for an international bid covered under this FTA. For example, the list includes the Ministry of Communications and Transports (“SCT”), the Ministry of Public Education (“SEP”), the Airports and Auxiliary Services (“ASA”), the Mexican Social Security Institute (“IMSS”), the Institute of Security and Social Services for State Workers (“ISSSTE”) and the National Water Commission (“CONAGUA”).

On the other hand, Chapter 10 of NAFTA (Government Procurement) includes several rules applicable to tendering procedures, bid challenges and scope and coverage of the government procurement. The Federal Government Entities Schedule of Mexico is identified as Exhibit 1001.1a-1, while the specific activities are listed in Exhibit 1001.1b-3.

Moreover, pursuant to article 1001, government procurement must be covered under NAFTA whenever the estimated value of the contract equals or exceeds the value of the updated thresholds established by NAFTA. The update of the thresholds should be in accordance with the inflation rate of the United States of America.

In addition, Chapter VI of NAFTA deals with trade in energy and basic petrochemicals goods.

## c. What are the basic underlying principles of the legal framework?

The guiding principles for public procurement are set forth in Article 134 of the Mexican Constitution and are the following: efficiency, effectiveness, economy, transparency, honesty and impartiality.

Pursuant to the hierarchy of sources of law in Mexico’s legal system, the Procurement Laws shall be aligned with the provisions set forth in the Mexican Constitution, although treaties, such as FTAs, have hierarchy over federal laws such as the Procurement Laws.

In similar terms, the PPP Law provides the following procurement principles: legality, free concurrence and competitiveness, objectivity, impartiality, transparency and publicity, as well as cost-benefit analysis on the feasibility of the project (*value for money*).

Moreover, in connection with the bidding processes to award hydrocarbons exploration and extraction contracts, the Hydrocarbons Law provides that such processes must be ruled by the principles of transparency, wide publicity, equality, competitiveness and simplicity.

In addition, both the PEMEX Law and the CFE Law, provide that the acquisitions, leases, contracting of services and public works required by PEMEX and CFE shall be carried out pursuant to the provisions of Article 134 of the Mexican Constitution, subject to the principles of economy, effectiveness, efficiency, fairness and honesty, in order to ensure the best available conditions in term of pricing, quality, financing, opportunity and other relevant circumstances pursuant to the nature of the contracts.

Finally, concepts such as equal treatment are also covered under the relevant FTAs such as NAFTA and Mexico-EU FTA.

## d. Is aerospace and defense procurement treated differently from other types of procurement?

No, procurement of the aerospace and defense sector is conducted using the Acquisitions Law and the Works Law, but the contracting procedures applicable to both sectors are carried out by different ministries or public entities, such as the Army, the Air Force and the Navy. The Acquisitions Law and the Works Law establish that the government entities can call for acquisitions, leases, services and works through: (**i**) the procedures of restricted invitation, or (**ii**) direct award, when they are exclusively for military purposes, or when public bidding may put at risk national security or public safety. For instance, projects may include the construction of federal prisons, the acquisition of radars, or training services.

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

In accordance with the Works Law and the Acquisitions Law, the public entities covered are:

all administrative units of Mexico’s federal executive branch (except for those that have their own special procurement regime, such as PEMEX, CFE, etc.);

the Ministries of State and the Legal Counsel of the federal executive power;

the Attorney General’s Office;

the decentralized entities;

the state-owned entities and trusts where the settlor is the federal government or a state-owned entity; and

the States, the Municipalities and their public entities when federal funds form part of funding, in accordance with the covenants entered with the federal executive power.

In another example, in accordance with PPP Law, the public entities covered are:

the agencies and entities of the federal public administration;

federal public trusts not considered quasi government entities;

persons of federal public law, with autonomy derived from the Mexican Constitution; and

the States and municipalities when using federal funds, in accordance with the covenants entered with agencies or entities of the federal public administration.

For instance, public entities covered by the Procurement Laws include, among others, the SCT, SEP, the Ministry of the Interior, ISSSTE, IMSS, CONAGUA, the Army and the Navy, among others.

Moreover, under the energy secondary laws published in August 2014, the public agencies covered are: (**i)** under the Hydrocarbons Law, the National Hydrocarbons Commission (“CNH’’); **(ii)** under the PEMEX Law, PEMEX and its subsidiary productive companies; (**iii)** under the CFE Law, CFE and its subsidiary productive companies; **(iv)** under the Electric Law, the National Center for the Control of Energy (CENACE) and **(v)** under the Third Title Activities Regulations, the Mexican Energy Regulatory Commission (the “CRE”) and the National Center of Natural Gas Control (the “CENAGAS”).

## b. Which private entities are covered by the laws?

There are no private entities covered by these Procurement Laws.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

Yes. For instance, under the Acquisitions Law, contracts entered into agencies or public entities, are not covered under this law, unless the agency or entity that is obligated to deliver or perform, has not capacity to do it by itself and retains a third party to perform or deliver. However, the Acquisitions Law will not apply if the amount of the contract with such third party does not exceed 49% of the amount of the contract entered into between the agencies or entities. A similar principle applies under the Works Law.

Now, there are also co-operations between public bodies. For instance, under the Acquisitions Law, public agencies may agree to contract certain goods or services under one single joint negotiation. This not only applies to goods and services of general use, but also to other products such as medicines, medical equipment and vaccines, as well as insurance coverage. This structure allows them to join efforts to procure goods and services reducing prices and improving conditions. One single entity conducts the process, while the relevant contracts will be entered with each specific entity separately.

## d. Which types of contracts are covered?

The contracts that are covered are those that relate to the procurement of: (i) public works and related services, (ii) acquisitions, leases, rendering of services of any nature, (iii) public-private partnerships agreements, (iv) hydrocarbons exploration and extraction contracts (under the modalities of **(a)** production sharing contracts; **(b**) profit sharing contracts; **(c**) license contracts; and **(d)** services contracts), (v) coverage agreements to sell electricity and/or other associated products to the CFE in its character of basic service supplier; and (vi) those contracts for the development of strategic projects related with the expansion of the natural gas transportation system and natural gas integrated national storage to be entered with CENAGAS.

In other words, the types of contracts include acquisitions (sale and purchase), lease agreements, services agreements, master agreements, public works contracts - unitary price and lump sum, services related to public works, PPP contracts, PPAs, open contracts and upstream related contracts, among others.

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

In principle, the changes to an existing contract do not require a new procurement procedure.

For instance, the Acquisitions Law provides that with the prior acceptance of the supplier, the public entities may modify the contracts up to twenty percent of the amount or maximum budget originally agreed.

Also, except for contracts under the Acquisitions Law and Works Law, contracts may be transferred with the prior written authorization from the public entity, and as long as the assignee complies with all the requirements of the original public bidding procedure, or as set forth in the relevant contract.

Under the laws covering the contracts entered by the energy public agencies, such changes are typically regulated in accordance with the provisions of the respective contract.

## f. What is the applicable regime for framework agreements?

For instance, the Acquisitions Law and its Regulations describe the applicable regime for framework agreements. It establishes that the Ministry of Public Function (“SFP”) can promote framework agreements with the prior determination of the technical and quality characteristics to be agreed with the relevant agencies. The framework agreements are the contracts entered by a public agency with one or more possible suppliers. These agreements specify the technical and quality requirements, terms and conditions, including pricing that will later on regulate the specific acquisition, lease or services contract.

The execution of framework agreements is not subject to the provisions of the Acquisitions Law, but to the applicable procedure determined by the SFP, which will contemplate the principles of economy, effectiveness, efficiency, impartiality and honesty. A market research should be previously conducted. Any party can subsequently adhere to the framework agreement. The specific contracts deriving from a framework agreement, will not be subject to a public tender process, but will be directly awarded.

## g. What is the applicable regime for public-private partnerships (PPPs)?

The PPP Law and its Regulations regulate procurement of PPPs and their operation; generally, the procurement process is similar to those conducted under the Works Law and Acquisitions Law.

However, for the first time in Mexico, unsolicited proposals are regulated under the PPP Law. Anyone interested in sponsoring a public-private partnership may submit their proposal to the competent federal entity. The public entities publish in the Official Federal Gazette and in their own web page goals, sectors and kind of projects under which they are willing to receive unsolicited proposals for their analysis and subsequent tender. The sponsor of the unsolicited proposal will have a benefit in the evaluation of its economic proposal that may not exceed ten percent in relation to the economic criteria indicated to award the contract, as part of a tender process. The Regulations establish the methods and procedures for calculating this benefit.

## h. How are concessions dealt with?

Concessions are regulated as per the applicable legislation of the corresponding industry sector. For instance, concessions of federal highways are regulated and awarded by the SCT in terms of the Federal Highways Law, while ports and certain port activities are also subject to concession under the Ports Law, and while railways are subject to concession under the Railway Service Law. The concessions shall be awarded by public tender according to a public call published in the Official Federal Gazette.

In addition, article 27 of the Mexican Constitution provides that in connection with petroleum and other solid, liquid and gaseous hydrocarbons located in the subsoil, the Nation will have ownership and no concessions shall be granted. With the purpose to secure revenues for the Mexican State for the long term development of the Nation, it will carry out hydrocarbons exploration and extraction activities through **(i**) the award of allocations to State Productive Companies, or **(ii)** the award of contracts with such State Productive Companies or private entities, in accordance with the corresponding regulatory laws.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

The Procurement Laws and the tender rules set forth anti-avoidance rules including bid rigging consequences. They generally set forth economic penalties and sanctions for the bidders, service providers or contractors who violate these laws. For instance, in any typical tender process, bidders will be required to file statements related to: (i) who is participating in the tender, (ii) the identity of consortium parties and parent entities, (iii) integrity (not conducting any actions to influence a result), (iv) they not implementing structures to circumvent any sanctions or participation restrictions under the relevant law, and (v) fair and market prices, not under collusion with other bidders, etc. Note that under the Acquisitions Law and the Works Law, economic penalties are generally imposed by the SFP. In addition, the SFP may temporally bar anyone from directly or indirectly participating in procurement procedures, or enter into contracts, upon the occurrence of certain circumstances, including without limitation, submitting false information or acting with bad faith or willful misconduct during any procurement procedure, performance of a contract or during its term, or in the submission of one conciliation or non-conformity action. This ban may range from 3 months to 5 years. In other regimes, such as those related to power and oil and gas, different agencies may impose sanctions or penalties.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

Typically, there are three different procurement procedures, namely: (**i**) public bid (generally applied), (**ii**) restricted invitation to at least three participants, and (**iii**) direct award. Items (**ii**) and (**iii**) are exceptions to the tender requirement. As set forth above, the general rule is that contracts or orders should be awarded through a public tender procedure. All tender processes are publicly conducted and can be followed in the internet since their information and status is available at the government’s procurement web platform known as CompraNet, which can be followed by any interested party.

However, under the Hydrocarbons Law, the only procurement procedure allowed to award hydrocarbons exploration and extraction contracts is the public bid. Also, pursuant to the Electric Law, the award of coverage agreements to be entered with the CFE as basic service supplier is through an auction procedure conducted by CENACE. These processes conducted by the CNH and the CENACE are publicly available in their internet pages and can be followed by anyone.

Finally, regarding port, highway, railroad and airport concessions, they can only be granted through a tender process.

## b. What status do electronic means/procedures have?

CompraNet is an electronic system developed by the SFP with the objective of establishing an adequate process of contracting services, goods, leases and public works by the agencies and entities of the federal public administration with the principles of simplicity, transparency and modernization. Through internet and data networks, this system automates all the stages of the contracting process that are accessed by the calling entities and suppliers or contractors.

At the federal level, there has been a progress in terms of electronic procedures as the government increases the use of electronic means to conduct tender processes and award contracts, avoiding personal interaction and corruption.

In addition, the Hydrocarbons Law allows the proposals to be submitted and analyzed through electronic media, under the terms provided in its Regulations. Moreover, the PEMEX Law and CFE Law allow the proposals for acquisitions, leases and services procurement bids to be submitted and analyzed through electronic means, in the terms approved by the PEMEX and CFE Board of Directors. Finally, within the auctions called by CENACE for the award of coverage contracts to be executed with CFE, the submission of the pre-qualification documents as well as the technical and economical proposals is made through an Electronic Platform known as “*Sitio*” same which may be accessed through the CENACE website.

## c. Where are contract notices, i.e. calls for bid, published?

At the federal level, the calls for tender are published in:

the Official Federal Gazette (www.dof.gob.mx);

CompraNet ([www.compranet.funcionpublica.gob.mx](http://www.compranet.funcionpublica.gob.mx)); and

Newspapers of national circulation as well as local newspapers where the projects will be developed.

For instance, the calls for tenders and the contract notices corresponding to the energy agencies (i.e. CNH, CFE, PEMEX, CENACE, CENAGAS) are published in the Official Federal Gazette and also in the corresponding agency webpages: <http://www.gob.mx/cnh/>, <http://www.cfe.gob.mx/paginas/Home.aspx>, <http://www.pemex.com/en/Paginas/default.aspx>, <http://www.cenace.gob.mx/>, <https://www.gob.mx/cenagas>.

## c. Can certain prospective bidders be excluded from the competition?

Yes. For example, at the federal level, the Procurement Laws set forth the scenarios under which certain prospective bidders are to be excluded from participating (e.g., when a bidder has been banned by the SFP from participating in procurement procedures, in which case all governmental entities should refrain from contracting with such third party). Also, competition (antitrust) issues may impede a party from participating as a prospective bidder or as a party to a consortium.

For instance, the Works Law and the Acquisitions Law set forth various scenarios in which agencies will refrain from receiving proposals from potential bidders or interested parties, including when companies have a personal relation with the officer calling the bid, among others.

In addition, the Hydrocarbons Law provides that CNH shall abstain from considering bids or entering into hydrocarbons exploration and extraction contracts with those which: **(i)** are debarred or prevented by a competent authority from contracting with federal authorities, in terms of the applicable legal provisions, **(ii)** have severe breaches pending to be cured regarding hydrocarbons exploration and extraction contracts awarded before, **(iii)** use third parties to circumvent the above mentioned provisions, and (**iv**) provide false or incomplete information. For this last case, the CNH shall warn the interested parties for one time, so that they cure such failure within the term set forth for such purpose. Similar provisions are applicable under the PEMEX Law and CFE Law, respectively.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

According to the Procurement Laws, the public entities are bound to include in the tender rules, all the legal, technical and economic requirements that the bidders shall meet for purposes of evaluation, and to award the contract. Based on these requirements, the bidders shall prepare their technical and economic proposals.

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Yes, it is an option as prequalification helps the bidders to prepare their own proposals in a less formally manner than the normal proposals.

In the prequalification stage, the calling entities will review all the technical and legal requirements that the applicant must comply, as well as financial conditions.

For instance, a prequalification stage is regulated under the PPP Law.

On the other hand, within the energy sector, it is common that tender processes include a pre-qualification stage allowing the calling agency to determine if the interested bidders meet the criteria regarding technical, financial, performance and experience requirements prior to the formal submission of the corresponding proposals. In the event that the interested bidders do not meet such criteria, they would not be able to submit a proposal and continue participating within the corresponding bid. Within the prequalification stage, the interested bidders submit the required prequalification documentation, as requested in the tender rules. The calling agency will have a period of time to review and validate if the submitted documents comply with the prequalification requirements provided in the tender guidelines. In the event that the calling agency determines that some information or requirement is missing, such agency will require to the interested bidders to submit additional documentation or clarifications. On the other hand, if the calling agency considers that the prequalification documents meet all the requirements, the corresponding agency will issue a prequalification certificate, allowing the interested bidders to submit proposals.

Prequalification is becoming more commonly used by all agencies, in many different projects.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

Yes, as stated above, the SFP may temporally impose penalties or even impose a ban on companies that breach the Works Law or the Acquisitions Law. The blacklist period shall not be less than three months and not more than five years, and the SFP will publish the blacklist in the Official Federal Gazette and in CompraNet. The SFP publishes in its web page the bidders’ blacklist (<http://directoriosancionados.funcionpublica.gob.mx/SanFicTec/jsp/Ficha_Tecnica/SancionadosN.htm>).

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

Yes, the companies that are involved in the set-up of a procurement procedure will be excluded due to a conflict of interest.

In principle, the following companies are excluded from the procurement procedure: (**i**) companies that are linked by a partner or common associate and that submit proposals in the same bidding process, (**ii**) companies that were involved in the set-up of the procurement procedure, and (**iii**) companies that have used privileged information.

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

Yes, participation in the form of a consortium is allowed in tender procedures but not in restricted invitations and direct award procedures. The bid rules regulate, in accordance with the consortium provisions contained in the law, how two or more parties may combine to submit a bid and develop the project or operate a contract and how many offers they can present in the same process. For instance, under the Acquisitions Law a bidder may only present one offer; a bidder may only participate in one consortium.

Also, competition issues will also arise if the consortium parties affect fair competition by submitting a joint proposal.

If the bid call is a national one, then only Mexican incorporated entities may participate in the bid process. If the bid call is international, then Mexican and non-Mexican entities may participate in the process.

Pursuant to the Works Law and the Acquisition Law, there is no need to incorporate a new legal entity to participate in a public bid or once the contract is awarded, if participating through a consortium.

On the other hand, the PPP Law establishes that a new legal entity must be incorporated (a special purpose vehicle or “SPV”), but after the contract is awarded. In some projects, such as tenders to award gas transportation service contracts, and port concessions, bidders must obtain clearance from competition authorities to be able to submit a proposal.

## g. Can members of a bidder consortium be changed during a procurement procedure?

In case of a bidder consortium, the preliminary registration will apply to all the members. If the members of a bidder consortium change, the new member shall submit the technical proposal again, including all the documents and information required.

Furthermore, the members who separate from the bidder consortium could participate individually and may present all the documents and the information in the technical offer.

In connection with tenders called by the public agencies involved within the Mexican energy sector, the rules governing the changes of the bidder consortiums are typically set forth in the respective tender rules. Such changes usually require the consent of the calling agency.

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

Yes, the limitation for participation of related bidders in the same procedure with competitive bids applies and is established in the Procurement Laws and in their regulations; also the limitation shall be stipulated in the tender rules.

For instance, in terms of the Works Law, the limitation applies for the companies that are linked by a partner or common associate and that submit proposals in the same bidding process.

In another example, in accordance with the Hydrocarbons Law, the tender rules to the award hydrocarbons exploration and extraction contracts provide as a cause to reject proposals when a company submits more than one proposal for the same contractual area, either (**i**) individually; (**ii)** through the direct or indirect participation in more than one joint bidder (i.e. a consortium); or (**iii)** individually through companies, either directly or indirectly, over which a different bidder has the control or belong to the same business group of a different bidder. Also, in this case, a bidder may not participate in more than four consortiums.

## i. Is there a special regulation or a special requirement for a foreign company to participate in a procurement procedure?

In principle, there is no special regulation or a special requirement for a foreign company to participate in a procurement procedure. However, in some cases, public tenders are called under FTAs in which case only companies that belong to a FTA country can participate. In other cases, tender processes are national meaning that only Mexican companies (companies established under Mexican laws) can participate.

Nevertheless, for instance, the PPP Law establishes that the public-private partnership agreements can only be entered with Mexican companies. In a more specific way, the tender rules will indicate other requirements that the company must meet. This is also applicable under the Hydrocarbons Law since, notwithstanding that foreign companies are allowed to participate in a tender the CNH is only entitled to enter into the respective contracts with companies incorporated under Mexican laws.

Furthermore, all documents to be submitted before the corresponding public agency and which are signed by foreign public officers, must be legalized or apostilled in order to be deemed valid in Mexico. As a general rule, any document in another language must be translated into Spanish and certified by an expert translator in Mexico.

# 5. Specifications

## a. Are there any rules on the specifications?

Rules on the specifications will be contemplated in the relevant tender documents. Normally, tender rules will set forth all required specifications and will also include reference to all technical regulations and Mexican or international standards that a bidder must comply with.

There are general principles or provisions contained in the Procurement Laws. For instance, the Acquisitions Law and the Works Law clearly state that all bidders must comply with the same requirements and conditions, and shall have the same access to all relevant information.

As a general rule, conditions cannot be negotiated, and the terms and conditions of the tender documents shall not limit participation, concurrence and economic competition. The agencies shall refrain from establishing requirements that limit participation, concurrence and economic competition, or that are not possible to meet.

On the other hand, the PPP Law specifies that the call and bidding process have to take into account the recommendations of the Federal Competition Commission in order to be competitive and allowing free concurrence.

Finally, but in the same line, the Procurement Provisions applicable to the public agencies awarding contracts within the Mexican energy sector provide that the tender rules shall not set forth requirements with the purpose of limiting the competition process and free concurrence.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

Generally, the bidders are not allowed to change the specifications or submit their own standard terms of the business.

The Procurement Laws expressly establish that none of the conditions contained in the public call, the tender rules, the legal framework and its exhibits, nor in the proposals of the participants, will be negotiated.

Any changes that the calling agencies may make to the call or to the tender rules shall only take place: (i) as a result of the Q&A sessions, or (ii) as adjustments made by the agencies not deriving from Q&A sessions, and said changes or adjustments shall be considered by the bidders while preparing their proposals.

Finally, the Mexican procurement framework is in constant development and procurement tools such as the General Provisions in connection with the acquisitions, leases, services procurement and public works applicable to the CFE and its Subsidiary Productive Companies already contemplate negotiation phases or processes.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

Yes. For instance, according to the Acquisitions Law, once the bidding proposals are evaluated, the contract may be awarded to the bidder who offers the best project in terms of technical and legal requirements and economic solvency. In case of tie, when there bidding proposals obtain the same cost-benefit score or offer the lowest price, there is a protection of small and medium national enterprises according to the Acquisitions Law.

The Works Law establishes that the Ministry of Economy will dictate the rules to be observed by public agencies in order to promote the participation of national companies, specially small and medium enterprises.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

Yes, the Procurement Laws regulate how contracts are to be awarded. These laws govern the procurement procedures and their terms and conditions are set forth and mirrored in the bidding rules, invitations or requests for proposal. The contracts or orders will be awarded if they comply with the terms of said rules, invitation or direct award procedure. Likewise, there are specific rules for not awarding a contract or order.

In principle, the award criteria is determined by: (**i**) the binary evaluation criteria, whereby the contract is only awarded to those who comply with the requirements established by the caller, (**ii**) the point and percentages criteria, or (**iii**) the lowest price criteria.

For instance, the Acquisitions Law establishes that the contract will be awarded to the bidding proposal that: **(i)** obtains the best result in the combined evaluation of points and percentages, or of cost-benefit; or (**ii**) offers the lowest price; or (**iii**) offer the lowest price with the modality of subsequent discounts, as long the proposal is technically and economically viable.

The Hydrocarbons Law, CFE Law and PEMEX Law provide that the award mechanisms under the tenders called by the CNH, CFE or PEMEX may be, among others, an ascending price auction, a descending price auction, or a first price sealed-bid auction, in which case, the bids shall be submitted and opened at the same public session.

Likewise, if there is a tie between proposals, the caller will decide on the proposal that offers the greater use of the country’s resources, as well as the use of national goods or services. Tender processes called by CNH, CFE and PEMEX shall contemplate tie-breaking criteria, which shall be included in the relevant tender terms and conditions. One tie-breaking mechanism that CNH has been used within its recent tenders is the one that allows the private entities which are tied in their proposals, to offer CNH a cash payment. Then, the contract will be awarded to the company which offers higher cash payment.

Generally speaking, tender rules will provide the award criteria setting forth, for instance, the points to be awarded regarding technical capacity, and experience. The criteria will typically mention the minimum score a technical proposal shall meet to be able to pass to the next stage that is the evaluation of the economic proposal, or the opening of said economic proposal.

## b. Are there any limitations regarding the offered bid price?

We follow the general principle that in the evaluation of the bidding proposals, the calling agency will verify that the bidders comply with the requirements indicated in the tender rules, and that they have sufficient technical and economical elements to develop the project.

The evaluation will include financial viability, the technical feasibility and compliance with legal requirements in order to guarantee the development of the project. If the calling agency considers an abnormally bid price that would not be viable for the project, it may turn down that proposal. It is important to note that bidders are required to submit various statements; one of these statements relates to pricing and bidders are required to state under oath that prices are fair and market, and that they are not colluding to affect prices.

Once the bidding proposals are submitted, in no case, the bidders could rectify the deficiencies of their proposals. However, in some cases, the calling agencies may require to the bidder further clarifications or information regarding the submitted proposals.

## c. Are there any rules on alternative bids?

Generally, there is no possibility of submitting a second proposal under a same procurement procedure; if the proposal is not successful in meeting all technical and economic requirements, then the said proposal will be disqualified and the contract or order will be awarded to the compliant proposal. If there is no compliant proposal, then the parties should be entitled to file a proposal under a new procedure if the authority or entity decides to launch a new procedure. For instance, if a contract under tender is not awarded because there were no compliant proposals, then the entity or authority will be entitled to re-launch the project under another bidding procedure, or under a restricted invitation or direct award procedure, in which case the bidders, invitees or awarded contractor may submit a new proposal, notwithstanding that they may have filed previous proposals under the original public bidding procedure.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

As a general rule, public entities must procure or contract through public bidding. However, when a public entity requiring the work or the acquisitions duly justifies that the public bidding procedure does not satisfy the best condition test in connection with price, quality, financing, opportunity, efficiency, effectiveness, impartiality, honesty and transparency, it may elect not to carry out the public bidding procedure and award the contract through: (**i**) a restricted invitation procedure, or (**ii**) a direct award.

Restricted invitation and direct award are considered exception procedures to the public bidding and shall be properly justified, including the reasons why public tender is not the most appropriate route to ensure the best contract conditions in terms of price, quality, timing, etc. Exceptional procedures are also allowed, for example, when a public tender process does not result in an award provided that the essential and original contract requirements remain unchanged from the tender.

For instance, the PPP Law allows a direct award when there are insufficient options for the development of infrastructure or equipment, or when there is only one possible developer in the market.

Additionally, the Works Law and the Acquisitions Law allow the direct award when the works or services, or when the goods to be acquired, deal with the Army or the Navy, or when a tender process may put national security or public safety at risk.

On the other hand, the Hydrocarbons Law does not contemplate the exceptional procedures of direct award or restricted invitation procedure. Therefore, the hydrocarbons exploration and extraction contracts can only be awarded through a public tender.

As already mentioned, the granting of concessions related to highways, railroads, ports and airports only allow public tender processes.

## b. What are the consequences for violation of the competitive bidding requirement?

The Procurement Laws contemplate economic penalties for the bidders, service providers or contractors who violate the competitive bidding requirement. In addition, the authority may temporally disqualify or ban anyone from directly or indirectly participating in procurement procedures or entering into contracts regulated under the Procurement Laws for breaching their provisions. Likewise, there are administrative laws that impose sanctions on the public officers that circumvent the provisions of the Procurement Laws.

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

The Procurement Laws, mainly the Works Law and the Acquisitions Law, set forth remedies to challenge an award or protest in a tender process. The remedy is called “non-conformity”. This procedure is intended to declare null and void any action or omission of the contracting entity that breaches or avoids the application of the law in the following stages:

calls and instructions for public tenders and clarification meetings;

tender evaluation and award;

cancellation of the bidding process;

acts or omissions by the contracting entity calling the bidding process that prevent the execution of the contract.

Once the bidding procedure is completed and the contract is awarded, those parties which were not favored with the results of the procedure are entitled to challenge any part of the outcome through the procedures of: **(i)** non-conformity appeal, **(ii)** appeal of review, **(iii)** contentious administrative trial, and **(iv**) *amparo* suit (constitutional trial). In the event that any of these challenge procedures are presented, it may delay or suspend the commencement or progress of the schedule for the awarded contract.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

All the legal remedies against any action or omission of any contracting entity should be pursued under the applicable laws. However, some private entities have used public opinion as leverage to put some pressure on the contracting entity.

It is possible to file damage claims under civil law against the public agency, however before that filing it is necessary to obtain a favorable resolution issued under a procurement legislation that recognize that the public entity has acted illegally.

## c. Is there a specific forum before which procurement disputes are heard?

A non-conformity action may be filed before the SFP in the event a breach is claimed in connection with any stage of the public bid process or invitation to at least three interested parties. After analyzing the case and the evidence produced, the SFP should issue a resolution. Such resolution may:

declare that the non-conformity action is, or is not, duly founded in law;

declare the annulment of any action of the respective entity; or

declare the execution of the contract.

Some common reasons for filing a dispute within a bidding procedure or exemption procedures are the late delivery or performance of the works, the amount of the corresponding penalties, delays in payment or demand for payment for additional works.

Also, suppliers may always file a request for conciliation with the SFP due to disagreements resulting from the performance of contracts. The SFP will hold a hearing in order to reconcile the parties and try to reach an agreement. The conciliation procedure is not admitted when the contracts are terminated or under litigation, or when those contracts have been subject to conciliation before and no agreement was reached.

Moreover, other procedures may be initiated before different federal courts in addition to the foregoing remedies, such as the *Tribunal Federal de Justicia Administrativa* (Administrative Federal Justice Tribunal) and the *Poder Judicial de la Federación* (Federal Judicial Power). If the contract does not have any arbitration clause, the litigation will occur before the Administrative Federal Justice Tribunal and/or Federal Judges.

## d. Are there any timing requirements for the review?

Generally, an affected party has six business days to file an application for non-conformity. In case of international public tenders under the coverage of treaties FTAs, the term to file a non-conformity action is 10 business days.

In some cases, a non-conformity action may suspend a procurement procedure (e.g., by preventing the performance of the contract with the awarded company). In such cases, suspension will be guaranteed through a bond. Such guarantee should be posted for an amount equivalent to 10% to 30% of the amount of the economic proposal of the affected party filing the non-conformity action.

## e. What are the main preconditions for review?

The “non-conformity” appeal should be filed by any bidder that demonstrates its participation in the bid procedure, against any of the following resolutions:

Calls and instructions for public tenders and clarification meetings

Tender evaluation and award

Cancellation of the bidding process

Acts or omissions by the contracting entity calling the bidding process, which prevent the execution of the contract.

The non-conformity writ must include some specific information, such as the reason to challenge the resolution, the harm caused, the information and documentation that demonstrate the legal arguments, as well as the documentation that demonstrate the participation in the public bid procedure.

## f. What are admissible grounds for starting a review proceeding?

Any violation within a bid procedure could be appealed by the bidders. The most common grounds for starting an appeal are violation of the competitive bidding requirement, disqualifications of a proposal without legal grounds, not fulfilling the legal terms set forth in the procurement laws for a public bid procedure, etc.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

With the filing of a non-conformity appeal, it is possible to request the suspension of a procurement procedure (e.g., by preventing the performance of the contract with the awarded company). In such cases, suspension will be guaranteed if the party that protests posts a bond. Such guarantee should be posted for an amount equivalent to 10% to 30% of the amount of the economic proposal of the affected party filing the non-conformity action.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

The non-conformity appeal has the purpose to declare null and void any action or omission of the contracting entity that breaches or avoids the application of the law. A successful appeal could cause a cancelation of an agreement, a change in an award decision, or the re-initiation of a bid procedure.

## i. How long does a judicial proceeding for review take?

The non-conformity appeal could take around 6 to 8 months to be resolved. If after such appeal the case is presented before the Administrative Federal Court the judicial proceeding takes around 1.5 years to be resolved.

## j. Must unsuccessful bidders be notified before the award? If so, when?

According to the Procurement Laws, all the bidders should receive a notification of the award at the same time, and the award shall be uploaded in CompraNet. In most of the cases, the notification is made the day of the decision, or within the next days. Again, it is important to mention that the public entity has the obligation to submit the award decision through CompraNet the same day of the award.

## k. Are review proceedings common?

Yes, these kinds of procedures are very common in Mexico.

## l. Are damage claims in relation with procurement procedures common?

No, because damages must be filed under the civil law before a Civil Court. Such procedures take a lot of time to be resolved.

## m. What are the leading court decisions involving procurement disputes?

In Mexico, jurisprudence is the consistent interpretation that federal higher courts give to the laws as a result of litigation cases. The Federal Courts regularly issue decisions regarding the procurement regime.

Some of the judicial resolutions and interpretation of the law in connection with public procurement related to, among others: **(i)** early termination of public contracts; **(ii**) submission of proposals; **(iii)** electronic public bidding; **(iv)** the principles of the public bidding; and **(v)** definitive suspension of claimed actions.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

Local (State and, in some cases, municipal) public agencies have their own procurement laws and regulations that sometimes differ from the Procurement Laws. Although, laws and regulations generally follow the principles set forth by their federal counterparts, there can be important differences, and local laws tend to be less-developed with regard to concepts such as multi-annual contracting and open contracts.

Furthermore, certain federal public agencies having budgetary and functional independence have their own independent procurement regulations, which often allow for more flexibility and are typically subject to internal contracting committees.

## b. Does a specific contract law apply for public contracts?

The Procurement Laws described above are the specific laws that apply for public contracts. The terms and provisions of these laws are usually mirrored in the contracts. Now, please consider that Mexico is evolving rapidly and in some cases, although the procurement processes are administrative in nature, the contracts are of a private and commercial nature. This is the case with contracts that can be now be entered into with the CFE and PEMEX, as a result of their new procurement and legal framework deriving from the Constitutional energy reform. Those contracts are no more administrative or public contracts.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

In general, the procurement of technology follows the standard of the Procurement Laws and practices.

However, some considerations should be taken into account: (**i**) every year, the Expenditure Budget of the Federation is issued and describes the total amount of funds allocated to science and technology programs in accordance with the Law of Science and Technology; (**ii**) every public entity issue its own resolution of austerity and budgetary discipline for the fiscal year (p.e. 2017) which determine that technology acquisitions, especially computer and communications equipment, should follow a technology update program and are ordinarily subject to budget caps as well as their procurement may only be appropriate whenever it is justified in terms of cost-benefit with their compatibility and standardization criteria; and (**iii**) Mexico must comply with the Resolution 1540 of the Security Council of the United Nations, for the procurement of technology and software that can be used for the development or use of weapons of mass destruction (including, for example, certain cryptographic technologies).

## b. Are there any specific laws or practices that apply in the defense sector?

No, as already mentioned, the public procurement of the aerospace and defense sector is regulated by the Procurement Laws, mainly by the Acquisitions Law and the Works Law.

Additionally, under the Acquisitions Law and the Works Law, these acquisitions, leases and services, or works, may be procured without a public bidding procedure because they relate to military or army purposes, and because public procurement may compromise national security or public safety.

## c. Are there any specific laws or practices that apply in the health care sector?

The public procurement of the health care sector is also regulated by the Public Procurement Laws, basically by the Acquisitions and the Works Law, and now by the PPP Law, since Mexican health institutions such as IMSS and ISSSTE are now launching hospitals and services under a PPP modality. These projects are part of a huge PPP program that the federal government has recently launched to build and operate various hospitals in Mexico.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

As previously mentioned, on December 2013, the Mexican congress enacted the Constitutional energy reform which in turn resulted in the enactment and amendment of several secondary laws and regulations. All this resulted in a huge transformation of the energy sector in Mexico. In sum, this new legal framework allows private entities the opportunity to participate in a more broadly manner in activities that were previously restricted or reserved exclusively for the Mexican government acting through PEMEX or the CFE. Therefore, there is a whole new framework that exclusively applies to the Oil & Gas and Power sectors.

Also, the Telecommunications sector is regulated under the Telecommunication and Broadcasting Federal Law which regulates the procurement of telecommunications and broadcasting concessions. The Federal Institute of Telecommunications (IFT), with its own criteria, may call tender processes and shall allocate the assignment of frequency bands of the radio electric spectrum in telecommunications and broadcasting sector, as well as the orbital resources with their frequency bands.

Notwithstanding the aforementioned, the biggest telecommunications project in Mexico’s history, known as “*Red Compartida*”*,* was just awarded under the PPP Law.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

The PPP Law and its Regulations whose main purposes are the generation of better financing schemes for infrastructure projects and the elevation of the country’s competitiveness were published in 2012 and recently amended. In this area, along with a new Strategy to Promote Federal PPP projects (the Strategy, as described below) and a new 2030 National Program for Sustainable Infrastructure that is currently under preparation, we do not expect any other important changes in the near future.

The federal government has implemented several programs to facilitate, promote and develop projects. For instance, on March 2017, the Ministry of Treasury presented the *Strategy to Promote Federal PPPs* (the “Strategy”) as a mechanism to foster and publicize long-term infrastructure projects. The Strategy aims to: (**i**) guarantee that the tender processes are conducted to allow participation, competitiveness, fair treatment, efficiency and transparency, and (**ii**) supervise the development of projects throughout all stages to guarantee that they comply with their purpose, reach their goals and result in benefits.

Also, the federal government has launched a platform called *Proyectos Mexico/Mexico Projects Hub* which is fully aligned with the Strategy and has been designed to promote not only the PPP projects covered under the umbrella of the Strategy, but also other highly relevant infrastructure projects that are currently being implemented or will be implemented soon in Mexico.

On the other hand, there is a legislative proposal to abrogate the Works Law. Senators submitted a proposal to issue a new law with the main purpose of ensuring competition, transparency and efficiency in the processes to contract public works, as well as to harmonize Mexican legislation with the best international practices. If the Congress approves this proposal, some of the most relevant changes will relate to liability for public officers and transparency, as the main goal of this new law is to end corruption.

Finally, regarding the fairly recent legal framework implemented as a result of the above referred Constitutional energy reform, we do not expect major changes to it in the short term, although Mexican agencies are constantly working to adapt their procurement processes to international standards expediting all contracting procedures and conducting them with full transparency.

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