Public Procurement World - Mexico

1. The Laws

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# 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.

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