

The International Comparative Legal Guide to:

Public Procurement 2009

A practical insight to cross-border Public Procurement



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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Federal Public Procurement in Mexico is governed by the provisions set forth in: (i) article 134 of the Federal Constitution; (ii) The Procurement, Leases and Services of the Public Sector Law (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*) and its Regulations; and (iii) The Public Works and Related Services Law and its Regulations (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*) (all of them collectively the “Procurement Laws”).

With the intention of guaranteeing the best conditions for the State regarding price, quality, financing, and supply opportunity, the Procurement Laws establishes as a general rule that all contracts related to acquisition, lease, or sale of goods, rendering of services, and performance of public works shall be awarded through a public bidding process.

The Procurement Laws regulate all actions related to the planning, programming, budgeting, contracting, expenses and surveillance of acquisitions and leases of goods and the rendering of services of any nature, as well as, the performance and surveillance of any public work and services related to same carried out by: (i) any public entity or agency of the Executive Branch; and (ii) any Mexican State when the above-mentioned activities are performed with Federal funds.

Each of the thirty one Mexican States and the Federal District has their own Procurement and Public Works legislation that applies when they are carrying out activities where no Federal funds are involved. As a general rule, all of the local Laws consider that procurement and public works contracts shall be awarded through bid processes that basically follow the same principles set forth in the Federal legislation.

1.2 How does the regime relate to supra-national regimes including the GPA and/or EC rules?

The Procurement Laws provide three different types of public bidding process; National bids, International bids under the rules of International Treaties and International open bids.

National Bids are those in which only Mexican individuals or companies incorporated under Mexican laws are allowed to participate and the goods or services subject matter of the bid are produced in Mexico and composed of at least 50% of national components.

International Bids Under the Rules of International Treaties are those that follow the rules set forth in the different Free Trade Agreements of which Mexico is party and participation in the same is restricted to Mexican individuals or entities and foreigners from countries that have entered into a Free Trade Agreement with Mexico.

International Open Bids are those where any individual or corporation (Mexican or foreign) are free to participate. Such type of bids may be called only if one of the following requirements is met: (i) that the calling party carries out a market investigation that reaches the conclusion that there is no sufficient offer from Mexican or foreigners from a country that has entered into a Free Trade Agreement with Mexico regarding quantity, quality and price of the goods or services to be contracted; (ii) a National or an International bid under the rules of International Treatments took place and the contract was not awarded due to lack of solvency of the proposals; and (iii) it is a condition established in an external loan granted to the Federal government for the purpose of carrying out a specific bid process.

1.3 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The Procurement Laws contemplate that contracts must be awarded to the bidder offering the lowest price. However, prior to calling the bid, the calling party must have an estimated budget authorised by the Ministry of Finance and Public Credit (Treasury) and any offer below said estimated budget has to be declared non acceptable.

All bidders shall be equally treated and have access to the same information. The calling party can not request the compliance of any type of requirements that may limit or affect the participation of any interested party in the bid process. The guidelines to participate in the bid must follow the principles of transparency, non partiality and equal treatment that applied to all participants, any breach of such principles may cause the cancellation of the bid by the Ministry of the Controllershship (*Secretaría de la Función Pública*) who is the agency in charge of verifying that the bid process is carried out pursuant to applicable law.

1.4 Are there special rules in relation to military equipment?

The Procurement Laws provide certain exceptions where governmental agencies or offices may avoid a public bid process and award a contract through a restricted bid where a minimum of three bidders may participate or directly designate the contract to a specific

party. One of those exceptions refers to the acquisitions of goods which use will be exclusively for military purposes or needed to guarantee national security. It is completely discretionary and of the sole responsibility of the Mexican Army to justify the reason to perform an acquisition without following a public bid process, if said acquisition is not fully justified, the Ministry of the Controllorship may cancel the process and order a call for a public bid.

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law and is it possible to obtain a ruling on this issue?

Any public entity or agency of the Executive Branch including state own companies and any other type of corporations, investment vehicles or trusts incorporated with Federal funds, as well as, any State of the Federation carrying out a project with federal funds must comply with the provisions set forth in the Procurement Laws.

No rulings can be obtained on this issue, however as previously mentioned the Procurement Laws contemplate certain exceptions where a contract may be assigned without going through a public bid process. In these cases the contract may be assigned either (i) through a restricted bid process in which at least three different offers must be evaluated, or (ii) directly awarded to a specific individual or corporation. In this case, certain conditions, such as the existence of an emergency or a *force majeure* must be met, or a justified cause to directly contract with a specific person exist for instance, protection rights applicable to the goods intended to be acquire.

2.2 Which private entities are covered by the law and is it possible to obtain a ruling on this issue?

The Procurement Laws do not apply to activities performed by private entities. Even the activities related to the construction and/or operation of infrastructure linked to the rendering of a public service such as telecommunications or toll roads systems that are performed by a private entity in terms of a concession title, are not subject to the provisions of the Procurement Laws.

2.3 Which types of contracts are covered?

Any contract where an entity or agency of the Executive branch is a part and refers to the acquisition of goods, rendering of services, construction of facilities, maintenance of infrastructure and leasing of goods, should be subject to the provisions set forth in the Procurement Laws.

2.4 Are there threshold values for determining individual contract coverage?

There are no threshold values for determining individual contract coverage, however, before initiating a contracting process it is mandatory that the calling party must prepare an estimated budget for the activity to be carried out and to obtain a budgetary authorisation from the Treasury. Depending on the amount of said budget, the contract may be awarded through a public bid process, a restricted bid process or directly assigned to a specific provider.

2.5 Are there aggregation and/or anti-avoidance rules?

One of the provisions set forth in the Federal budget refers to the

amounts that each governmental body must bear in mind in order to determine whether the acquisition of goods or the hiring of a service has to be contracted through (i) a public bid procedure, (ii) a restricted bid process, or (iii) directly award the contract to a specific party. Aggregation or anti-avoidance rules are not accepted and it is not allowed to divide a procurement requirement of goods or services with the sole purpose to avoid a public bid alleging that the value of the goods needed is in the range of the value determined in the Federal budget to perform a restricted bid or to directly award the contract to a specific party.

2.6 Are there special rules for concession contracts and how in practice are these applied so as to determine coverage?

Although in some cases concessions are awarded through a bid processes, same process is not linked to the Procurement Laws regime.

Concessions are usually granted to private individuals or corporations for the rendering of a public service like telecommunications, toll roads operation, or water treatment. The bid process, if any, to grant the concession is carried out pursuant to specific guidelines issued for each case following the general rules set forth in the legislation applicable for the activity subject to the applicable concession.

3 Procedures

3.1 What procedures can be followed, how do they operate and is there a free choice amongst them?

As previously mentioned, the Procurement Laws establish as a general rule that all contracts related to the acquisition of goods or the performance of a public work, must be assigned following a public bid process. However, there are certain exceptions to the above-mentioned general rule and some contracts may be awarded through a restricted bid process where a minimum of three bidders may participate or be directly assigned to a specific provider.

In any event, it is completely discretionary and of the sole responsibility of the calling party to determine the procedure to be followed and the selection of assigned party has to be duly justified, based on the specific circumstances of each case and in the economical or effectiveness factors that may assure the best contract conditions for the State.

3.2 What are the rules on specifications?

The calling party has to issue a bidding guideline in order for third parties to participate in the bid process. The guideline shall be available to all interested parties and include all legal, administrative and financial requirements that have to be met by the bidders, as well as, a clear description of the goods, services or works that will have to be supplied, rendered or performed by the winner of the bid and a calendar of all events related to the process. The bid guidelines shall not include any requirements that are impossible to meet by the bidders or that limits the participation of any potential participant, and must comply with transparency principles.

3.3 What are the rules on excluding tenderers?

In a public meeting that takes place on the date set forth in the bidding guidelines, the calling party receives the technical and economical proposals of the bidders. Prior to the evaluation of such

proposals the calling party performs a prequalification procedure with the sole intention of quantitatively verifying that the bidders have complied with the all requirements included in the guidelines. Bidders failing to comply with any of the requirements established in the guidelines are precluded to participate in the bid process.

3.4 What are the rules on short-listing tenderers?

Once the prequalification procedure has ended, the calling party indicates the name of the bidders which technical proposal will be evaluated and publicly communicates the amount of each economical proposal presented. On the date indicated in the bid calendar, the calling party announces, in a public meeting, the results of the technical evaluation performed and lists the name of the bidders that have to be disqualified considering that they didn't meet all technical requirements requested in the guidelines.

3.5 What are the rules on awarding the contract?

The calling party awards the contract to the bidders that fully comply with all technical requisites set forth in the bidding guidelines and whose economical proposal contains the lowest price to be paid for the activities to be rendered or the goods to be acquired.

3.6 What methods are available for joint procurements (e.g. framework agreements, central purchasing bodies, shared contracts)?

The Procurement Laws establish the possibility of executing open contracts. These type contracts are intended to cover those cases where a calling party requires the same goods or services continuously.

In an open contract, the calling party has to set a minimum and a maximum amount of goods to be subject to the procurement activity or define a minimum and a maximum budget to be exercised in the understanding that in all cases, the minimum budget has to be at least equal to 40% of the maximum budget provided. If the goods have to be produced exclusively for the calling party, the minimum amount of same must be equal to 80% of the maximum amount set.

3.7 What are the rules on alternative bids?

The Procurement Laws do not provide a possibility to carry out alternative bids. Once a bid process starts, such process has to be concluded in order to initiate a new bid process when the contract is not awarded for any reason.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions and who determines their application?

There are certain exceptions in which a public agency or office is not subject to the Procurement Laws regime, although all public agencies or offices performing a procurement activity must comply with the general rules set in article 134 of the Federal Constitution.

The Procurement Laws do not apply to (i) the Legislative and Judicial branches, (ii) the governmental autonomous entities like

the Bank of Mexico or the Federal Electoral Institute, and (iii) the entities that perform activities linked to investigation and development of technology when the procurement activities are carried out with self-generated funds.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The Procurement Laws do not apply to contracts executed between governmental entities unless the signing party obligated to deliver the goods or perform the services has to contract a third party to comply with its contractual obligations. In these cases, the contracting of the above-mentioned third party is subject to the provisions set forth in the Procurement Laws.

5 Remedies and Enforcement

5.1 Does the legislation provide for remedies/enforcement and if so what is the general outline of this, including as to *locus standi*?

If an interested party considers that during the contracting process the calling party acted contrary to the provisions set forth in the Procurement Laws and/or in the bidding guidelines, an administrative procedure named nonconformity (*inconformidad*) may be initiated before the Ministry of the Controllershship.

This administrative procedure has to be related to (i) the calling, bidding guidelines or any act performed during the contracting process, (ii) acts that took place during the public events of reception and opening of proposal and the awarding of the contract; and (iii) acts performed by the calling party with the intention of not allowing the signing of the awarded contract.

The Ministry of the Controllershship has to resolve the nonconformity procedure in a maximum term of 40 working days as of the day on which the procedure was started by the interested affected party. The resolution may confirm the acts performed by the calling party or order the nullification of the contracting process.

5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

Firstly, the interested parties have to initiate a nonconformity procedure, once concluded, if the resolution issued by the Ministry of the Controllershship does not favour their interests they are entitled to initiate an appeal procedure before competent courts.

5.3 Before which body or bodies can remedies/enforcement be sought?

The Ministry of the Controllershship through the Internal Auditor Unit in charge of surveillance the procurement procedure.

5.4 What are the legal and practical timing issues raised if a party wishes to make an application for remedies/enforcement?

The application has to be filed within the next 10 working days as of the day on which the acts performed by the calling party subject of the nonconformity procedure were known.

5.5 What remedies are available after contract signature?

The Procurement Laws establish one sided rules favouring the calling party regarding early termination and cancellation of the contracts awarded through a bid process.

The calling party has the right to early terminate any procurement agreement when there are reasons of general interest to do so, or when based on justified causes it can be proved that the necessity to acquire certain goods or required the rendering of some services has extinguished and the continuity of the contract may derive on damages or punitive damages to the State. In these cases, the calling party has the obligation to reimburse all non-recovery reasonable expenses incurred by the provider.

The calling party also has the right to terminate or rescind the contract at any time when the provider breaches any of its obligations. The Procurement Laws establish an administrative procedure where the provider has the opportunity to perform the necessary acts tending to comply with its contract obligations and allows the parties to reach an agreement regarding compliance of the contract obligations.

If the calling party does not comply with its obligations regarding prompt payment of invoices or submission of information and documentation needed for the rendering of a specific service, the providers have the right to claim payment of financial expenses and request an extension in the term of the contract.

5.6 What is the likely timescale if an application for remedies/enforcement is made?

There is no specific timeframe to which a termination or rescission procedure has to be subject to. If the calling party decides to initiate same, a written communication has to be given to the provider who has a term of five working days to express its allegations. Once the allegations are submitted, the procedure is open and it's at sole discretion of the calling party to decide, based on justified reasons, if the contract has to be terminated or propose an agreement to resolve the existing differences. If at any time during this open period the provider complies with its contract obligations the termination or recession procedure automatically ends.

In the cases that the provider decides to initiate a conciliation procedure before the Ministry of the Controllershship, same has to be resolved in a maximum term of 45 working days.

5.7 Is there a culture of enforcement either by public or private bodies?

All contract procedures are directly supervised and audited by the Ministry of the Controllershship and in some cases by an external auditor or a social observer, therefore, it can be said that there is a culture of enforcement pushed either by public or private bodies. In addition, pursuant to transparency laws provisions, all information related to procurement or public works is of public domain and have to be accessible to any interested party.

5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

Examples of cases are contracts linked to the development of infrastructure called either by Petroleos Mexicanos or the Federal Power Commission.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) or changes to contract terms post-signature? If not, what are the underlying principles governing these issues?

Modifications in the contracts related to changes in the timetable, extensions and amount of goods to be acquired or services to be rendered are allowed and have to be formally amended in writing. The calling party is precluded to modify the conditions of the contracts that refer to prices, pre-payments, and general specifications of the contract that will give better conditions to the provider compare with those originally established.

6.2 In practice, how do purchasers and providers deal with these issues?

Generally, all modifications to the assigned contracts are agreed between the parties through a modification procedure. In case of doubt regarding the scope of the modifications, the parties can seek for and obtain an opinion of the Ministry of the Controllershship.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

Privatisations are performed through a bid process that is approved by a Commission integrated with representatives of different ministries. This Commission is headed by the Treasury and among other attributions, it can set a minimum price to consider an offer as acceptable as well as to define the mechanism to award the winner of the corresponding bid.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

PPP's are generally awarded through a bid process on which the calling party, which is the agency interested in received certain services, prepare the corresponding guidelines that are submitted to the above-mentioned Commission for its validation.

Prior of the calling of a PPP's bid, the calling party must obtain the corresponding budgetary authorisation from the Treasury and define a maximum budget that will be allocated to the service matter of the bid.

8 Other Relevant Rules of Law

8.1 Are there any related bodies of law of relevance to procurement by public and other bodies?

The system and regime on procurement is based on Article 134 of the Mexican Constitution, and the federal laws described above. The Ministry of the Controllershship is responsible to construct the administrative application of Procurement Laws and, thus, has issued certain internal rulings applicable to public bodies or entities with respect to the scope and interpretation of Procurement Laws.

Except for the Procurement Laws, and the internal criteria described herein, there are no other related bodies of law of relevance to procurement by public and other bodies.



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9 The Future

9.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Procurement Laws are continuously reviewed by the Executive and Legislative branches, however, the last major amendment was passed on July of 2005, there have been some minor modification since then, but amendments do not materially modify the procurement regime that has been described through this document.



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