



Fighting Bid Rigging in Public Procurement in Mexico

**A Secretariat report on IMSS'
procurement regulations and practices**

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IMSS' procurement
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2011



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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FOREWORD

In January 2011 the OECD signed a Memorandum of Understanding with the Mexican Competition Authority (*Comisión Federal de Competencia*, CFC) and the Mexican Institute of Social Security (*Instituto Mexicano del Seguro Social*, IMSS) to support the adoption by IMSS of the OECD Competition Committee's Guidelines for Fighting Bid Rigging in Public Procurement. These Guidelines, approved in 2009, provide practical and readily applicable checklists for designing effective public procurement procedures and for detecting collusive practices during the course of the tender process, with the aim of reducing the risk of bid rigging in public tenders.

Since January 2011, the OECD Secretariat, IMSS and CFC officials have worked closely to understand the legal framework and practices governing public procurement at IMSS and identify areas for possible improvement. A preliminary report was presented and discussed with IMSS senior management in June 2011 and IMSS has already started implementing a number of recommendations put forward in that context. This final report contains more than 20 recommendations to IMSS on how to improve procurement procedures to avoid collusion among suppliers. It also identifies limitations and drawbacks in the current legal framework.

The implementation of the OECD recommendations together with the increased awareness among IMSS' procurement officials of the costs and risks of collusion will help IMSS to increase the effectiveness of its procurement strategy to the benefit of IMSS' beneficiaries and of the Mexican taxpayers. The savings generated can be used by IMSS to offer more and better services. Fighting bid rigging helps to improve a country's competitiveness and economic growth in the long term.

The OECD Secretariat would like to thank for their inputs and the fruitful cooperation: Lorenzo Martínez Garza, Carmen Zepeda Huerta, María Elena Mondragón, Susana Lugo, Araceli Pais and José Luis Romo at IMSS; Benjamin Contreras, José Luis Ambriz, Paolo Benedetti and Heidi Sada at CFC; Javier Dávila Pérez and his team at the *Secretaría de la Función Pública* (SFP); Jana Palacios and her team at the *Instituto Mexicano para la Competitividad* (IMCO); and Carolyn Galbreath, OECD consultant.

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EXECUTIVE SUMMARY

The Mexican Institute of Social Security (*Instituto Mexicano del Seguro Social*, IMSS, in Spanish) is the third largest public buyer of goods and services in Mexico, after the state-owned oil and electricity companies (PEMEX and CFE, respectively). IMSS is also the single largest purchaser of pharmaceutical products and other medical supplies, on which it spends around USD 2.5 billion each year.

Since 2006 IMSS has been making significant efforts to buy more effectively, for example by consolidating its purchases of generic medicines within a single purchasing division (as opposed to having each individual local delegation buy separately, as occurred previously). In the period from 2006 to 2009 these changes resulted in cumulative cost savings of around MXN 35,000 million to the benefit of IMSS' beneficiaries (and ultimately of taxpayers).

In addition, IMSS has cooperated with the Mexican competition authority (*Comisión Federal de Competencia*, CFC, in Spanish) in fighting collusive practices in its procurement, which has helped the CFC to successfully prosecute dishonest bidders and impose significant fines in 2010.

In January 2011 IMSS decided to step up its fight against bid rigging and signed a Memorandum of Understanding with the OECD and CFC. With this cooperation agreement IMSS became the first public agency in Mexico (and in the world) to formally commit to adopt and implement the OECD Competition Committee's Guidelines for Fighting Bid Rigging in Public Procurement.

The OECD committed to support the process of adoption and implementation of the Guidelines by IMSS through:

- a) Providing capacity building for IMSS officials on the design of public procurement to reduce risks of bid rigging and on the identification of bid rigging practices;
- b) Preparing an analytical report on the current public procurement legislation, regulation and practices governing IMSS procurement; and,

- c) Recommending areas for further improvement in procurement legislation, regulation and practices at IMSS in accordance with the Guidelines.

In respect of point a) above, in early May 2011 the OECD Secretariat – together with staff from the CFC – organised a training course for over 200 IMSS’ procurement officials who are based at IMSS’ headquarters in Mexico City and in local delegations throughout the rest of the country.

This report in turn fulfils the remaining points b) and c) listed above. Specifically, Chapter 3 of the report provides an overview of the existing legal framework of public procurement in Mexico, while Chapter 4 is a detailed summary of the laws and regulations governing the procurement of goods and services.

Chapter 5 lists areas in the current procurement laws and regulations which we consider restrict IMSS’ and other public agencies’ scope for action and their ability to obtain the best value from their purchases. Among other areas, this Chapter examines: limits to foreign bidders’ participation to tenders; use of procurement procedures which are less competitive than public tenders; and, provisions facilitating collusion such as mandatory clarification meetings, joint bids and split awards. Chapter 5 also presents possible remedies for each area.

Chapter 6 contains recommendations specifically addressed to IMSS on how to improve their procurement procedures. These recommendations address issues in the following broad thematic areas:

- Further opportunities for IMSS to exercise buyer power;
- Coordination with SFP, the CFC and adoption of best practices;
- Fighting practices which may facilitate collusion;
- Increased use of competitive mechanisms;
- Overhaul of market studies;
- Monitoring and information-sharing activities; and,
- Training activities.

Most of these recommendations were provided in a preliminary form to IMSS in June 2011 and have been incorporated in IMSS' 2012 procurement cycle since they did not require changes to the procurement laws and regulations. IMSS has also planned further actions to implement the recommendations of Chapter 6 and such actions are listed in Chapter 7.

Fighting bid rigging is a key priority for IMSS in Mexico and all public buyers around the world. Reducing the risk of collusion saves money which can be used to satisfy other needs, fosters innovation and increases a country's competitiveness. IMSS should therefore be praised for its continuing efforts in this area. We are confident that this report will promote more competition in public procurement and allow IMSS to obtain better "value for money" from its purchases, to the benefit of its members and ultimately of Mexican taxpayers.

CHAPTER 1: INTRODUCTION

1.1 Background

In January 2011 the Mexican Institute of Social Security (*Instituto Mexicano del Seguro Social*, IMSS, in Spanish) signed a Memorandum of Understanding with the OECD and the Mexican Competition Authority (*Comisión Federal de Competencia*, CFC, in Spanish).¹

IMSS' goal in signing this cooperation agreement is to – with the support of the OECD and CFC – step up its fight against bid rigging by agreeing to adopt and implement the OECD Competition Committee's Guidelines for Fighting Bid Rigging in Public Procurement (hereafter, the "OECD Guidelines"; see the next section).

The OECD, in turn, committed to support the process of adoption and implementation of the OECD Guidelines by IMSS through:

- a) Providing capacity building for IMSS officials on the design of public procurement to reduce risks of bid rigging and on the identification of bid rigging practices;
- b) Preparing an analytical report on the current public procurement legislation, regulation and practices governing IMSS procurement; and,
- c) Recommending areas for further improvement in procurement legislation, regulation and practices at IMSS in accordance with the OECD Guidelines.

¹ See press release "OECD to help Mexico tackle bid rigging for government contracts" of 14 January 2011, available at: http://www.oecd.org/document/59/0,3746,en_21571361_44315115_4688844_3_1_1_1_1,00.html.

Within this context and in order to obtain the maximum benefit from the cooperation agreement in time for the beginning of IMSS' 2012 procurement cycle, in June 2011 the OECD Secretariat provided IMSS with a set of preliminary recommendations whose implementation did not require changes to the existing Mexican procurement laws.

In addition, in early May 2011 the OECD Secretariat – together with staff from the CFC – organised a training course for over 200 IMSS' procurement officials who are based at IMSS' headquarters in Mexico City and in local delegations throughout the rest of the country.

This report is the Final Report prepared by the Competition Division of the OECD Secretariat and is based on an in-depth review of the legal framework for public procurement in Mexico as well as on information gathered during several meetings with officials of IMSS, CFC and the Mexican Ministry of the Public Administration (*Secretaría de la Función Pública, SFP*, in Spanish).

In fulfilment of points b) and c) in the list above, this Final Report includes a review of the current public procurement legislation in Mexico as well as a list of areas for improvement in order for current laws and regulations to become more closely aligned with the OECD Guidelines and thus be more effective in preventing and fighting collusion. It also includes the final set of recommendations to IMSS, taking into account the lessons learned during the implementation of the preliminary recommendations listed in the Interim Report delivered in June 2011.

The Report is structured as follows. The next two sections in this Chapter summarise the OECD Guidelines and the motivation of this study and potential benefits, respectively.

The next Chapter provides an overview of the role played by the Mexican Institute of Social Security in Mexico as well as of how much and how it buys. Chapter 3 then provides a brief overview of the current legal framework of public procurement in Mexico, while Chapter 4 presents the key provisions for the public procurement of goods and services in Mexico (which are applicable to all public agencies) and the set of policies and guidelines which are specific to IMSS in this area.

The areas for improvement in the current procurement laws and regulations and the OECD recommendations to IMSS are presented in Chapters 5 and 6, respectively. Lastly, Chapter 7 describes the actions which IMSS plans

to undertake to improve its procurement procedures in line with these recommendations.

1.2 The OECD Competition Committee’s Guidelines for fighting bid rigging in public procurement

Approved by the OECD’s Competition Committee in 2009, the Guidelines for fighting bid rigging in public procurement² are non-binding guidance which collects international best practices in respect of fighting bid rigging in public procurement.

In particular, the OECD Guidelines list the most common strategies of bid rigging (e.g. cover bidding, bid suppression, bid rotation and market allocation; see the next section) and industry, product and service characteristics that facilitate collusion (i.e. a small number of suppliers, little or no entry, market conditions, industry associations, repetitive bidding, identical or simple products or services, few if any substitutes, and little or no technological change).

The OECD Guidelines also include two checklists, the first one on how to design the procurement process to reduce the risk of bid rigging and the second one on how to detect collusion in public procurement.

The checklist on how best to design procurement procedures contains a number of suggestions to procurement officials, including:

- Be informed before starting a tender procedure (e.g. about market conditions, potential suppliers and recent prices);
- Design the tender process to maximise the potential participation of genuinely competing bidders (e.g. by avoiding unnecessary restrictions and reducing constraints on foreign participation);
- Define contract requirements clearly and avoid predictability (e.g. by aggregating or disaggregating contracts in order to vary the size and timing of tenders and working together with other public agencies);

² Available at: <http://www.oecd.org/competition/bidrigging>.

- Design the tender process to effectively reduce communication among bidders (e.g. by requiring bidders to sign a Certificate of Independent Bid Determination);
- Carefully choose the criteria for evaluating and awarding the tender (e.g. in order to avoid favouring incumbents and giving any kind of preferential treatment to certain suppliers);
- Raise awareness among procurement staff about the risk of bid rigging in procurement (e.g. by implementing regular training programs on bid rigging and cartel detection and storing information from past tenders).

The checklist on how to detect bid rigging during the procurement process complements these suggestions and recommends procurement officials to look for:

- Warning signs and patterns when businesses are submitting bids (e.g. that the same supplier wins all the tenders or that some companies always submit bids but never win);
- Warning signs in all documents submitted (e.g. identical mistakes or similar handwriting in bid documents submitted by different companies);
- Warning signs and patterns related to pricing (e.g. sudden and identical increases in price that cannot be explained by cost increases or a large difference between the winning bid and other bids);
- Suspicious statements at all times (e.g. spoken or written references to an agreement among bidders or statements that bidders justify their prices by looking at “industry suggested prices”, “standard market prices” or “industry price schedules”); and,
- Suspicious behaviour at all times (e.g. suppliers that meet privately before submitting bids or regularly socialise together or appear to hold regular meetings).

This checklist concludes with a list of steps that procurement officials should take if bid rigging is suspected:

- Gain a working understanding of the law on bid rigging applicable in their jurisdiction;
- Do not discuss concerns about bid rigging with suspected participants;
- Keep all documents, including bid documents, correspondence, envelopes, etc.;
- Keep a detailed record of all suspicious behaviour and statements including dates, who was involved, and who else was present and what precisely occurred or was said;
- Contact the competition authority;
- After consulting with internal legal staff, consider whether it is appropriate to proceed with the tender offer.

1.3 Motivation of the study and potential benefits

Bid rigging (or collusion in procurement) occurs when firms secretly conspire to increase the prices or lower the quality of goods and services which are bought by private and public organisations through a bidding process, instead of genuinely competing against each other to win a tender.

Bid rigging can take various forms. For example, dishonest bidders can agree to submit courtesy or phony bids which are higher than the bid of the designated winner (or bids which do not meet all the technical requirements), thus creating an appearance of genuine competition – a practice known as “cover bidding”. In other cases, members of the conspiracy may simply refrain from submitting a bid or withdraw a previously submitted bid (“bid suppression”), thus letting the designated winner win the contract.

In addition, in bid-rotation schemes members of the agreement continue to bid, but take turns to submit the lowest bid and thus win the tender, according to more or less sophisticated schemes (e.g. they may follow the phases of the moon). Dishonest bidders can also agree not to compete for certain categories of customers or in certain geographic areas, thus dividing the entire market among themselves.

These mechanisms are not mutually exclusive and are not the only ones that dishonest bidders can use to limit competition among them in a bidding procedure. What they all have in common, however, is that buyers will end up paying higher prices for their purchases or buying goods of lower quality than when there is no bid rigging. In particular, as shown in the Table below, a recent summary of six economic surveys about cartel overcharges suggests that the presence of a collusive agreement can (on average) increase prices by at least 30 per cent, compared to a competitive benchmark with no collusion.

Table 1: Summary of six economic surveys of cartel overcharges

Study	Number of cartels	Average overcharge	
		Mean (percent)	Median (percent)
Cohen and Scheffman (1989)	5 - 7	7.7 – 10.8	7.8 – 14.0
Werden (2003)	13	21	18
Posner (2001)	12	49	38
Levenstein and Suslow (2002)	22	43	44.5
Griffin (1989)	38	46	44
OECD (2003)	12	15.75	12.75
Total, simple average	102 – 104	30.7	28.1
Total, weighted average	102 – 104	36.7	34.6

Source: Table 1 in John M. Connor and Yuliya Bolotova, “Cartel overcharges: Survey and meta-analysis”, *International Journal of Industrial Organization*, vol. 24, issue 6, November 2006, pp. 1109-1137.

Moreover, apart from taking resources away from procurers (and ultimately taxpayers in the case of public procurement), these practices discourage entry by rivals, diminish public confidence in the competitive process and undermine the benefits of a competitive marketplace.

Bid rigging is illegal in all OECD member countries and can be investigated and punished under the competition law. In several OECD

countries (including Mexico, following the reform to the competition law of May 2011), bid rigging is also a criminal offence.

No country is immune from these illegal practices. In fact, these anti-competitive practices are investigated and punished in practically all jurisdictions with competition policy legislation. Mexico is no exception in this respect. Even before criminal penalties for bid rigging were introduced in Mexico, the CFC was investigating and punishing this offence. In particular, as summarised in Box 1 below, the Mexican competition authority has so far punished bid-rigging practices in several instances, the latest fine being imposed in 2010.

Box 1: Collusion in public procurement in Mexico punished by the CFC

In 2006, the Mexican competition authority (CFC) started an investigation into possible bid-rigging practices which might have been occurring in tenders organised by IMSS. In particular, the CFC focused on tenders to procure two pharmaceutical products, humane insulin and saline solutions, between 2003 and 2006 (i.e. the period before IMSS started consolidating its purchases, in line with international best practices to make the most effective use of its buyer power; see below).

The CFC's investigation revealed that several firms adopted a coordinated behaviour at the time of bidding for contracts put out to tender by IMSS, e.g. by submitting identical bids and allocating contracts among themselves. These practices effectively removed rivalry among bidders and resulted in higher prices for IMSS, to the detriment of IMSS' beneficiaries and taxpayers in general.

As a result of the CFC's investigation, six pharmaceutical companies (as well as several individuals who had acted on behalf of such companies) were fined in January 2010 for a total of MXN 151.7m, the maximum amount allowed by the competition law applicable at the time in Mexico.

IMSS cooperated with the CFC during the investigation by providing access to its database of tenders as well as assistance.

The CFC had also tackled collusion in tenders conducted by IMSS (as well as other public-sector entities) in previous years. In particular, the CFC imposed fines in the following sectors (in parentheses the year when the fine was imposed and its total amount):

- Surgical sutures (2000; MXN 400,072);
- Radiographic material (2001; MXN 15,959,000); and,
- Chemicals to process X-ray films (2002; MXN 8,430,000).

In these cases as well, IMSS assisted the CFC by providing relevant information.

IMSS has been making significant efforts to buy more effectively since 2006, i.e. well before signing the Memorandum of Understanding with the OECD and CFC in January 2011. For example, IMSS has achieved cost savings by centralising its purchases of generic medicines rather than having each individual local delegation buy separately. Furthermore, following changes to the procurement law in 2009, it has been using innovative auction formats (e.g. reverse auctions) in order to achieve better tender results. In the period from 2006 to 2009 these changes resulted in cumulative cost savings of around MXN 35,000 million to the benefit of IMSS' members.³ In addition, IMSS has cooperated with the Mexican competition authority in fighting collusive practices in its procurement tenders, as briefly described in Box 1 above.

IMSS has now decided to make even more efforts in this endeavour. With the Memorandum of Understanding of January 2011 IMSS committed with the OECD to adopt and implement the OECD Competition Committee's Guidelines for Fighting Bid Rigging in Public Procurement.

These steps – together with the areas for improvement in the procurement laws and regulations presented in Chapter 5 – will promote competition in public procurement and allow IMSS to obtain better “value for money” from its purchases, to the benefit of its members and ultimately of Mexican taxpayers.

³ See CFC's press release “Firman IMSS, OCDE y CFC acuerdo para combatir la colusión en licitaciones de compras públicas” of 13 January 2011. The press release is available at: <http://www.cfc.gob.mx/images/stories/Noticias/Comunicados2011/comunicado13-ene-2011.pdf>.

CHAPTER 2: THE MEXICAN SOCIAL SECURITY INSTITUTE

Founded in 1943, the Mexican Institute of Social Security is the public autonomous agency responsible for providing social security services in Mexico, in accordance with Article 123 of the Mexican Political Constitution and the provisions of the Social Security Act (*Ley del Seguro Social*, in Spanish).

IMSS is today mainly active in the provision of healthcare services (through its network of hospitals and other medical centres) to its beneficiaries, e.g. eligible workers, as well as of social and retirement benefits to qualifying Mexican nationals.

Data collected by the CFC⁴ indicate that IMSS is the third largest public-sector purchaser of goods and services, only preceded by the state-owned oil and electricity companies (PEMEX and CFE, respectively). In 2008 IMSS bought goods and services for a value of around MXN 44,000 million, which constitutes 6.6 per cent of the total for the entire public sector in Mexico. IMSS spends about 40 per cent (i.e. MXN 17,500 million) of this amount on generic drugs.

Although PEMEX and CFE account for 45.6 per cent and 11.3 per cent of public-sector purchases respectively, IMSS spends around USD 2.5 billion each year on pharmaceutical products and other medical supplies, which makes it the single largest purchaser of this category of goods in Mexico.⁵

⁴ See CFC's presentation on "Public procurement and completion in Mexico" of 17 August 2010, available at: <http://www.cfc.gob.mx/index.php/OTROS/presentaciones-del-foro-regional-de-competencia-economica.html>.

⁵ See OECD's press release "OECD to help Mexico to tackle bid rigging for government contracts" of 14 January 2011, at:

As a starting point and in order to better understand the structure of IMSS' purchases, SFP and IMSS provided us with data about the types of procurement procedure IMSS used in 2010. A summary of the data concerning purchases of goods⁶ is shown in Table 2 below.

Table 2: Procurement of non-durable goods: Types of tender used by IMSS in 2010 (by number and value of contracts)

Type of procedure	Public tender	Invitation to 3 or more suppliers	Direct award	All types	Public tender	Invitation to 3 or more suppliers	Direct award	All types
	Number of contracts				Value of contracts – MXN million			
National	5,804	34	528	6,366	5,275	14	149	5,437
International	2,141	10	500	2,651	7,404	10	5,397	12,811
All types	7,945	44	1,028	9,017	12,678	23	5,546	18,248

Source: IMSS.

Notes: International includes tenders which are open to all international bidders as well as those which are published in accordance with free-trade agreements.

Two things are noteworthy. Firstly, a significant number of contracts in that year (approximately 69 per cent, in value terms) were awarded using a public tender. Secondly, approximately 70 per cent (in value terms) of the contracts tendered out by IMSS in 2010 allowed for the participation of foreign suppliers.

http://www.oecd.org/document/59/0,3746,en_21571361_44315115_4688844_3_1_1_1_1,00.html.

⁶ Data by type of procurement procedure (i.e. National vs. International) are not available for services. For this reason the Table above only includes information relating to non-durable goods purchased by IMSS.

Table 3: Commissioning of public works: Types of tender used by IMSS in 2010 (by number and value of contracts)

Type of procedure	Public tender	Invitation to 3 or more suppliers	Direct award	All types	Public tender	Invitation to 3 or more suppliers	Direct award	All types
	Number of contracts				Value of contracts – MXN million			
National	45	29	241	315	1,525	69	1,914	3,509
International	-	-	-	-	-	-	-	-
All types	45	29	241	315	1,525	69	1,914	3,509

Source: IMSS.

Notes: International includes tenders which are open to all international bidders as well as those which are published in accordance with free-trade agreements.

The corresponding information for public works commissioned by IMSS in 2010 is shown in Table 3 above. In 2010 43 per cent of IMSS' contracts for public works were awarded through public tenders, and only national tenders were used.

CHAPTER 3: OVERVIEW OF THE EXISTING LEGAL FRAMEWORK OF PUBLIC PROCUREMENT IN MEXICO

This Chapter provides a brief overview of the current legal framework of public procurement in Mexico.

To start with, Article 134 of the Mexican Political Constitution establishes (among other things) that the public procurement of all types of goods and services as well as the commissioning of public works in Mexico must occur through sealed-bid tenders, in order to achieve the best results in terms of price, quality, financing and convenience.⁷

Article 134 also establishes that these general principles are implemented through legislation. In addition, it mandates that exceptions to the use of sealed-bid tenders by the public administration can be specified by law, when sealed-bid tenders are not suitable to achieve the best results.

The two key laws (and their associated regulations) implementing Article 134 are:

- The Procurement Act, covering public procurement of goods and services; and,
- The Public Works Act, covering the commissioning of public works and related services.⁸

⁷ Article 26 of the Procurement Act lists a number of additional goals, including (among others) economic growth, employment creation, energy efficiency and responsible use of water resources.

⁸ The full title of these acts in Spanish is *Ley de adquisiciones, arrendamientos y servicios del sector público* (LAASSP) and *Ley de obras públicas y servicios relacionados con las mismas* (LOPSRM), respectively. Both Acts

The Mexican Ministry of the Public Administration (SFP) is responsible for the implementation of the Procurement Act and the Public Works Act and for issuing further provisions necessary to adequately implement those laws.⁹ SFP published general guidelines in respect of procurement of goods and services and commissioning of public works in September 2010.¹⁰

In August 2010 SFP also published a procurement manual which all public agencies in Mexico must adopt. This manual supersedes any internal manual, regulation or guidelines adopted by the agencies (unless mandated by law) prior to that date. While the SFP's procurement manual does not introduce any additional provisions and only covers the procurement of goods and services (i.e. it does not apply to public works), it is a valuable tool in that it provides a step-by-step guide for all stages in the procurement cycle (i.e. from planning to organising the tender to awarding the contract) and standardises existing procedures in the Mexican public administration.¹¹

Public agencies are also required to publish and follow their own set of policies and guidelines to implement the provisions of the procurement laws.¹² The content of these policies and guidelines is however confined within the narrow boundaries established by such laws, their regulations and SFP's guidelines.¹³ In particular, they can only indicate:

have been modified several times since their promulgation, the latest revisions being dated June 2011.

⁹ See Article 7 and 8 of the Procurement Act and Public Works Act, respectively.

¹⁰ *Acuerdo por el que se emiten diversos lineamientos en materia de adquisiciones, arrendamientos y servicios y de obras públicas y servicios relacionados con las mismas*, in Spanish.

¹¹ There is also a manual covering the commissioning of public works. This and the procurement manual were both updated in June 2011.

¹² See Article 1 of the Procurement Act and the Public Works Act.

¹³ See Article 3 and 9 of the regulations implementing the Procurement Act and the Public Works Act, respectively, as well as Chapter I of SFP's guidelines in respect of procurement of goods and services and commissioning of public works.

- The administrative divisions within each public agency in charge of applying the provisions of the ordinary laws and their implementing regulations;
- The rank of the civil servants responsible for the different procedures during the tenders (e.g. preparation and publication of the annual procurement plan as well as of the different tenders, conduct of market studies, opening and evaluation of bids, etc.);
- The way in which each agency complies with the terms or deadlines contained in the ordinary laws and their implementing regulations;

The agencies' own policies and guidelines may also deal with any other issue as established by the general guidelines issued by SFP. IMSS' set of policies and guidelines are summarised at the end of this Chapter.

In addition to the national laws governing procurement, Mexico has also signed a number of free-trade agreements with other countries and jurisdictions which affect public procurement in Mexico.¹⁴ These agreements contain a number of exceptions whereby a permanent or transitory reserve of public procurement contracts in respect of certain goods and services is effectively established for Mexican suppliers only or for Mexican suppliers and nationals of countries with which Mexico has signed an agreement.

¹⁴ In particular, these countries and jurisdictions include the US and Canada (signatories, together with Mexico, of the North America Free Trade Agreement – NAFTA – which entered into force in January 1994), Colombia and Venezuela (although the agreement is no longer applicable to the latter country since November 2006), Costa Rica, Nicaragua, Israel, the EU and its Member States, the Member States of the European Free Trade Association, Japan, and Chile.

The provisions contained in the free-trade agreements signed by Mexico with Japan and Chile which relate to procurement of off-patent medicines by IMSS and a small number of other agencies (e.g. the Social Security Institute for Public Workers – *Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado*, ISSSTE, in Spanish) are not applicable until 2013 and 2016, respectively.

How these reserve mechanisms apply in practice is described in the Procurement Act (see next Chapter) and in more detail in regulations issued by the Mexican Ministry of Economy, the latest of which is dated 28 December 2010.

CHAPTER 4: SUMMARY OF THE PROCUREMENT ACT AND OTHER ANCILLARY PROVISIONS

This Chapter reviews in detail the main provisions of the law governing the public procurement of goods and services in Mexico (i.e. the Procurement Act and its corresponding implementing regulation) which are most relevant for the scope of this study. We focus on the procurement of goods and services because IMSS concentrates most of its procurement activity there rather than commissioning public works, as shown in Chapter 2. In addition, the provisions governing the commissioning of public works (contained in the Public Works Act; see the previous Chapter) which are relevant for the scope of this study are largely identical to those of the Procurement Act, so most remarks will equally apply to both Acts.¹⁵ In this Chapter we also summarise IMSS' own set of policies and guidelines in respect of procurement of goods and services.

It is worth noting that this Chapter describes the current status of the procurement laws and regulations in Mexico. The list of areas for improvement to make procurement laws and regulations more robust and more closely aligned with the OECD Guidelines is presented in the next Chapter.

The scope of the Mexican Procurement Act is quite broad since it practically covers all purchases of goods and services by the Mexican public sector, with only a limited number of exceptions being allowed.¹⁶ For convenience, we have organised the material in four sections: i) the pre-tender evaluation and tender design phase; ii) the tender process; iii) the bid-opening and contract-award phase; and, iv) the post-award phase relating to the

¹⁵ Where appropriate, we describe any significant difference between the Procurement Act and the Public Works Act in a footnote.

¹⁶ The Procurement Act, however, does not replace other ordinary legislation, e.g. the Federal Civil Code, where applicable (Article 11). The state-owned oil company PEMEX can also procure goods and services using special legislation.

performance of the contract. The OECD Guidelines emphasise the importance of activities taken during each phase in order to effectively minimize the potential for collusion and to detect collusion when it has occurred.

4.1 Pre-tender phase

During the pre-tender phase public buyers must carry out a number of important activities. To start with, the type of tender must be selected and the scope of the tender must be defined. The type of bidding and format of the contract must be decided. A mandatory market study must be completed. Each of these activities is governed by the Procurement Act, its regulations and the SFP procurement guidelines, as we describe below.

4.1.1 *Types of procurement procedure*

Article 26 of the Procurement Act establishes that public agencies can use one of the following three procedures to buy (or lease) goods and procure services:

1. Public tender;
2. Invitation to no fewer than 3 suppliers; and,
3. Direct award of the contract to a specific supplier.

The Procurement Act, however, assigns a prominent place to the public tender with sealed bids (in accordance with Article 134 of the Mexican Political Constitution) since it mandates that such procedure is to be used as a general rule. Public tenders can also be carried out remotely using electronic bidding (Article 27).

The other two procedures listed above (i.e. invitation to no fewer than 3 suppliers and direct award) are labelled as “**exceptions**” in the Procurement Act and can only be used in the specific circumstances listed in Article 41 of the Act. A total of 20 justifications for using one of the exceptions are listed in Article 41 and include:

- There is only one supplier or patent holder (subpart I of Article 41);

- There is a threat to the social order, economy, public services, health conditions, safety or environment as a result of unforeseeable circumstances or *force majeure* (subpart II);
- Additional significant, quantifiable and justified losses or costs are likely (subpart III);
- Procurement is exclusively for military aims or the use of public tenders might endanger national or public security (subpart IV);
- A public tender cannot be organised within the appropriate time period, due to unforeseeable circumstances or *force majeure* (subpart V);
- A contract awarded through a public tender has been rescinded, in which case it can be assigned directly to the second lowest bidder, as long as the difference with respect to the initial winning bid is less than 10 percent (subpart VI);
- A previous public tender was declared void (subpart VII);
- The goods or services to be procured are covered by a framework agreement (see below) (subpart XX).

As well as falling in one of the twenty justifications enumerated in Article 41, Article 40 of the Procurement Act requires that the selection of the exceptional procedure to be used in alternative to the public tender must be based on criteria of economy, efficacy, efficiency, impartiality, respectability and transparency.

In addition to the circumstances listed in Article 41, public agencies can procure goods and services without using a public tender if the contract has a relatively modest value, as established in Article 42. There are two criteria for the use of this possibility and each of them must be satisfied. First, the value of the contract must be below the maximum amount established each year in the Federal Budget.¹⁷ Second, the total value of contracts awarded each year using

¹⁷ These upper limits vary with the agency's annual procurement budget. For example, in 2011 for an agency with a total budget of up to MXN 15 million the maximum value of a contract which is assigned directly as per Article 42

the exception in Article 42 cannot exceed 30 per cent of the agency's annual procurement budget.

4.1.2 Scope of the tender: Deciding which bidders can participate

During the pre-tender stage the agency also determines whether it can allow non-Mexican bidders to participate in the tender. In particular, Article 28 of the Procurement Act establishes that the standard procurement procedure (i.e. public tenders) can be of one of the following three types:

1. **National:** When only Mexican suppliers are allowed to participate.

National tenders may be used when one of the following conditions is satisfied: a) goods to be purchased are produced in Mexico and are of at least 50 per cent of Mexican origin (considering the labour force and other inputs used in their production);¹⁸ b) the contract value is below the thresholds included in free-trade agreements signed with other countries; or, c) if the value is above such thresholds, the option to reserve the contract to Mexican suppliers only has been exercised.

2. **International in accordance with free-trade agreements:** When only Mexican suppliers and nationals of countries with which Mexico has signed a free-trade agreement covering public procurement are allowed to participate.

These tenders are used when: a) it is mandatory according to the free-trade agreements signed by Mexico to the extent they include public procurement of goods and services; or, b) a previously organised national tender has been declared void because no bid at all or no

is MXN 147,000, whereas the maximum value of a contract for which no fewer than 3 suppliers are invited is MXN 504,000.

Conversely, at the other end of the range, for an agency with a total budget exceeding MXN 1,000 million such maximum values are MXN 389,000 and MXN 2,678,000, respectively.

¹⁸ In the case of contracts to lease goods or to procure services (as opposed to buy goods), the applicable criterion is that only Mexican suppliers can participate (i.e. the origin of the goods or services is not taken into consideration).

acceptable bid was submitted (see below for cases when a bid is not acceptable).

3. **International open:** When there are no restrictions in terms of bidders' nationality or the origin of goods and services, i.e. all interested suppliers can participate.

These tenders are used when: a) a previously organised international tender subject to free-trade agreements has been declared void because no bid at all or no acceptable bid was submitted; or, b) it is a condition of procurement contracts which are financed with external credit awarded to the Mexican government.

Article 40 of the Act establishes that invitations to no fewer than 3 suppliers as well as direct awards can also be reserved to Mexican suppliers only or be international in accordance with free-trade agreements signed by Mexico or completely open, as in the case of public tenders described above.

When a tender is declared void, public agencies may use one of the two exceptions permitted by the Procurement Act (i.e. invitation to no fewer than 3 suppliers or direct award), instead of opening up the procedure to non-Mexican suppliers.

4.1.3 Deciding whether the use of a reverse auction is appropriate

In a typical public tender, bidders submit their bids and the agency then evaluates such bids and selects one or more winners according to pre-determined criteria. In this case bidders have only one possibility to submit an offer to the agency.

Recently, however, following the changes made to the Procurement Act (particularly, Article 28) in May 2009, many public buyers in Mexico (including IMSS) have started using a novel multi-stage auction mechanism known as “**reverse auctions**” (or *ofertas subsecuentes de descuentos* in Spanish).¹⁹

¹⁹ Given the differences existing between procurement of goods and services on the one hand and commissioning of public works on the other hand, the Public Works Act does not contain provisions relating to the use of reverse auctions.

This mechanism allows bidders in public tenders to offer additional discounts after their initial bids have been opened (and so the provisional winning bid determined) in order to improve their offer, if they wish to do it. In other words, in reverse auctions an initial stage with sealed bids is followed by a (reverse) English auction.

The use of reverse auctions is, however, only allowed in cases where the description and technical characteristics of goods and services to be procured can be objectively defined (e.g. standardised goods) and the technical and economical evaluation of bids can be done immediately after the opening of the sealed bids.

Public agencies wishing to use reverse auctions must justify their decision and verify that the market for the goods or services under consideration is sufficiently competitive (based upon the conclusions of their market investigation; see subsection 4.1.7 below). In particular, the SFP's procurement guidelines specify that a market is deemed competitive when there are at least 5 national or foreign suppliers capable to supply the required volumes.²⁰ Moreover, reverse auctions cannot be used when any micro-, small- or medium-sized firm participates in the tender individually.

4.1.4 Types of contract

During the pre-tender phase a public buyer must also determine what type of contract will most effectively fulfil its procurement requirements. A typical contract involves a fixed price and quantity, but the Procurement Act lists other alternatives as well.²¹

For example, public agencies can sign “**open contracts**” with the supplier that has been determined through a tender (or one of the two exceptions allowed) in the case of goods and services which are routinely needed. In this

²⁰ See Chapter IV of SFP's guidelines in respect of procurement of goods and services and commissioning of public works. These guidelines also establish that volumes of goods or services to be procured should be convenient for the public agencies to generate economies of scale. According to the guidelines, reverse auctions can also be used to procure more complex goods and services, but only with SFP's express authorisation.

²¹ The Public Works Act does not contain provisions in respect of either open contracts or framework agreements.

case Article 47 of the Act requires that in the tender documents the agency must:

- Specify minimum and maximum volumes (or value) of the goods and services to be procured (with the minimum being at least 40 per cent of the maximum); and,
- Provide a complete description of the goods and services being procured through the contract, including their unit prices.

Furthermore, SFP may promote “**framework agreements**” through which public agencies can procure specific goods and services. In particular, according to Article 14 of the regulation implementing the Procurement Act, framework agreements are exempt from the application of the tender procedures established in the Procurement Act, although they must still respect the principles of “value for money”, effectiveness, efficiency, fairness and respectability in order to achieve the best results for Mexico.

Accordingly, before signing a framework agreement, SFP – in addition to deciding which goods and services to include in the agreement – must carry out a market study (similar to those described in subsection 4.1.7 below and aimed, among other things, to ascertain the prevailing prices) and determine the volumes of goods and services to procure.

In addition, as explained in the next subsection, an agency can also consolidate its procurement requirements with those of other agencies.

4.1.5 Consolidation of purchases

Article 17 of the Procurement Act gives SFP the responsibility to establish which goods and services of general use can be procured by several agencies together, i.e. through consolidation of purchases, in order to achieve the best terms in respect of price, quality and convenience.

Public buyers may, however, also independently decide to jointly procure goods and services, irrespective of SFP’s initiatives in this area (Article 17). In this case, Article 13 of the regulation implementing the Procurement Act requires that the public agencies involved jointly determine the procurement procedure to use on the basis of the conclusions of the market study (see below) and designate one of them as responsible to carry out the procedure. The

coordinating agency will also apply its own policies and guidelines relating to procurement of goods and services to the joint procurement.

4.1.6 Joint bids

Article 34 of the Procurement Act allows the submission of joint bids by multiple suppliers. The joint bidders are not required to form a new company or joint venture for the specific tender, since it is sufficient that the joint bid describes the obligations of each party to the agreement and how these will be fulfilled.

Article 44 of the regulation implementing the Procurement Act places on public agencies the responsibility to specify the necessary requirements for the submission of joint bids in the tender documents, in compliance with Article 34 of the Act.

4.1.7 Market studies

In order to design an effective tender it is imperative that the conditions in the markets for the goods and services to be procured are known and adequately reflected in the tender design.

In this respect, Article 26 of the Procurement Act also requires public agencies to conduct a market study before starting *any* tender procedure.²² The purpose of these market studies is to ascertain the prevailing market conditions (e.g. existence and number of suitable suppliers, whether they are Mexican or not, and an estimate of current prices) relating to the goods or services to be procured.

The information gathered through a market study is quite important. Article 29 of the regulation implementing the Procurement Act specifies that public agencies can use the market studies for the following purposes (among others):

- To support the decision to group several goods or services in a single lot;

²² In particular, Article 30 of the regulation implementing the Procurement Act establishes that market studies need to be carried out sufficiently ahead of the procurement procedure.

- To determine non-acceptable and maximum reference prices (described below);
- To establish whether it is appropriate to use reverse auctions;
- To determine the appropriate choice of the procurement procedure to be used (i.e. whether a public tender is required or one of the two exceptions allowed by the Act should be used instead);
- To determine if it is appropriate to apply one of the reserves included in the public procurement chapters of free-trade agreements signed by Mexico;
- To determine if it is appropriate to organise an international open tender, when the public agency is not required to do so by free-trade agreements and there are no Mexican suppliers or (if they exist) they are unable to satisfy the agency's needs (e.g. in terms of volumes or quality) or their price is not acceptable;
- To determine if it is appropriate to organise an international open tender, when there are no suppliers in Mexico or in countries with which Mexico has signed a free-trade agreement or (if they exist) they are unable to satisfy the agency's needs (e.g. in terms of volumes or quality) or their price is not acceptable.

According to Article 28 of the regulation implementing the Procurement Act, in order to carry out their market studies, public agencies must use at least 2 of the following sources (with the use of information from COMPRANET being mandatory, if available):

1. Information available in COMPRANET or (if not available) historic information available to the agency;
2. Information obtained from specialised bodies, trade unions, associations of suppliers, or from manufacturers, dealers, wholesalers and distributors;

3. Information obtained from the Internet, through the phone or other channels (for which a record needs to be kept).²³

4.2 Tender phase

The tender phase begins with the first public notice of the tender and ends with the award of the contract. During the time prescribed for the tender phase, the tender documents must be made available, the tender requirements, the terms for submission of tenders and the methods by which the bids will be evaluated must be determined and explained to potential bidders. Each of these activities will affect the success of the tender.

4.2.1 Key stages of a public tender

Public tenders have five stages, of which four are mandatory under the current Procurement Act. Box 2 below lists the key stages of a public tender in order to make it easier to follow what is summarised in the next subsections.

In brief, a public tender starts (Article 26) with the publication of the call for tenders on the agency's website and in COMPRANET (see the next subsection for details about COMPRANET). Prior to that, as per Article 29, the agency may wish (but is not required) to publish a draft call for tenders on its website and in COMPRANET and invite comments.

The next requirement is for the public agency to hold at least a clarification meeting (*junta de aclaraciones*, in Spanish) to address comments from potential bidders and clarify doubts, as stated by Article 33. Subsequently, the agency receives and opens the bids (see Article 35 in this respect) and takes a decision as to which bidder is awarded the contract (Articles 26 and 37). This is normally the last step of the tender procedure.

²³ In particular, Article 30 of the regulation implementing the Procurement Act establishes that, in respect of direct award of contracts as per Article 42 of the Act and whose value is equal to or above 300 times the daily minimum wage applicable in Mexico City, market studies are valid if they include no fewer than 3 quotations obtained during the 30 calendar days preceding the award of the contract.

Box 2: Key stages of a public tender as established by the Procurement Act

The key stages established by the Procurement Act for a public tender are the following:

1. Draft call for tenders (Optional), Article 29

Before the official publication of the call for tenders, the agency can publish a *draft* call for tenders on its website and COMPRANET and invite comments;

2. Call for tenders (Mandatory), Article 26

The call for tenders is published on the agency's website and COMPRANET; a summary is also published in the Federal Official Gazette;

3. Tender clarification meeting (Mandatory), Article 33

The agency must hold at least one clarification meeting (*junta de aclaraciones*, in Spanish) to address comments from potential bidders and clarify queries concerning the tender specifications;

4. Bidding and bid opening (Mandatory), Article 35

The agency publicly receives and opens the bids;

5. Bid evaluation and contract award (Mandatory), Articles 26 and 37

After evaluating the bids submitted (and, if applicable, running a reverse auction), the agency either declares the winning bid and awards the contract or cancels the procurement procedure.

Alternatively, the agency may declare the procedure void when no bid fulfils the necessary requirements or the prices offered are unacceptable (see Article 38). In this case, the agency may decide to organise a second tender; alternatively, as allowed by Article 41 subpart VII, it can either use the procedure of inviting no fewer than 3 suppliers to compete for the contract or directly award the contract to a specific supplier. The invitation to no fewer than 3 suppliers follows a similar sequence which is primarily regulated in Article 43 of the Procurement Act.

4.2.2 *Public notice and publicity requirements for tenders*

The Procurement Act imposes a number of notice and publicity requirements on public procurers. A central role in the dissemination of this information is played by COMPRANET, the electronic information portal containing comprehensive information about the procurement of goods and services and commissioning of public works and related services by the Mexican government.

Maintained by SFP, COMPRANET makes the following information (among other things) available to the general public for free: each agency' annual procurement plans (see below); the single register of providers of goods and services (including those who have been fined or otherwise punished; see also below); the list of social witnesses;²⁴ calls for tenders, invitations to no fewer than 3 suppliers and direct awards; official acts relating to the outcome of the clarification meetings, receipt and opening of bids as well as awarding of contracts; the outcome of the complaints submitted by bidders; and, information about the contracts signed by public agencies and their modifications.²⁵

Among the transparency requirements imposed by the Procurement Act, public agencies must prepare (Article 20) an annual procurement plan, taking into account multi-year financial commitments as well. This annual plan (with the exception of confidential information) is published on COMPRANET and on the agency's website by 31 January of each financial year (Article 21).

Furthermore, according to Article 56 bis of the Procurement Act, COMPRANET must include a unified register of providers, listing all providers of goods and services to the public administration and also their track record in terms of contracts won and fulfilled. The register is made available to every

²⁴ Social witnesses are a recent innovation in the Mexican procurement legislation. They exert a control function and, specifically, participate in all stages of a public tender. At the end of the procedure they provide SFP and public agencies with a statement containing their remarks about the specific tender (e.g. whether they detected any irregularity) and recommendations on how to improve transparency, fairness and legislation of public procurement. This statement is then published in COMPRANET and on the public agency's website.

²⁵ See Articles 2 and 56 of the Procurement Act.

interested person, with the exception of confidential material, according to the terms of the Mexican Transparency Act.

4.2.3 Call for tenders

The calls for tenders are made public through the agency's website, the COMPRANET web portal as well as through the publication of a summary in the Federal Official Gazette (Article 30). Invitations to no fewer than 3 suppliers are published in COMPRANET and in the agency's webpage (Article 43).

Among other things, the call for tenders must specify (Article 29 subpart XII) whether the contract is awarded to a single or multiple suppliers. In the latter case (*abastecimiento simultáneo*, in Spanish) the call must specify how many suppliers will be selected, the proportion of the contract awarded to each, and the range of bids that will be accepted. The call for tenders must also list the specific criteria which will be used to evaluate submitted bids and award the contract, e.g. whether a point-based mechanism or a binary criterion will be used.

The call for tenders must also explicitly list the causes for rejecting bids (Article 29 subpart XV). Among the listed causes for rejecting bids is the circumstance that some bidders have reached an agreement among themselves to increase the cost of the goods or services being procured or to obtain an advantage over their rivals.

In addition, Article 29 of the Procurement Act requires public procurers not to impose on bidders any condition or requirement which have as an object or effect that of restricting competition or limiting participation (e.g. requiring a track record of more than a year or to have signed contracts with a public agency in the past, buying goods of a specific brand; see Article 40 of the implementing regulation). Procurers must also take into account any prior recommendation expressed by the Mexican competition authority, as per the terms of the Mexican Competition Act.

4.2.4 Clarification meeting

Public agencies are also required by Article 33 of the Procurement Act to hold at least one clarification meeting, the purpose of which is to discuss queries and clarify doubts that interested bidders may have in respect of a specific tender. For each meeting the public agency (as per Article 33 bis)

releases a statement containing the queries formulated by participating bidders and its response. Such statement is affixed at the agency's premises and also made public through COMPRANET.

4.2.5 Terms for submission of bids

From the time that a call for tenders is published pursuant to Article 26, the tender may provide a limited time frame for bids to be submitted. Under Article 32, interested bidders must be provided no fewer than 20 and 15 calendar days to submit their bids, in the case of international and national public tenders, respectively, since the publication of the call for tenders on COMPRANET. Both terms, however, can be shortened to 10 calendar days, if there are justifiable reasons.

For tenders by invitation to no fewer than 3 suppliers, Article 43 of the Procurement Act requires a minimum term of 5 calendar days from the delivery of the last invitation. Under the same article, however, in order to establish the terms for the submission of bids the agency must take into account the type of goods and services being procured as well as the complexity of the tender.

4.2.6 Methods by which the agency evaluates submitted bids

The tender must specify the criteria and methods the agency will use to evaluate the bids submitted in response to the tender in the case of public tenders and invitations to 3 or more bidders. There are two general methods permitted by the Procurement Act, one based solely on the lowest bid (binary criterion) and the second based upon a point-based evaluation that takes into account factors in addition to price and assigns a weight to each of them to determine the most highly qualified bid (point-based, or cost-benefit based criteria.) The method which is to be used by the agency must be described in the tender documents in order to permit bidders to formulate their best offers.

4.2.7 Bidders' compliance with competition law

Article 34 of the Procurement Act places a general responsibility on all bidders (including those who submit joint bids) to comply with the provisions of the Mexican competition law at all stages of the tender procedure, although this responsibility is not made further explicit. Bidders may also contact the Mexican competition authority directly to submit evidence on facts which it is within its remit to evaluate.

4.3 Bid-opening, bid-evaluation and contract-award phase

In this phase an agency evaluates the bids it has received by checking that they meet the technical requirements and rejects those which are either too low or too high (see next subsection). Specific procedures must be followed for opening the bids and declaring one (or more) winners according to pre-determined rules.

4.3.1 *Prices and margins of preference*

Before evaluating the bids and awarding the contract, the agency must calculate two reference prices: i) The “non-acceptable” price; and, ii) the “convenient” price; see Article 2 of the Procurement Act.²⁶ The calculation of these prices is, however, only necessary when the binary evaluation criterion is used (Article 51 of the regulation implementing the Procurement Act), i.e. when the contract is to be awarded to the lowest bid (see below).

The non-acceptable price is an *upper* bound above which no bid can be accepted. It is calculated either as 1.1 times the median of all prices collected in the market study or (if it is not possible to calculate such median price) 1.1 times the average of the technically acceptable bids submitted in response to the call for tenders.

The convenient price is the *lower* bound below which no bid can be accepted. It is calculated as the average of the technically acceptable bids submitted in the tender procedure less a discount which is determined by each individual public agency in its procurement guidelines but which may in no case be higher than 40 per cent.²⁷

Article 29 of the regulation implementing the Procurement Act also introduces a third reference price, the “maximum” reference price. This is the agency’s reserve price, i.e. the maximum that it is willing to pay, and is derived from the information gathered during the market study. It is not related to the

²⁶ The Public Works Act does not include provisions in respect of the non-acceptable and convenient prices. Instead, Article 30 allows public agencies to require the use of a certain share (to be decided by the agency itself) of local (i.e. Mexican) materials and equipment.

²⁷ In the case of IMSS, this discount is equal to 40 per cent, i.e. the highest level established by the Act.

non-acceptable price in any formal way and may in fact be lower. Article 39 of the regulation implementing the Procurement Act gives the agency discretion as to whether to disclose or not the maximum reference price in the call for tenders. The maximum reference price is however disclosed if any of the bidders file an appeal against the public agency's decision in relation to the award of the contract. Maximum reference prices may not be used in reverse auctions (Article 38 of the regulation).

The Act also establishes preferences and other provisions relating to bid evaluation in specific cases. For example, in the case of international open tenders (where all interested suppliers can participate, i.e. irrespective of their nationality or whether Mexico has signed a free-trade agreement):

- Public agencies must give preference to goods produced in Mexico and which are of at least 50 per cent of Mexican origin, as per Article 14 of the Procurement Act;
- In particular, in evaluating the submitted bids Mexican goods are granted a margin of preference of up to 15 per cent compared to imported goods, in accordance with regulations which are determined by the SFP; and,
- To determine the convenient price, the lowest prevailing price in the Mexican market enjoy a margin of preference of up to 15 per cent compared to the price of imported goods (Article 28).

4.3.2 Bid opening and tender certification

The Procurement Act that the bid opening and tender certification must be done publicly. In particular, at the time of receiving and opening the bids, the agency must write an official note (Article 35) listing the amount of each bid received and providing the date for the declaration of the winner. This note is made public through COMPRANET.

The declaration of the winner must contain (according to article 37), among other things:

- the list of bidders whose bids were rejected, with the corresponding motivations;

- the list of bidders whose bids were accepted, with a general description of such bids;
- a copy of the market study carried out by the agency, if a bid has been deemed as non-acceptable or not convenient;
- Name of all the bidders who are awarded the contract, the motivation for this decision in accordance with the evaluation criteria listed in the call for tenders, and, if applicable, the share of the contract attributed to each winner as well as its value.

The declaration must not contain confidential information, in accordance with the applicable legislation, and is also made public through COMPRANET.

4.3.3 *Criteria to award a contract*

Article 36 bis of the Procurement Act states that the contract is awarded to the bid which complies with all the legal, technical and economical requirements established in the tender documents, and specifically to:

1. The bid which obtains the best score when a point-based mechanism or a cost-benefit evaluation is used;
2. The lowest bid, if the mechanisms listed above are not used and provided that the lowest bid is above the convenient price (see above);
3. The lowest bid when a reverse auction is used, if it is also technically and economically acceptable.

The Procurement Act, Article 29 subpart XIII, provides that point-based and cost-benefit evaluation criteria are preferable to other evaluation mechanisms, particularly the binary criterion.²⁸ Point-based and cost-benefit evaluation criteria are mandatory when the goods or services being procured are

²⁸ The specific criteria which are to be used to evaluate bidders (e.g. characteristics of the goods to be purchased, bidders' capability, bidders' experience and specialisation, and fulfilment of previous contracts, in the case of procurement of goods) as well as the detailed range of points which can be attributed to each criterion are listed in Chapter II of SFP's guidelines in respect of procurement of goods and services and commissioning of public works.

technically highly specialised or innovative (Article 36). Instead, a binary criterion – whereby the lowest bidder is awarded the contract²⁹ – can only be used if point-based and cost-benefit evaluation criteria are not suitable (Article 36).

4.3.4 *Split awards*

Under the Procurement Act, agencies may award a contract to a single bidder or to more than one bidder. When the contract is split among multiple suppliers (*abastecimiento simultáneo*, in Spanish), Article 59 of the regulation implementing the Procurement Act specifies that the lowest bidder must receive at least 40 per cent of the volumes being procured.

The same article (as well as Article 39 of the Act) also establishes that the highest acceptable bid to be awarded part of the contract cannot exceed the margin established by the public agency in the tender documents, which in itself cannot be more than 10 per cent higher than the winning bid. The public agency wishing to award the contract to multiple suppliers needs, however, to take into account the prior opinion of the Mexican competition authority in relation to the provisions of the Mexican Competition Act (Article 39 of the Procurement Act).

4.3.5 *Contract prices*

Article 44 of the Procurement Act establishes that contracts are generally awarded at a fixed price, although in justified cases price increases or reductions can be agreed in accordance with adjustment mechanisms or formulas determined by the public agency prior to the submission of bids. In addition, public agencies are required to grant price increases (or request reductions) if, after the contract has been awarded, prices change as a result of general circumstances which could not have been foreseen and could thus not be included in the original contract.³⁰

²⁹ Provided such lowest bid is above the convenient price; see the previous section.

³⁰ Moreover, where goods or services are sold at official prices, public agencies are required to grant the corresponding increases (Article 44 of the Procurement Act).

4.4 Post-award phase

The sections below summarise what the Procurement Act in turn says about:

- a) Penalties, guarantees and rescission of contracts; and,
- b) Infringements and fines.

4.4.1 *Penalties, guarantees and rescission of contracts*

Article 45 of the Procurement Act lists all the performance terms and conditions that the contract signed by the public agency with the selected provider must contain, including (at subpart XIX) “the conditions, terms and procedure for the application of *penalties* in case of delay in the provision of goods and services, when such delay is attributable to the provider.”

Article 48 of the Procurement Act, on the other hand, requires the winning bidder to provide a financial *guarantee* that the contract will be fulfilled, in the form of a performance bond. The Act, however, allows the procurement official in charge of signing the contract to exempt the winner of the tender from providing such guarantee when an exception to public tenders is used as per Article 41 (subparts II, IV, V, XI and XIV only) or 42 of the Act.³¹ The type and amount of the guarantee is determined by the public agency, taking into account the track record of the provider in supplying to the public administration in order to reduce the value of the guarantee (Article 48).

The Procurement Act establishes a link between the penalty imposed in the case of delay and the value of the performance bond which guarantees the fulfilment of the contract. Specifically, the penalty imposed by the public agency in case of delay cannot exceed the value of the guarantee and is determined on the basis of the type of goods and services not provided on time (Article 53). The agencies can also establish deductions from progress payments if the provider is late in the provision of goods or services agreed. In this case, the agency will also establish a maximum level of non-fulfilment of

³¹ The winner of the contract must provide the guarantee within the term specified in the call for tenders. If such term is not specified, the guarantee must be provided no later than 10 calendar days after signing the contract or on the day specified in the contract, if the provision of goods and services is scheduled within the 10 days following the signing of the contract.

the contract, beyond which it may decide either to cancel the portion of the contract non-fulfilled or rescind the contract altogether (Article 52 bis).

The procedure that a public agency has to follow in order to rescind a contract when the provider does not comply with his obligations is established in Article 54 of the Procurement Act. In brief, it involves the following three steps:

- The provider must be notified in writing about the contractual obligations he is not complying with and be given five working days in order to reply and provide evidence;
- After this initial term of five working days, the public agency has fifteen days to decide whether to rescind the contract or not, considering the arguments and evidence put forward by the provider. The agency's decision must be motivated and notified to the provider within the same term;
- If the contract is rescinded, the agency pays what is due to the provider in respect of the goods and services already provided until the date of the rescission.

This procedure to rescind the contract can be suspended or cancelled in several instances, including: when the agency starts a conciliation procedure, the provider delivers the goods and services (as long as the agency still needs them and subject to payment of the corresponding penalties) and the rescission of the contract can damage the agency's operation.

4.4.2 *Infringements and fines*

According to Article 59 of the Procurement Act, any bidder or provider who infringes the provisions of the Procurement Act is to be sanctioned by SFP with a fine equal to an amount of 50 – 1,000 times the minimum salary applicable in Mexico City at the time of the infringement.

A fine equivalent to 10 – 45 times the minimum salary applicable in Mexico City at the time of the infringement is also imposed on bidders who, without justification and for causes attributable to them, do not sign a contract whose value is no more than 50 times the minimum salary applicable in Mexico City.

In addition to the fines mentioned above, SFP will prohibit from participating to a tender procedure or signing a contract – for a period of between 3 months and 5 years – any person who finds himself in the circumstances listed in article 60, including:

- Bidders who without justification and for causes attributable to them do not sign two or more contracts that they have been awarded by any public agency during a two-year period;
- Providers who have a contract rescinded by two or more agencies during a three-year period;
- Providers who do not comply with their contractual obligations for causes attributable to them and as a result cause serious damages to the agency (see also Article 50 subpart V) as well as those who deliver goods and services different from those agreed;
- Any person providing false information or acting with deceit or in bad faith in a tender procedure, in the signature of a contract or during its term, or in the submission and assessment of an application for conciliation or of a complaint.

Article 61 states that in imposing the sanctions SFP will take into account: i) the damages suffered by the agency due to the infringement; ii) whether the infringement was committed intentionally or not; iii) the seriousness of the infringement; and iv) the conditions of the person who committed the infringement.

In addition, a public agency will refrain from receiving bids from or awarding a contract to any person who finds himself in the circumstances listed in Article 50, including:

- Providers who have more than one contract rescinded by the agency for causes attributable to them during a two-year period;
- Providers who are late in the delivery of goods and services to the agency for causes attributable to them (in respect of any contract signed with the agency), as long as the agency has suffered serious damages; and,

- Bidders who without justification and for causes attributable to them do not sign a contract awarded by the agency.

4.5 IMSS' set of policies and guidelines for the procurement of goods and services

As noted in Chapter 3 above, public agencies must publish and follow their own set of policies and guidelines to implement the provisions of the Procurement Act and Public Works Act, and their corresponding implementing regulations.³²

The contents of these agency-specific policies and guidelines cannot, however, go beyond what is permitted in the implementing regulations and SFP's guidelines (see Articles 3 and 9 of the regulations implementing the Procurement Act and the Public Works Act, respectively, as well as Chapter I of SFP's guidelines in respect of procurement of goods and services and commissioning of public works).

IMSS' latest policies and guidelines in respect of procurement of goods and services were published in November 2010, in order to make them consistent with the various changes to the procurement legislation of 2009.³³ The following summarises the key provisions which are most relevant for the scope of this study, in the same order as they are presented in the policies and guidelines.

4.5.1 General provisions

Among other things, IMSS' policies and guidelines designate the authority within IMSS for making decisions about the tender design and pricing mechanisms.

- IMSS' purchasing units (*áreas contratantes*, in Spanish) are responsible for establishing: a) the specific tender procedure to be used; b) whether the contract is to be awarded to a single supplier or

³² See Article 1 of both the Procurement Act and Public Works Act.

³³ In Spanish these sets of policies and guidelines are called *Políticas, bases y lineamientos en materia de adquisiciones, arrendamientos y servicios* and *Políticas, bases y lineamientos en materia de obras públicas y servicios relacionados con las mismas*, respectively.

multiple suppliers; and, c) whether to use “open” contracts (in case of goods which are repeatedly used) (Article 4);

- When applying the binary criterion to evaluate bids, the convenient price to pay is calculated by IMSS’ purchasing units as the average of bids which are technically valid less a 40 per cent discount, in application of Article 51 of the regulation implementing the Procurement Act (Article 11);
- The purchasing units can declare a price as non-acceptable if it is more than 10 per cent higher than the price resulting from the market study, again in application of Article 51 of the regulation implementing the Procurement Act (Article 11);
- Joint bids are allowed in all tenders unless the purchasing unit prohibits them for justified reasons and articulates its decision in writing (Article 17).

4.5.2 Annual procurement plan

- IMSS’ managers responsible for procurement at a local level must send a prospective procurement plan to the Goods and Services Procurement Coordinating Unit (*Coordinación de Adquisición de Bienes y Contratación de Servicios*, CABCS, in Spanish) by 31 December of the year before purchases are due to be made (Article 23);
- The CABCS then formulates a single integrated procurement plan and makes it public (with the exception of confidential information) through the COMPRANET platform and the IMSS’ website by 31 January of the year in which purchases are due to be made (Article 24).

4.5.3 Market studies

- Purchasing units (through the CABCS’ subdivision for market studies) are required – before the start of any tender procedures – to carry out a market study aimed at investigating the prevailing market conditions relating to the goods or service to be procured (Article 30);

- Local purchasing units can use material made available on IMSS' Intranet by the CABCS' subdivision for market studies to prepare the corresponding market studies (Article 30);
- Prices which are determined through these market studies are used as a reference for IMSS' purchases, after taking into account local conditions and circumstances (Article 30).

4.5.4 *Consolidation of purchases*

- The IMSS' Directorate for Administration and Evaluation of Local Delegations (*Dirección de Administración y Evaluación de Delegaciones*, DAED, in Spanish) can decide that, under certain circumstances, purchases can be consolidated into a single procurement procedure and designate a consolidating division (Article 31);
- These circumstances are the following:
 - There are no local suppliers in a specific geographic area;
 - Volumes to be acquired at a local level are insufficient to attract suitable bids;
 - The consolidation allows IMSS to achieve better price conditions;
 - Tenders belong to special or national-coverage programs;
 - There are situations of national, regional or local emergency or in case of natural disasters;
 - Upon DAED's initiative (Article 31).

CHAPTER 5: ALIGNMENT OF THE PROCUREMENT ACT WITH THE OECD GUIDELINES

As noted in section 1.1 above, the Memorandum of Understanding signed by the OECD with IMSS and the CFC in January 2011 requires the OECD to: a) identify areas where the procurement legislation in Mexico could be improved in order to make it more effective in preventing and fighting bid rigging; and, b) making recommendations to IMSS on how to improve their procurement practices.

In respect of point a) above, both the Procurement Act and Public Works Act (and their implementing regulations) underwent significant changes as recently as in 2009. Most of these changes were positive and gave public agencies additional flexibility to procure goods and services effectively (e.g. through the use of reverse auctions, to name just a novel feature).

There are, however, a number of areas where further changes to Mexico's procurement laws and regulations could be made in order for such laws and regulations to be more closely aligned with the OECD Guidelines and thereby provide additional benefits from competition and safeguards against collusion in public procurement in Mexico. These areas for possible improvement (and their effects in terms of limiting IMSS' current scope for getting better value for money from tenders) are presented below and are grouped by broad thematic area.

As the previous Chapter, this Chapter also focuses on areas of improvement and changes that could be made to the Procurement Act. The motivation for this is twofold. Firstly, IMSS spends the bulk of its financial resources procuring goods and services (as opposed to commissioning public works), as discussed in Chapter 2. More importantly, many provisions of the Public Works Act are quite similar to those contained in the Procurement Act and therefore any suggested change in respect of the latter would be equally applicable to the former. Lastly, in the same spirit, we do not discuss changes to

be made to the implementing regulations as these easily follow from the recommended changes to the primary legislation.

The next Chapter in turn presents the OECD recommendations to IMSS on how to fight bid rigging in its procurement procedures, which is point b) of the OECD's list of commitments included in the Memorandum of Understanding.

5.1 Procurement procedures

- 1. Current procurement rules on bidders' participation can be discriminatory towards foreign bidders and limit their possibility of selling goods and services in Mexico. IMSS and other public agencies would therefore likely benefit if current restrictions to participation were abolished and all qualified bidders, irrespective of their nationality, could participate.**

Articles 28 and 40 of the Mexican Procurement Act distinguish between national and international procurement procedures in the case of both public tenders and the admissible exceptions.

Specifically, only Mexican nationals can participate in national procedures, whereas participation is open to foreign bidders as well in the case of international procedures. In the latter case, however, participation may be restricted to nationals of countries with which Mexico has signed a free-trade agreement before participation is opened up to all interested bidders regardless of their nationality.

These provisions effectively limit the pool of bidders who may genuinely be interested in selling goods and services to the Mexican government and public agencies, including IMSS. The result is likely to be that buyers end up paying higher prices for their purchases or buying goods and services of lower quality, compared to the situation when there are no restrictions to bidders' participation, because there may be less competition. Moreover, the restrictions contained in the current legislation – by reducing the number of potential bidders – facilitate collusion because it is easier to agree and enforce a collusive scheme when there are relatively few bidders.

Without prejudice to the provisions included in the free-trade agreements signed by Mexico, IMSS and other Mexican public buyers would likely benefit if restrictions to bidders' participation were removed, so that all interested qualified bidders – irrespective of their nationality – are allowed to participate

in all tenders. In this respect, it may also be useful to conduct an evaluation of the impact that opening up tenders to foreign participation more fully can have on national suppliers, and in particular on small and medium-size enterprise, in order to determine the best way of implementing this suggested change.

2. An excessive use by public agencies of the “de minimis” exception under Article 42 of the Procurement Act may result in competition being unnecessarily restricted and “value for money” not achieved for these purchases. A review of the use by public agencies in Mexico of this exception would be useful.

In addition to the exceptions listed in Article 41 of the Procurement Act, Article 42 establishes a “*de minimis*” exception to the use of public tenders.

In particular, public agencies can assign contracts either directly to a specific supplier or through an invitation to no fewer than 3 suppliers as long as:

- The value of each contract is below the maximum amount established each year in the Federal Budget,³⁴ and,
- The total value of contracts awarded each year using this exception is below 30 per cent of the agency’s annual procurement budget.

It makes sense for the law to provide public agencies with such a “*de minimis*” exception since it gives them flexibility and allows cost savings in the case of small-value contracts or local purchases. The overall value of contracts covered by this exception can, however, be significant – up to 30 per cent of the agency’s annual procurement budget.

Finding the appropriate balance in respect of the use of the exception allowed by Article 42 can then be a challenge. On one hand, flexibility is obviously required. For highly technical contracts, invitations to qualified bidders may result in a more effective and efficient tender, and achieve greater value from the contract award. In markets with a limited number of participants, a requirement for invitations to a greater number of bidders would defeat their purpose. Additionally, where the time of a tender is extremely limited, invitations to tender may save the agency from being required to

³⁴ See footnote 17 for the annual limits imposed by the Federal Budget for 2011.

expend scarce resources to qualify bidders. Finally, where tenders are based upon invitations, there may be less incidence of non-performance, sub-standard performance or contract defaults.

On the other hand, by avoiding a sealed-bid tender open to all potential bidders, invitations to a small number of qualified bidders raise a number of potential anti-competitive concerns. Firstly, they limit the bidding pool and raise the potential for collusion. Invitation-only bids may also preclude invitations to new entrants or to bidders who may have innovative solutions to a tender. Moreover, invitation-only bids, if frequently used on successive tenders, may raise the potential for systemic bid rigging by known participants and increase the opportunity for corruption. In addition, they can also preclude cost savings based upon aggregation of tenders, which can be significant, as the OECD Guidelines, international experience and IMSS' own results show.

A review – by SFP, for example – of the use by public agencies in Mexico of the exception under Article 42 would be useful in this respect. Among other things, such review could shed some light on whether competition is unnecessarily restricted in the case of a sizable portion of the public procurement budget and “value for money” is still achieved for these purchases. In other words, the review could determine whether flexibility requirements and restrictions to competition are currently appropriately balanced in practice and thus whether the upper threshold of 30 per cent of an agency's annual procurement budget is appropriate (and, if not, propose the necessary modifications to the procurement laws).

Moreover, the increased use of electronic tendering and centralized procurement information becoming available through the COMPRANET portal would provide additional tools to more closely evaluate whether the size and scope of the exception to the use of public tenders (as allowed by Article 42 of the Procurement Act) is achieving the greatest value for taxpayers.

3. The use of remote procurement procedures could be further promoted.

As currently formulated, the Procurement Act (at Article 26 bis) simply says that procurement procedures can be conducted remotely (i.e. through COMPRANET), in a traditional way (i.e. where bids are submitted in person or by post and bidders can personally attend clarification meetings) or using a mixture of these two methods.

IMSS and other public agencies in Mexico would likely benefit if the use of remote procedures were given priority and made the default choice, relatively to traditional or mixed methods. In particular, such remote procedures may result in significant cost savings and efficiency gains for public agencies. In addition, by limiting opportunities for bidders to meet together in a single place (e.g. when attending a clarification meeting), they may also reduce the risk of bid rigging in public procurement.

5.2 Public notice and publicity requirements

4. The mandatory requirement to hold a clarification meeting for each call for tender may represent for bidders an opportunity to exchange sensitive information or reach a collusive agreement.

The Procurement Act at present requires that public buyers hold at least one clarification meeting to address bidders' queries about each call for tenders.

The OECD Guidelines, however, highlight the potential for collusion during a tender when bidders are provided the means to know the identities of their potential competitors and to meet with them. Clarification meetings, site visits, lists of those who have requested information on tenders or expressed an interest in the tender, list of bidders, public submission of bids, public bid openings and verification of the bid price submitted by each bidder are all identified by the OECD Guidelines as red flags for tenders.

The OECD Guidelines are based upon wide international experience that such practices facilitate collusion and should be eliminated from tender procedures whenever possible. Where elimination of the opportunity for potential bidders to meet and interact is not feasible, such practices should be minimised and carefully monitored. Some OECD jurisdictions specifically prohibit disclosure of the identity of potential bidders and group meetings involving bidders. International experience raises concerns that statutorily mandated clarification meetings provide a natural forum where potentially colluding bidders can reach or finalise an agreement or exchange competitively sensitive information.

These collusion concerns can be in the short term addressed by requiring that, wherever feasible, clarification meetings should be held “virtually”, i.e. using “remote” technology to eliminate on-site meetings of competitors. Eventually, the mandatory requirement for a public agency to hold at least one clarification meeting during each tender could be eliminated. There should also

be possible to use alternative methods for an agency to entertain bidders' questions and to share the agency responses with all potential bidders without the necessity of disclosing the author of the questions, or the identity of the potential bidders with whom the responses are shared. These alternative procedures could be drafted so that an agency is permitted a measure of discretion and flexibility to answer bidders' questions effectively and efficiently. Furthermore, the statement released by the public agency with the queries examined and its response should not list nor explicitly identify the participants.

5. Current disclosure requirements (e.g. relating to the identities of bidders and the value of the bids they submit) can facilitate bid rigging and could accordingly be eliminated or substantially circumscribed.

Transparency is a key requirement for procurements in Mexico. It is mandated to allow maximum participation in public tenders, to obtain greater competition and to deter corruption. It is a core principle which governs and guides the Mexican procurement laws and procedures. Calibrating the extent of transparency and establishing the proper timing, scope and audience for the disclosure of information in order to achieve the policy goals of obtaining value for money in all procurements requires a balancing of policy objectives and practices.

The Procurement Act contains a number of mandatory disclosure requirements that create greater possibilities for collusion among competitors. In addition to the requirement of a clarification meeting, agencies must publish the list of potential bidders attending a clarification meeting, including their questions, and the list of bids received (including both rejected and accepted bids) on each tender, including the identity of the bidder and amount of the bid.

Furthermore, Article 56 of the Procurement Act requires SFP to compile a unified register of providers, listing all providers of goods and services to the public administration and also their track record in terms of contracts won and fulfilled.

The compiling of information and posting it on the COMPRANET portal should be calibrated to permit procurement officials access to important information about bidders and tenders throughout Mexico. Information made available to bidders and the public should be carefully assessed in light of the risks and benefits from disclosure and confidentiality concerns. The timing and form of public disclosures should be carefully considered in light of the dual

mandates of transparency and obtaining maximum value from public expenditures for procurements.

Moreover, the use of the COMPRANET as a tool by the SFP and agencies to monitor all aspects of tenders, including submission of bids, offers substantial potential to uncover collusion and corruption. Efforts to make COMPRANET a robust, fully functional portal that serves the public policy goals should first focus on making it a tool by which procurement officials and agencies can attain the best value public tenders. The second policy goal of transparency should be carefully assessed to determine the optimum timing and content of public disclosures concerning tenders that will minimize the opportunities for collusion on present and future projects.

Some of the information which is currently disclosed may facilitate collusion because it can be used by dishonest bidders to reach a collusive agreement as well as to monitor that all member comply with it. Accordingly, there is in our view room for revising the current disclosure requirements. Specifically, information about the identity of bidders and the amount they bid could be released in a form which does not allow explicitly identifying bidders (e.g. bidders should be identified by letters or numbers, not by their names). Alternatively, this information could be made available in full with a certain lag (say, three or six months after the conclusion of the tender), when its usefulness to dishonest bidders is more limited.

Information about contracts won and fulfilled by individual suppliers could be made available either to procurement officials only or, if that is not possible, to the general public but again with some delay, e.g. three or six months. Even this short delay in releasing the information to the public may have the possibility to hinder the timely monitoring and enforcement of a collusive scheme.

5.3 Joint bids and compliance with competition law

6. In the current practice, the fact that joint bidders are not required to specify the purpose and merits of submitting a joint bid may facilitate the implementation of a collusive agreement.

The Mexican procurement laws (see, for example, Article 34 of the Procurement Act) allow two or more potential suppliers to submit a joint bid. In addition, joint bidders are not required to form a new company or joint venture for the specific tender.

Joint bids can be a useful way for suppliers with different capabilities or strengths (e.g. a presence in different areas of Mexico, or a focus on different parts of the supply chain) to get together and submit a more competitive bid. In practice, however, joint bids can also be used to reduce competition among bidders and implement a collusive scheme aimed at sharing the market among the participants.

On balance, it would not be appropriate to go as far as prohibiting (or significantly limiting) the use of joint bids. Attempts to collude in public procurement, however, could be made more difficult if bidders were required to specify the purpose and merits of submitting a joint bid. This would help procurers in their assessment of submitted bids and also of whether a specific tender is genuinely competitive or not. In particular, it would make it easier for procurers to detect possible bid rigging and alert the Mexican competition authority.³⁵

In addition, collusion would be more difficult to implement if the current wording of the Procurement Act were stronger and explicitly gave procurers the option of not allowing joint bids in a specific tender, as long as they duly justify their decision (e.g. because they suspect that joint bids might facilitate collusion).

7. Collusion would be made more difficult if IMSS and other public buyers could require bidders to submit a “Certificate of Independent Bid Determination” in addition to the “Integrity Statement” required by Article 29 subpart IX of the Procurement Act.

As noted in subsection 4.2.7, all bidders (including those who submit joint bids) are required to comply with the provisions of the Mexican competition law at all stages of the tender procedure (see Article 34 of the Procurement Act).

In addition, Article 29 subpart IX of the Procurement Act require bidders to submit an “Integrity Statement”. In this statement bidders declare that they will refrain from adopting conducts aimed at that procurement officials

³⁵ For a survey of how joint bidding is regulated in Europe and its possible pro- and anti-competitive effects, see: Gian Luigi Albano, Giancarlo Spagnolo and Matteo Zanza, Regulating joint bidding in public procurement, *Journal of Competition Law and Economics*, vol. 5(2), pages 335 – 360, 2008.

influence or change the evaluation of the bids, the outcome of the tender or any other aspect of the tender which may favour a specific bidder over his rivals.

This Integrity Statement is a useful tool to fight corruption of officials in public procurement. In its current formulation, however, it does not address potential collusion among bidders and therefore may not be effective to prevent and fight bid rigging.

It would be useful then for IMSS and other public buyers if they could require bidders to submit a “Certificate of Independent Bid Determination”. As shown in the two examples presented in Annex 1, with this Certificate bidders are required to disclose all material facts about any communications that they have had with competitors pertaining to the invitation to tender, along the lines of the certificates. The purpose of this Certificate is to ensure that each bidder submits bids which are genuine, non-collusive, and made with the intention to accept the contract if awarded.

As the OECD Guidelines say, consideration may also be given to requiring the signature of an individual with the authority to represent the firm and adding separate penalties for statements that are fraudulently or inaccurately made. Ultimately, the use of this Certificate should make collusion riskier and more expensive for dishonest bidders and therefore discourage bid rigging.

8. Disclosure requirements imposed on bidders would make it more difficult to use sub-contracting as a mechanism to implement collusion.

Current procurement laws and regulations are silent about sub-contracting. While legitimate in most cases, this practice can however be used to implement a collusive agreement. Specifically, the winner of a tender use sub-contract to unsuccessful rival bidders as a way of remunerating them for their participation in a bid-rigging scheme.

Some of the risks associating with sub-contracting could be reduced if bidders were asked to satisfy some ex-ante and ex-post disclosure requirements. Bidders could, for example, be asked to: i) disclose up-front (i.e. in the bidding documentation submitted to the buyer) the intention to use sub-contractors; ii) clearly identify these subcontractors; and, iii) explain why sub-contracting is necessary for the proper performance of the contract. Ex-post disclosure obligations (e.g. to be included in the contract signed by the winner of the

tender) would also make ex-post monitoring of collusive practices by public buyers or the CFC easier.³⁶

5.4 Market studies

9. In order to reduce differences in the quality of market studies within the Mexican public administration, best practices should be actively disseminated.

Article 26 of the Procurement Act requires buyers to carry out a market study for any tender they organise. This requirement is commendable and in line with the OECD Guidelines as a thorough understanding of the prevailing market conditions is essential if buyers want to buy effectively as well as to prevent and fight bid rigging.

It appears, however, that there is a huge variance in respect of the quality of market studies which are currently done by public buyers in Mexico, e.g. in terms of the quality of sources used, the issues considered, the methods by which data are compiled, the time and attention devoted to market studies, and the extent to which the data collected are shared within an agency and between agencies. As COMPRANET becomes a more robust and reliable portal, the opportunities to improve and share market intelligence gained from tenders will increase.

While no legislative change is required, more efforts could be done – by SFP, for example, in cooperation with the Mexican competition authority – in order to disseminate best practices (including a template which could be used by all procurers in the Mexican public administration). Such template could take into account current best practices and be presented as a model to be used before any tender procedure. SFP could also consider issuing guidelines on the minimum content of market studies, again consulting the CFC in this endeavour.

5.5 Prices and margins of preference

10. At present Mexican bidders are granted preferential treatment in the evaluation of bids. This limits the possibility for IMSS and other public buyers in Mexico to obtain the best prices.

³⁶ See also recommendation 8 in Chapter 6.

At present Mexican bidders benefit from a preferential treatment in some circumstances, e.g. in the evaluation of bids in international open tenders (see Article 14 of the Procurement Act) and in the calculation of the convenient price (see Article 28).

This discriminatory treatment effectively penalises foreign bidders and imported goods, which may ultimately discourage participation to the tender procedures and, therefore, ultimately facilitate collusion. IMSS and other public buyers in Mexico would likely benefit if such preferential treatment were abolished, so that all bidders are equally treated, irrespective of their nationality and of the origin of the goods and services they intend to provide.

5.6 Criteria to award a contract

11. The requirement that IMSS and other public buyers in Mexico cannot accept bids below the minimum threshold represented by the convenient price may limit their ability to obtain the best value from their purchases.

Article 36 bis, subpart II, of the Procurement Act requires that the winning bid in a tender must be above the convenient price. This requirement – by limiting price competition among bidders – may also limit the ability of IMSS and other public buyers in Mexico to obtain the best value from their purchases. This lower bound – if leaked outside the agency – may also facilitate collusion among bidders.³⁷

It would be better, then, that public agencies were permitted to award a contract below the convenient price if certain safeguards and guarantees are met. These could include higher performance bond guarantees (multiples of the

³⁷ Leakage of the convenient price to bidders following the tender may have a number of potentially anti-competitive consequences. First, it may serve to establish a “floor” on similar tenders where the convenient price determined by the agency in the second instance is actually lower, thereby artificially increasing the price received from bidders. Second, it may facilitate collusion by providing bidders with some indication of the threshold from which they should raise bid prices in a rigged bidding. Third, if bid rigging is already present in an industry or among a group of competitors, leakage of the convenient price furthers the ability to collude on prices at the next tender and monitor compliance with the cartel.

normal guarantees), greater monitoring of performance, adjustments to progress payment requirements and other methods to assure performance.

Where there are justified concerns about any supplier bidding too low and subsequently being unable to fulfil the contract (or also about the quality of the goods and services being procured, especially in the case of pharmaceutical products), they are better addressed by strengthening the framework for penalties and guarantees (see below) than by restricting price competition.

12. The possibility of splitting a contract among multiple suppliers may facilitate collusion.

Article 29 subpart XII of the Procurement Act requires public agencies to indicate in the call for tenders whether the contract is to be awarded to a single supplier or it can be split among multiple suppliers (*abastecimiento simultáneo*, in Spanish) and, if so, the total number of suppliers allowed, the share of the contract attributable to each and the admissible difference in bids (compared to the winning bid).

Furthermore, Article 39 allows public agencies to make use of this option and specifies that bids which may be attributed a portion of the contract cannot be more than 10 per cent higher than the winning bid.

Both joint bidding and split awards appear to be designed to allow the agency flexibility to award a contract where suppliers may not have sufficient capacity to perform the entire procurement. Both provisions also serve the policy goals of permitting small and medium-sized enterprises to be selected to perform all or a portion of contracts where they would not otherwise be able to compete.

These complementary procurement goals are policy objectives worth of consideration. However, they can also facilitate collusion. Specifically, in the current Mexican practice split awards appear to be a device frequently used by dishonest bidders to collude. For example, bidder A agrees with bidder B to submit a slightly higher bid for a specific contract – so that bidder B wins 60 per cent, say, of the contract and bidder A the remaining 40 per cent – and bidder B agrees to do the same for a different contract.

In addition, from a more theoretical point of view, one could think that that a “winner-takes-all” format encourages aggressive bidding and is likely to provide the best price for procurers. This contrasts with the situation when

bidders know that the same contract is going to be split among several of them and may have an incentive to converge on a focal price and minimise differences in bids, so that each of them is awarded part of the contract. This scenario, indeed, resembles a sort of (implicit or even explicit) market-sharing agreement, which may, for example, take into account the capacity utilisation rate of the different bidders at the time of the tender.

Taken together, the requirements of Articles 29 and 39 of the Procurement Act provide an almost perfect scenario for collusion among competitors. Where competition among competitors is weak or where bid rigging is already in place, advertising the fact that multiple suppliers may be chosen allows the cartel to effectively divide the procurement and monitor bid prices. If the opportunity for multiple suppliers is used on successive or recurring contracts, the procurement laws and regulations effectively allow the tender process to be used to set up a bid rotation scheme where each member of the cartel gets a portion of the contract. Such a scheme may be far more attractive than a traditional bid rotation scheme that requires all bidders except the winning bidder to forego the benefits of the cartel until a future date. The competitive issues may be exacerbated for those products where the number of suppliers is very limited.

It is acknowledged that public agencies need to have the flexibility in all tenders to ensure that they obtain bids sufficient to allow the contract to be awarded. Particularly in procurements in remote areas of Mexico where requirements may be difficult to fill, creative methods need to be available to procurement officials to obtain performance. However, these considerations should not sacrifice the primary goal of obtaining value for money.

Given these issues, a study on the current use and justifications for split contracts among all public buyers in Mexico and the results they produce in terms of performance, price and other policy goals seems justified. Whether the rationale for split contracts is sufficiently robust or may need to be more stringent should be studied across industries, with particular attention being paid to critical procurements. Specific attention should be given to those split contracts where identical prices have been submitted by bidders, which would indicate that collusion is occurring. Emphasis should also be given to understanding the reasons and rates of default and non-performance on split contracts.

Since there are many common policy and competition issues surrounding multiple-award tenders and joint bids, it would also seem prudent to conduct the

study of both provisions together in order to gain a full picture that may be used to recommend necessary changes in the law or regulations. Such study could, for example, be conducted by SFP in cooperation with the CFC.

Subsequently, based on the results of the study, the SFP produce guidance for agencies about how to better construct split contracts to maximize the incentives for competition and minimize the incentives for collusion. For example, constructing split procurements so that the percentage of the award available to be “split” is limited to a small percentage necessary to ensure security of supply.

5.7 Penalties, guarantees and rescission of contracts

13. The current procurement laws and regulations provide a weak framework for penalties related to fulfilment of a contract. In particular, with the current provisions providers’ strategic choice of partial fulfilment of a contract is relatively cheap.

The current framework for penalties and guarantees relating to fulfilment of a contract is summarised in section 4.4 above, including the provision that the penalty imposed by the public agency in case of delay in the delivery of goods and services cannot exceed the value of the guarantee provided.

It has emerged during this study, however, that it is a relatively common practice for some winners of contracts awarded by IMSS to fulfil the contract only partially. It happens, for example, that some providers supply goods in most of the Mexican states, but not in those (typically smaller states) where delivery is too costly or complicated compared to the volumes required, e.g. because the provider does not have a local base.

In other words, given the current framework it is relatively inexpensive for providers to fulfil only part of the contract. A public agency, e.g. IMSS, is therefore subsequently forced to buy the goods it requires in the states where the selected provider does not comply with his obligations in a hurry and at a higher price (often through an emergency procedure).

These practices seem then to show that the current framework for penalties is weak in the sense that partial fulfilment of a contract by providers is “cheap” and not appropriately punished. Accordingly, there may be room for revising the current framework for penalties, e.g. by removing (through a change in the

procurement laws and regulations) the provision that the amount of the penalty cannot exceed the value of the guarantee and perhaps setting higher penalties.

It should be noted that this weakness has also an impact on other aspects of the procurement legislation. As discussed in the previous subsection, for example, the Act mandates that admissible bids must be above a certain threshold and allows splitting the same contract among multiple suppliers. Both provisions can be viewed as a way of reducing the risk of selective non-fulfilment of a contract by providers, but can also facilitate collusion.

A better way to address selective non-fulfilment might be through strengthening the penalty framework which is applicable after the contract has been awarded, rather than introducing distortions and limiting competition during the tendering stage.

In addition, the structure of a typical contract might be modified to provide disincentives for partial performance and remove the capacity of bidders to selectively perform the contract. These contract provisions could be highlighted in the tender documents and explicitly made a part of the contract terms.

Furthermore, in order to give the agency better information on which to support its point-based or risk-based analysis, bidders might be asked to provide specific information concerning their cost structure in supplying the most remote and underserved locations. This would better enable the agency to evaluate its estimates of convenient and non-acceptable pricing and to set the performance bond at an adequate level to the associated risks of partial or non-performance.

Providing the proper disincentives for partial performance might be accomplished by linking progress payments to the satisfactory performance of the contract in those areas which the market study has shown will be the most costly for bidders to perform. The contract could require that progress payments for all aspects of the contract could be withheld entirely (or substantially reduced) pending performance in the most problematic locations. Conversely, as “carrot” rather than “stick” approach might be considered which would provide incentives for early delivery to remote locations.

Additionally, where the product is durable and can be adequately accommodated, the contract might specify full delivery to the most remote or costly locations first. Alternatively, IMMS could consider entering into joint procurements with PEMEX and CFE.

Where distribution issues are arising in relation to pharmaceutical products (particularly those supplied by international bidders and which may be sole-sourced as a result of patents), guarantees of performance from the manufacturers or subrogation provisions might be required from distributors as part of the contract, so that direct recourse and supply will be guaranteed by manufacturers in the case of non-performance by their distributors and suppliers. Other creative contracting provisions should be encouraged by the agencies to allow them to better ensure full, timely performance on contracts.

CHAPTER 6: RECOMMENDATIONS TO IMSS AIMED AT FIGHTING BID RIGGING IN PROCUREMENT

IMSS is the first public agency in Mexico which has formally committed with the OECD to adopt and implement the Guidelines for Fighting Bid Rigging in Public Procurement. This noteworthy commitment of resources follows on IMSS' own efforts to obtain better value from its tenders in the past and its cooperation with the CFC, which have been summarised in section 1.3 above.

The recommendations listed below (which are grouped by broad thematic areas) build on such efforts and aim at enabling IMSS to obtain additional cost savings by constructing tenders to minimise the opportunities for collusion, developing sophisticated practices to detect collusive practices and building upon IMSS' successful cooperation with the CFC to pursue bid rigging cartels. Whenever appropriate, we have also included examples of concrete actions already taken by IMSS to already implement these recommendations.

It should be also noted that in order to successfully tackle collusive bidding practices these recommendations need to be adopted in a flexible and dynamic way. No single recommendation is likely to be valid for all tenders or exclusively effective in the long term. Bidders who have colluded in the past (or wish to do so in future) may be expected to react to policy changes and explore new, more inventive and secretive ways to collude. To combat collusion and obtain the best value for its purchases, IMSS needs to be always vigilant and ready to nimbly “change the rules of the game” if that appears necessary. Moreover, several of the recommendations listed below come with caveats, since – if implemented in the wrong circumstances – they might lead to adverse effects on competition.

6.1 Further opportunities to exercise buyer power

1. IMSS should explore additional opportunities to make the best use of its significant buyer power by:

- **Further consolidating purchases among its local centres;**
- **Using multi-year tenders where appropriate (e.g. for generic medicines which have already lost patent protection since several years – i.e. for which the number of eligible suppliers is now fairly stable);**
- **Procuring goods and services jointly with other government agencies;**
- **Attracting the interest and sponsoring the entry of new suppliers.**

IMSS has been consolidating its purchases since 2006 (when responsibility for the procurement of generic medicines was to a large extent transferred from IMSS' local delegations to a central unit in Mexico City) and this has resulted in considerable savings. In addition, some anecdotal evidence shows that such consolidation contributed to disrupt existing collusion.

We recommend that IMSS should explore additional opportunities to consolidate its purchases, either among its local centres or in cooperation with other public agencies, or by using multi-year tenders.

There may also be another benefit from consolidating purchases for IMSS, in addition to disrupting and deterring collusion. Specifically, consolidation would give suppliers opportunity to exploit economies of scale (and therefore to bid more aggressively), where these are present.

We are aware that since 2010 IMSS has been further encouraging the use of consolidated purchases and also conducting multi-year tenders, where feasible. In cooperation with SFP and the Mexican Ministry of Budget, IMSS is also seeking to increase coordination with other agencies (e.g. by synchronising their respective purchase and delivery timetables). An example of this is that IMSS is now procuring goods and services on behalf of the Mexican Ministry of Defence (*Secretaría de Defensa Nacional*, SEDENA, in Spanish) as well. IMSS is also considering the use of “framework agreements”, if and when these are implemented by SFP, in line with the current legislation.³⁸ It is also useful

³⁸ Obviously, IMSS should remain vigilant that such framework agreements do not limit bidders' participation (e.g. by locking in a pre-determined number

for IMSS to retain the flexibility of using these different options as they see it appropriate depending on the purchases to be made and with the ultimate objective of obtain better “value for money”.

When increasing its purchase volumes, however, IMSS should be careful that its consolidation efforts do not reduce permanently the number of suppliers who are capable of participating in a tender (e.g. because they do not have sufficient capacity or cannot cover the entire territory) below the optimal number of suppliers that will foster continued vigorous competition and stable source of supply. Otherwise, in the longer term IMSS could be left with a pool of suppliers which is smaller than the original one and possibly less competition.

One way to avoid this drawback – which has the additional advantage to reduce the predictability of IMSS’ tender formats – is to vary the number of “lots” being made available. For example, when consolidating purchases among local centres, IMSS could one year procure goods and service for the entire Mexico, another year split the purchases in three separate areas, the following one in two areas, and so on.

As noted above, this suggestion assumes that there are a sufficient number of large players who are not capacity-constrained. More inventive structures will be necessary if such assumption does not hold.

In this respect, another area where IMSS could be more active is attracting the interest and sponsoring the entry of new bidders. As noted above, IMSS has a prominent position as a buyer of pharmaceutical products in Mexico and may therefore be a significant business opportunity for most suppliers. It would make sense then for IMSS to adopt an aggressive marketing strategy aimed at domestic and foreign suppliers illustrating the type and volumes of goods and services it buys. We are aware that this proactive marketing strategy is already adopted by some state-owned firms in Mexico (e.g. CFE), where it has been successful in order to attract a suitably large set of bidders and suppliers.

of suppliers for a long time) and allow for price reductions in line with prevailing market conditions.

6.2 Coordination with SFP, the CFC and adoption of best practices

2. IMSS should coordinate its procurement procedures with SFP not only at the stage of requesting social witnesses, but also earlier in the procurement cycle by requesting advice on how to best design the procurement and structure the tender.

SFP, among other responsibilities, oversees the functioning of all public agencies in Mexico, including IMSS.

In respect of tender procedures, in addition to publishing a significant amount of secondary legislation as required by the Procurement Act, SFP usually intervenes in two ways: a) at an early stage by providing advice on the tender format to use and promoting cooperation among agencies; and b) at a later stage by appointing “social witnesses” who exert a control function.

At present IMSS tends to contact SFP mostly at the stage of requesting social witnesses.

We recommend that IMSS should be more proactive and ask SFP to provide advice on how to design the tender to best achieve the desired outcomes for the procurement.

Since SFP oversees and has visibility across the entire Mexican public sector, possible benefits (among others) from this course of action for IMSS may include:

- Dissemination and adoption of best practices in procurement (e.g. when IMSS or another agency is pioneering new approaches to procurement or improving on existing practices);
- Avoidance of duplicate efforts and coordination and promotion of joint initiatives with other agencies (e.g. when different agencies are dealing with the same issue or engaged in the procurement of the same good or service).

We are aware that since 2010 IMSS has been engaging in a constructive dialogue with SFP at a stage prior to requesting social witnesses (e.g. through the creation of high-level discussion groups for a significant number of tenders) and we commend this conduct. IMSS, for example, has asked SFP to provide prior advice on several tenders in 2010 and 2011. In this respect, it is also

commendable that IMSS has invited representatives of the CFC to these discussions with SFP as well as to provide specific advice on tender design, given the CFC's expertise in fighting collusion and the new competition law enacted in May 2011 (see also recommendation 5 below).

3. IMSS should make more efforts to promote among its staff the adoption of best practices in procurement and the use of standardised tender documents and procedures as described in SFP's procurement manual.

In August 2010 SFP published a procurement manual which is of mandatory adoption by public agencies in Mexico and replaces any internal manual, regulation or guidelines adopted by them (unless mandated by law) until that date.

The SFP's manual does not contain legal provisions in addition to those contained in the Procurement Act and its implementing regulation. However, it is a valuable tool in that it provides a step-by-step guide for all stages in the procurement cycle (i.e. from planning and organising the tender to awarding the contract) and standardises existing procedures in the Mexican public administration.

In order to increase bidders' participation in tender procedures and lower their costs, IMSS should adopt best practices in procurement and whenever feasible use standardised tender documents and procedures as described in SFP's procurement manual.

It appears that within IMSS procurement procedures are not uniform, the use of SFP's procurement manual is not widespread and tender documents tend to differ depending on the good or service to be procured, the purchasing unit, or even the official in charge of the specific tender. Inconsistent adoption of procurement procedures and requirements may have adverse consequences for competition on tenders and may increase the possibility for collusion.

One example of different requirements is the practice of some procurement officials to ask manufacturers (e.g. of electronic equipment, including personal computers and printers, or spare parts such as printer toners) to support individual distributors through a "letter of support", while other officials do not. We understand that for a distributor getting a "letter of support" from a manufacturer is not always an automatic process.

This may have the effect of discouraging potential bidders (especially small and medium-size firms as well as new entrants) from participating because they have to satisfy additional requirements which are not required by law or in tenders organised by other public agencies.

In addition, areas where best practices could be further promoted include: a) elaboration of the technical specifications of the goods and services to be procured; and, b) increase in the degree of standardisation of procurement procedures.

In respect of area a) above, the elaboration of technical specifications is critical for the success of a procurement procedure. Lack of clarity in this area may indeed lead to conflicts within the procuring agency and between the agency and bidders, necessity of multiple and long clarification meetings as well as complaints and cancellation of tenders after a winner has been provisionally designated. As to area b) above, a greater standardisation of procurement procedures will simplify the procurement officials' administrative tasks and allow them to focus on the more critical ones. In addition, it will also allow gathering of comparable historical information on procurement more easily.

In this respect, we see as a step in the right direction the fact that IMSS has been organising a comprehensive training program for its staff since 2010. This program – which is organised jointly with the Mexican Institute of Public Administration (*Instituto Nacional de Administración Pública*, INAP, in Spanish) – covers in detail the legal framework governing procurement of goods and services in Mexico, the SFP's administrative procurement manual, the planning and budgetary process underlying procurement at IMSS as well as the COMPRANET system.

Related to this, we consider it commendable that IMSS' procurement units (e.g. *Coordinación de Control de Abasto* and *Coordinación de Adquisición de Bienes y Contratación de Servicios*) are currently liaising with SFP to promote the use of standardised tender documents and procedures.

4. IMSS should adopt remote and electronic tender procedures for all its purchases and at all stages of the procurement process.

The Mexican procurement law requires tender notices and documents to be available on line (e.g. in COMPRANET and agencies' websites) and also allows tenders to be conducted remotely using electronic procedures.

In addition to the efficiency gains and cost savings which may result to IMSS, the adoption of electronic procedures may also contribute to reduce the risk of collusion, by eliminating the need for bidders to meet in the same place to submit their bids or participate in other acts.

We are aware that most stages of many tenders conducted by IMSS are already run remotely, e.g. the opening of bids and reverse auctions. We recommend, however, that remote and electronic bidding is adopted for *all* procurement tenders and at all stages, including preliminary ones. One area, for example, where IMSS could adopt remote procedures is for running clarification meetings (*juntas de aclaraciones*, in Spanish), where potential bidders ask IMSS to provide clarifications on certain aspects of the tender. Apart from benefitting from efficiency gains, IMSS would also avoid to create opportunities for bidders to come together in a single place and possibly agree to collude. It is commendable in this respect that IMSS included the use of the latest version of COMPRANET in the training program for its staff which was initiated in 2010.

Electronic bidding is also likely to lower the cost of tendering for potential bidders, thus encouraging participation and competition in procurement. It will also facilitate the creation of a database with information on bidders and their bids across a large number of tenders (see also below under recommendation 18).

5. IMSS should seek to expand its cooperation with the CFC and possibly make it more formal, e.g. by signing a protocol.

As noted above, IMSS has already and successfully cooperated with the CFC to fight bid rigging in its tenders. We recommend that this cooperation should be expanded and possibly made more formal, e.g. by signing an official protocol of cooperation.

The protocol could include various initiatives, e.g. provision of advice by the CFC on tender design, secondment of personnel, more frequent and comprehensive exchange of information (including through an anonymous hotline, see recommendation 21 below), assistance in the elaboration of Certificates of Independent Bid Determination (see recommendation 13 below), ongoing training programs, etc.

This protocol should also be seen in the context of the CFC having now more effective investigative and sentencing powers, following the approval of

the reform of the Mexican Competition Act in May 2011. Accordingly, an increase in the cooperation between the CFC and IMSS is likely to result in even more benefits for consumers than in the past.

6.3 Fighting practices which may facilitate collusion

6. IMSS' calls for tender should make it clear that joint bids are allowed only when there are pro-competitive justifications, e.g.:

- **Two or more suppliers active in different markets providing a single integrated service which none of them could supply independently;**
- **Two or more providers active in different geographic areas submitting a single bid for the whole of Mexico; or**
- **Two or more providers combining their capacity to fulfil a contract which is too large for each of them individually.**

7. IMSS should split a single contract among multiple suppliers only in exceptional circumstances, e.g. to allow new entrants to gain a presence in the market.

In cases where security of supply is a concern, IMSS should consider either repackaging the contract into smaller lots and assigning each of them to a single provider (which can be feasible for smaller players) or consolidating purchases (in order to attract additional large bidders), rather than simply awarding the same contract to multiple suppliers.

The Mexican procurement legislation allows: a) two or more competitors to submit a joint bid, and b) public agencies to split a contract among multiple bidders (if the difference in their bids is within a certain range).

The details of how to implement these options in a specific tender, as well as the decision of whether to implement them at all, are left to the individual public agencies.

We are of the view that IMSS should construct its tenders to limit the use of these options, within the constraints imposed by the current legislative framework and based on the information gathered through the market investigations (see below). Where they are permitted, IMSS should carefully

scrutinise the use of joint bidding and split awards in specific cases to ensure that they do not stifle competition or facilitate collusion and that pro-competitive justifications for such practices clearly outweigh the prospective risks.

The reasoning is the following:

- In respect of joint bids, there seems to be little plausible justification – apart from the intent to collude – for the case when two (or more) bidders first submit each his own quotation to the public agency when the market study is being carried out and then submit a joint bid. Indeed, it is reasonable to assume that, when a bidder submitted his quotation to the agency at the market study stage, he expected to be able to fulfil the contract alone and without relying on cooperation with competitors. With the exception of some circumstances (e.g. those indicated at point 66 above, when there are genuine pro-competitive reasons), therefore, IMSS should not allow joint bids when bidders had previously submitted individual quotations during the market study or when it is clear that the bidders could supply the contract independently from each other.
- In respect of contract splitting, a “winner-takes-all” format encourages aggressive bidding and is likely to provide the best price for IMSS. Conversely, when bidders know that the same contract is going to be split among several of them, they may tend to converge on a focal price and minimise differences in bids, as they rely on the possibility that each of them is awarded part of the contract – a sort of (implicit or even explicit) market-sharing agreement, which may, for example, take into account the capacity utilisation rate of the different bidders at the time of the tender. As noted above, there may be cases where splitting the contract can be justified, e.g. because IMSS wishes to have multiple suppliers and thus increase security of supply, or encourage new entrants or smaller firms to compete. We would, however, regard these as exceptions rather than the general rule. In these cases, it would be preferable to award contracts to different bidders in different tenders, rather than to split the same contract among the various bidders.

In some cases even avoiding splitting a contract equally between, say, two suppliers may contribute to disrupt or avoid collusion because that alters the balance of gains and risks of each colluding party.

- 8. In order to deter the use of sub-contracting as a mechanism to implement collusion, IMSS should require bidders to: i) disclose upfront (i.e. in the bidding documentation submitted to IMSS) the intention to use sub-contractors; ii) clearly identify these subcontractors; and, iii) explain why sub-contracting is necessary for the proper performance of the contract.**

The concern behind this recommendation is sub-contracting to rivals, i.e. the practice that the winner in a tender procedure subcontracts part of the contract to bidders who were not successful.

Again, there is no plausible reason to explain that the winner in a tender procedure – who bid alone and therefore expressed its ability to fulfil the contract without relying on his rivals – should assign part of the contract to his unsuccessful rivals afterwards. In fact, this is frequently one of the mechanisms which are used to reward cooperation in a collusive agreement.

On this basis, and considering that the Mexican procurement law is absolutely silent on sub-contracting, we recommend that IMSS allows sub-contracting while imposing the disclosure requirements indicated at point 8 above.³⁹

- 9. Within the limits imposed by the law, IMSS should assess whether the amount of information which is published in its annual procurement plan, and its level of detail, may facilitate collusion.**

The Mexican procurement law requires IMSS to publish its annual procurement plan in January of each year. This is useful information for potential bidders because it allows them to plan their efforts to participate in a tender and may influence other business and investment decisions as well. On

³⁹ IMSS could also impose ex-post disclosure obligations (e.g. in the contract signed by the winner of the tender) in this respect since that would make ex-post monitoring of collusive practices by IMSS itself or the CFC easier.

the other hand, *too much* transparency can facilitate collusion.⁴⁰ We recommend that when complying with the law, IMSS should assess the amount and level of detail of the information which is published in its annual procurement plan.

For example, IMSS' annual procurement plan for non-durable goods in 2011 is a list of 33,124 items, most of which are pharmaceutical products. For each of these IMSS provides the estimated value and volume of the contract, whether it is to open only to Mexican suppliers, and the specific geographic areas to which the product is to be supplied, along with other information.

IMSS may want to explore – possibly in cooperation with the Mexican competition authority – whether some of this information may be omitted altogether (e.g. value of the contract, which may give an indication of how much IMSS is willing to pay) or at a minimum may be aggregated, (e.g. by therapeutic area or generic name or across the different geographic areas) so that bidders may find it more difficult to reach any market-sharing agreement.

6.4 Increased use of competitive mechanisms

10. IMSS should limit the use of exceptions to public tenders (c.f. Article 41 and 42 of the Procurement Act).

The Mexican procurement law allows the use of different procurement procedures, namely a procedure to be used as a general rule (public tenders) and two exceptions (i.e. invitations to no fewer than 3 suppliers and direct award).

These two exceptions can be used in the circumstances listed in Article 41 of the Procurement Act (e.g. when there is a threat to the social order, economy, public services, health conditions, safety or environment as a result of unforeseeable circumstances or *force majeure*).

In addition, Article 42 allows public agencies to procure goods and services without using a public tender when the value of each contract is below certain thresholds established in the Federal Budget, provided that the total

⁴⁰ We are aware that transparency is important to prevent corruption and IMSS is required to comply with the existing legislation in this respect. The focus in the text above is that too much transparency can create the conditions for bidders to reach a collusive agreement and enforce it.

value of contracts awarded in each year under this Article does not exceed 30 per cent of the agency's annual procurement budget.

The Mexican procurement law generally provides some discretion to public agencies as to the choice of which tender format they wish to use. IMSS should make a parsimonious use of this flexibility. Specifically, it should limit the use of the exceptions under Article 41 and 42 of the Procurement Act and instead use public tenders as often as possible.⁴¹

We are aware that, in the case of IMSS, the use of these exceptions is partly justified by the purchase of medicines which are still covered by a valid patent and can therefore only be bought from the original manufacturer. Nevertheless, there may still be some room for IMSS to proactively monitor when a patent for a certain medicine expires and such medicine can therefore be bought from generic manufacturers (who would compete with the originator). Similarly, there may be instances where a medicine still under patent can be effectively substituted by a generic alternative, in which case a public tender could be used.

11. In general, IMSS should always opt for opening up participation in a procurement procedure as fully as possible. Related to this, whenever a national tender is declared void, IMSS should open the tender to non-Mexican suppliers rather than using an exception to public tender.

Public tenders and the two exceptions allowed by the Procurement Act can be open to Mexican suppliers only or to foreign bidders as well (and in some cases only to foreign bidders who are nationals of a country with which Mexico has signed a free-trade agreement).

IMSS is likely to hugely benefit from using the most open tender format available, e.g. public tenders where all interested foreign bidders are allowed to participate, since this enhances competition among bidders and makes collusion harder (in addition to disrupting any existing collusive agreement).

⁴¹ In any event, even when using an invitation to no fewer than 3 suppliers, IMSS should remain vigilant that genuine competition is established among the invited bidders.

We recommend IMSS to make use of the discretion granted by the Mexican procurement law in respect of the choice of which format to use, e.g. by using market studies strategically in order to open up markets to competition and thereby increasing the number of genuine potential bidders.⁴² We understand that this already happens occasionally and we encourage IMSS to take further steps in this direction, especially after the strengthening of the division in charge of elaborating market investigations.

12. IMSS should change tender mechanisms, timing of tenders and extent of consolidation in a way which makes collusion more difficult to emerge or to continue existing.

As noted above, potential colluders react to policy changes and are likely to find new ways to reach a collusive agreement, if they intend to collude. This is the reason why no single recommendation is valid in all cases and forever.

We recommend therefore that IMSS should introduce a degree of unpredictability in respect of the choice of tender format (e.g. whether to use reverse auctions or not) and its timing as well as on the extent of consolidation (e.g. in how many lots a single contract is going to be split, or whether to procure jointly with other public agencies or not).

These actions are likely to hinder the formation of collusive agreement and also to disrupt any existing collusion. This element of surprise can be introduced selectively (i.e. for the procurement of certain goods and services only) and gradually over time (taking into account the complexity of IMSS' procurement system, both at central and local levels), and possibly upon receiving advice from the CFC. We understand that this has already been happening for some time at IMSS, within the overarching goal of not disrupting procurement.

13. IMSS should consider requiring a Certificate of Independent Bid Determination (CIBD) to accompany all tenders.

⁴² A strategic use of market studies could also be made in order to establish competitive maximum and minimum prices (see section 4.1.7, **Error! eference source not found.** and the recommendations related to an overhaul of market studies below in the text).

One way to make it more costly and risky for dishonest bidders to collude is to require those who bid for government contracts to submit a Certificate of Independent Bid Determination (CIBD).

CIBD rules typically require each company submitting a bid to sign a statement that it has not agreed with its competitors about bids, that it has not disclosed bid prices to any of its competitors and that it has not attempted to convince a competitor to rig bids. Samples of CIBD from Canada and the United States are enclosed in Annex 1.

CIBDs may make bid-rigging conspiracies less likely because:

- They inform bidders about the illegality of bid rigging and also signal that the procurement officials are alert to the issue of collusion;
- They may make prosecution of bid riggers easier;
- They add additional penalties, including possibly criminal penalties, for the filing of a false statement by the conspirators; and
- They make prosecution of a firm that attempts to rig bids possible, even when other bidders do not agree, or cannot be proved to have agreed, to the proposed scheme.

We recommend IMSS to consider requesting a CIBD in all its future tenders. The exact wording of the certificate can be agreed with the CFC, within the cooperation agreement suggested under recommendation 5 above. SFP should also be involved in these discussions in order to ensure consistency with the Mexican legislative framework.

6.5 Overhaul of market studies

- 14. IMSS should consider changes to its planning procedures so that enough time is available to carry out informative market studies.**
- 15. IMSS should consider making changes to the way market studies are currently conducted so that a sufficient amount of information is collected from good-quality sources (possibly including international comparators) to inform the choice of the tender procedure to use as well as the level of reference prices.**

16. Information contained in the market studies should not be disclosed to bidders before the tender.

The Mexican Procurement Act requires public agencies to conduct a market study before starting *any* tender procedure (Article 26). The purpose of these market studies is to ascertain the prevailing market conditions (e.g. existence and number of suitable suppliers, whether they are Mexican or not, and an estimate of current prices) relating to the good or service to be procured.

These market studies are quite important. Indeed, according to Article 29 of the regulation implementing the Procurement Act, public agencies can use these studies for the following (among other things):

- To support the decision to group several goods or services in a single lot;
- To determine non-acceptable and maximum reference prices;
- To establish whether it is appropriate to use reverse auctions;
- To motivate the choice of the procurement procedure to be used (i.e. public tender as opposed to one of the two exceptions allowed by the Act);
- To determine if it is appropriate to apply one of the reserves included in the public procurement chapters of free-trade agreements signed by Mexico;
- To determine if it is appropriate to organise an international open tender, when the public agency is not required to do so by free-trade agreements and there are no Mexican suppliers or (if they exist) they are unable to satisfy the agency's needs (e.g. in terms of volumes or quality) or their price is not acceptable;
- To determine if it is appropriate to organise an international open tender, when there are no suppliers in Mexico or in countries with which Mexico has signed a free-trade agreement or (if they exist) they are unable to satisfy the agency's needs (e.g. in terms of volumes or quality) or their price is not acceptable.

IMSS acknowledges the importance of market studies in order to get “value for money” from its procurement efforts.

Indeed, the Institute is currently revising the way it conducts markets studies, which is a positive development. In particular, we welcome the creation of an independent dedicated unit responsible for market studies. We recommend that the review should address the following issues that seem to have arisen with market studies:

- We have been told that there is a certain lack of coordination between the planning and budgetary functions and procurement functions at IMSS. This is likely to result in market studies being done in a hurry and without having gathered sufficient information. Streamlining internal procedures and reducing the number of tenders (e.g. with multi-year tenders) should contribute to improve the effectiveness of market studies. In this respect IMSS is considering a plan, which is summarised in Box 3 below.
- Related to this, we also encourage IMSS to use as many sources as possible (including international comparators) to gather market intelligence. This intelligence is of key importance because, among other things, it is used to determine various reference prices and also which type of tender to use and whether to allow foreign bidders to participate. We understand that IMSS officials in some cases (e.g. in the latest procurement of medicines) go beyond the minimum requirements established by the Mexican procurement law and search for additional information to allow IMSS to get “best value for money” for its purchases.⁴³ This behaviour, and the associated strategic use of market studies to establish competitive maximum and minimum prices, should be praised and adopted more widely, together with information-sharing efforts with other agencies (see below).
- We have also been told that sometimes bidders ask for and are given information about reference prices before a tender (e.g. during the preliminary meeting to clarify doubts – *junta de aclaraciones*),

⁴³ IMSS provided evidence that for most of its purchases of pharmaceutical products it obtains better prices than other agencies in Mexico and also other countries. In this case IMSS also took into account the comments provided by SFP in the pre-tender stage.

although this may happen in agencies other than IMSS. IMSS should nevertheless take care that this leakage does not happen, because it gives an unfair advantage to some bidders and also reduces the competitive tension among bidders.

- In the extreme case, IMSS should consider outsourcing the preparation of the market studies to an external body (e.g. a specialised public agency) in order to improve their quality and reduce the risk of information-leakage. It appears that the division carrying out market studies at IMSS has recently gained independence from other divisions, which is a step in the right direction. IMSS should be vigilant that this independence is not merely formal, but substantive (e.g. by locating the unit responsible for market studies in a separate building and having it respond to the very senior management of the organisation).

Box 3: Key stages of IMSS' plan to streamline its internal procurement procedures

IMSS is currently considering to streamline its internal procurement procedures and organise them in 6 stages for a total duration of up to 22 weeks, as follows:

1. (2 weeks)

Planning and approval of procurement requirements;

2. (Up to 5 weeks)

Market investigation;

3. (2 weeks)

Definition of the procurement strategy, including modification of initial requirements, selection of tender mechanism and appointment of procurement officials;

4. (3 weeks)

Pre-tender stage;

5. (6 weeks)

Tender stage, including publication of the call for tender, holding of the clarification meeting, submission and opening of bids, and final decision;

6. (4 weeks)

Signing of the contract.

The duration of tenders who require the presence of social witnesses and/or SFP's prior advice is expect to be up to 29 weeks, according to IMSS' plan.

We also recommend that IMSS should consider the following options:

- Expanding the scope of the Market Studies Unit to include an ex-post assessment of procurement procedures in order to: 1) assess the efficacy specific procurements or groups of them, and 2) identify possible instances of collusion.
- Establishing the minimum content of an acceptable market study, which can then be used as a template in all tenders. This effort can be conducted in cooperation with the CFC, e.g. through the elaboration of a checklist.
- Consolidating certain information contained in market studies and making it available to all procurement units across IMSS in order to avoid duplicating efforts. The more comprehensive and detailed market studies should then be relied upon in regional/local procurements to inform and provide better justification for evaluation of the market for a specific procurement – i.e., the number of bidders available, the effect of transportation or distribution costs, etc.
- Sharing ex-post assessments with the CFC (and SFP) to achieve more competition and efficiency in future procurements.

6.6 Monitoring and information-sharing activities

17. IMSS should regularly and proactively monitor the number of bidders for each macro-category of expenditure and check that such number does not fall below acceptable levels.

18. Related to this, IMSS should proactively investigate why bidders decide not to bid any longer and take appropriate actions to remove obstacles to participation.

We are aware that IMSS is considering setting up a monitoring unit specialised in procurement. We recommend that the proactive gathering and analysis of market intelligence should be part of the remit of this unit.

In particular, it is well known that the more bidders participate in a tender procedure, the more difficult it is for some of them to collude. It is important therefore that IMSS proactively checks that several suppliers regularly bid in its tenders and, if such number falls below acceptable limits, investigate a) whether

it is possible to replace exiting bidders with other potential entrants (including from abroad), and b) why bidders have decided to exit the market and take remedial actions (e.g. by lowering participation costs).

19. IMSS should maintain a comprehensive dataset for all its tenders and make it available to CFC in a format which allows data to be easily analysed, so that any suspicious bidding pattern may be promptly investigated.

We are aware that IMSS and CFC have cooperated in the past and this cooperation has led to the successful prosecution of cartels in the pharmaceutical sector.

We think that a useful element in this ongoing cooperation would be a comprehensive dataset of tender data which would make it easier to detect any suspicious bidding pattern. In the case of electronic tenders, this information should, for example, include the IP addresses used by the various bidders.

We are aware that IMSS is currently working to improve the transparency portal on its website. While this effort is positive, IMSS should nevertheless discuss with the CFC the best way to exchange tender data between the two organisations. The specific purpose of this data exchange should be to allow the CFC to carry out statistical analysis in order to detect suspicious bidding patterns and act promptly.

20. IMSS should proactively engage in a systematic dialogue with other public agencies (e.g. through a consultation mechanism), in order to share best practices, views about suspicious bidding behaviour and market intelligence (e.g. price information, identity and provenience of suppliers)

In addition to exploring opportunities to consolidate purchases with other agencies, we think that it is important for IMSS to proactively engage in a systematic dialogue with other public agencies (e.g. through a consultation mechanism), in order to share best practices, views about suspicious bidding behaviour and market intelligence (including price information, identity and provenience of suppliers).

The main purpose of this cooperation is twofold:

- To avoid becoming victims of a systemic collusion, e.g. by discussing common “red flags” and opportunities to contact the completion authority;
- To ensure that IMSS pays prices which are in line with those paid by other agencies (even abroad, especially for standardised goods, e.g. generic medicines) and is attracting a sufficient number of qualified bidders.

In this respect, it should be noted that IMSS’ and other agencies’ procurement officials already routinely use COMPRANET (and indeed are required to do so by the law) to check the price they pay for the goods and services they procure. We recommend, however, that IMSS adopts a more proactive and systematic approach to exchange data (including price information) with other agencies in order to obtain better “value for money” from its purchases.

21. IMSS should set up clear procedures and reporting lines for its procurement staff to report any suspicious instance of collusion during tenders. Reporting procedures should take into consideration the need, in certain circumstances, to keep confidential the identity of the procurement official.

IMSS may also want to consider – jointly with the CFC – whether an anonymous hotline is the most effective way for IMSS procurement officials to report suspicious bidding behaviour.

In this respect, it would be important to communicate to procurement officials that, when there are suspicious instances of collusion during tenders, it is not their conduct which is under scrutiny and they are not to be blamed in any way for reporting such instances.

6.7 Training activities

22. IMSS should implement a training program for its procurement staff focusing on bid rigging and ways to fight it.

As part of the Memorandum of Understanding signed by the OECD, CFC and IMSS in January 2011, more than 200 members of IMSS’ staff involved in procurement – both from local delegations and central headquarters – attended

in May 2011 a two-day training session on how to fight collusion in public procurement.

The training saw the participation of international competition experts (in addition to staff from the OECD and CFC) and included (among others) presentations on bid rigging, how it is dealt under the Mexican competition law, the OECD's Guidelines and international examples as well as discussions of the "red flags" which should alert procurement officials of possible bid rigging conspiracies. Participants also had the opportunity to participate in hypothetical exercises to gain hands-on experience of these issues.

We recommend that IMSS – in cooperation with the CFC – should continue to organise this type of training for its staff, as part of its ongoing commitment to fight bid rigging in its tenders. The training program should also reflect lessons learned from previous initiatives and include case studies of actual tenders.

CHAPTER 7: FOLLOW-UP ACTIONS

IMSS was provided with an Interim Report containing preliminary recommendations in June 2011. Following such report, and in addition to the ongoing actions to fight bid rigging in its procurement procedures (described throughout Chapter 6), IMSS has been considering further actions to implement the OECD recommendations.

These actions are listed below using the same grouping used structure in Chapter 6.

7.1 Further opportunities to exercise buyer power

IMSS has committed to explore further opportunities to make the best use of its significant buyer power in addition to those it has been undertaking since 2006 (e.g. consolidation of purchases and use of multi-year contracts).

One example of these additional actions is that IMSS will in future adopt “regional consolidation” for certain purchases which is difficult or not feasible to consolidate at the central level. In this way it will increase effective procurement expertise among its procurement officials at a regional level and also encourage the formation of strong regional suppliers (which may eventually grow and become national players).

For certain other purchases IMSS will increase the scope of consolidation at the central level. Lastly, IMSS will also endeavour to attract additional bidders and thus increase the number of possible suppliers.

7.2 Coordination with SFP, the CFC and adoption of best practices

IMSS is considering several actions to increase its cooperation with SFP and the CFC as well as to adopt best practices to fight bid rigging. These include:

1. Signature of an agreement with the CFC, in order to obtain prior focused advice on tender design.

The agreement will also cover the assistance which the CFC can provide to IMSS in relation to: statistical analysis of bidding data (in order to detect suspicious patterns); improvements in the elaboration of market studies; exchange of experiences; and specific training on fighting bid rigging for procurement officials.

2. Strengthening of requirements and guidelines to elaborate the technical specifications of goods and services to be procured (with related training offered to procurement officials), in order to avoid ambiguity and limit participation of possible suppliers.
3. Optimisation of administrative procurement procedures (to be conducted by a specialised unit within IMSS), in order to increase efficiency and transparency as well as to encourage participation of additional bidders.
4. Planned reduction in the number of occasions where suppliers are brought together and of meetings with suppliers' representatives. Where a meeting is called, this will have a clear and set-in-advance agenda.
5. Proposed adoption of remote electronic tender procedures, which will be facilitated by the optimisation of administrative procurement procedures (see above).

7.3 Fighting practices which may facilitate collusion

While the scope of its action in this area is to some extent restricted by the current legislative framework, IMSS has nevertheless committed to endeavour the following:

1. To consider on a case-by-case basis whether it is appropriate to allow joint bidding and splitting of contracts among multiple suppliers, on the basis of the OECD's recommendations included in Chapter 6, the CFC's advice and the results of the market investigation.

Such analysis will also allow to determine in which cases limiting joint bidding and contract-splitting may jeopardise security of supply, e.g. in the case of medicines.

2. While the Mexican procurement legislation is silent in respect of subcontracting, IMSS sees no problem in imposing on bidders the disclosure requirements described in Chapter 6 above, namely in Recommendation 8.
3. IMSS will take care that the formulation and publication of its annual procurement plan does not encourage bid rigging, in line with Recommendation 9 of Chapter 6 above and on the basis of CFC's advice. At the same it will strive that such information promotes mutually beneficial relationships between IMSS and its suppliers.

7.4 Increased use of competitive mechanisms

IMSS intends to make an increased use of competitive actions by taking the following actions:

1. Consolidation at the regional level.

At present 95 percent of the medicines bought by IMSS are purchased at the central level through public tenders. For the first time, however, within the remaining 5 percent IMSS will identify products for which historically there has been no suitable supplier at the national level and organise regional tenders (instead of using direct awards, for example). In this respect, IMSS plans to organise 5 regional tenders to supply its 60 local distribution points. This new policy will also be adopted for other pharmaceutical products and services.

Together with the optimisation of administrative procurement procedures, this will facilitate procurement planning so that it will make it easier to organise public tenders rather than one of the two exceptions allowed by the law. Indeed, the intention is to use an exceptional procedure, namely direct award, only for medicines which are still protected by a patent.

2. Strengthening of the division in charge of elaborating market studies, with a special emphasis on the elaboration of technical specifications.

This will make it easier to determine of which type a tender should be (i.e. national or international) on the basis of the results of the market investigation and reduce at the outset the risk that a tender is declared void because no suitable supplier participates.

3. As part of its efforts to streamline the procurement process, IMSS will elaborate a timeline for a typical tender.

The duration assigned to each tender ideally will not exceed 22 weeks and will include the following stages: i) Planning and approval of procurement requirements (2 weeks); ii) Market investigation (5 weeks); iii) Definition of the procurement strategy (2 weeks); iv) Pre-tender stage (3 weeks); v) Tender stage, including publication of the call for tender, holding of the clarification meeting, submission and opening of bids, and final decision (6 weeks); and vi) Signing of the contract (4 weeks).

The duration of tenders who require the presence of social witnesses and/or SFP's prior advice is expect to be up to 29 weeks, according to this plan.

4. IMSS will start the procedure allowing it to require bidders to submit a Certificate of Independent Bid Determination (CIBD), in line with Recommendation 14 in Chapter 6 above.

7.5 Overhaul of market studies

IMSS has elaborated a detailed plan to implement the OECD's Recommendations in this area. Specifically, IMSS intends to adopt the following actions:

1. In addition to strengthening the division in charge of elaborating market studies, IMSS has so far been seeking the advice of specialist consulting firms in the case of specific tenders. This practice has produces valuable results and will be continued in the future.
2. Depending on the type of goods or service to be procured, IMSS will consider to solicit information beyond the minimum requirements established in the procurement legislation, e.g. price information from foreign suppliers.

These additional efforts will also be made for the regional tenders described above.

3. Make efforts to keep the results of market investigations confidential until a tender process is concluded.

7.6 Monitoring and information-sharing activities

IMSS has elaborated a detailed plan to implement the OECD's Recommendations in this area. Specifically, IMSS intends to adopt the following actions:

1. Strengthening of the division in charge of elaborating market studies, so that it has an adequate number of staff with suitable expertise to undertake follow-up enquiries about suppliers.
2. Establish a procedure to identify and detect issues relating to suppliers' participation.
3. Seek the CFC's advice on how to best organise a database containing bidding data which is suitable for statistical analysis.
4. Make further efforts to promote monitoring and information-sharing activities within IMSS and between IMSS and other stakeholders (e.g. other procuring agencies, SFP, and social witnesses).
5. Establish a mechanism which allows procurement officials to report suspicious bidding patterns and possible bid rigging, following specific training organised together with the CFC.

7.7 Training activities

In addition to the training sessions already provided by the OECD in cooperation with the CFC in May 2011, IMSS intends to approach the CFC in order to plan and organise additional ongoing training for its procurement officials on how to fight bid rigging.

ANNEX 1: CERTIFICATE OF INDEPENDENT BID DETERMINATION

Certificate of Independent Bid Determination

(Canada)

I, the undersigned, in submitting the accompanying bid or tender (hereinafter “bid”) to:

(Corporate Name of Recipient of this Submission)

for: _____

(Name and Number of Bid and Project)

in response to the call or request (hereinafter “call”) for bids made by:

(Name of Tendering Authority)

do hereby make the following statements that I certify to be true and complete in every respect:

I certify, on behalf of: that:

(Corporate Name of Bidder or Tenderer [hereinafter “Bidder”])

1. I have read and I understand the contents of this Certificate;
2. I understand that the accompanying bid will be disqualified if this Certificate is found not to be true and complete in every respect;
3. I am authorized by the Bidder to sign this Certificate, and to submit the accompanying bid, on behalf of the Bidder;
4. each person whose signature appears on the accompanying bid has been authorized by the Bidder to determine the terms of, and to sign, the bid, on behalf of the Bidder;
5. for the purposes of this Certificate and the accompanying bid, I understand that the word “competitor” shall include any individual or organization, other than the Bidder, whether or not affiliated with the Bidder, who:
 - a. has been requested to submit a bid in response to this call for bids;
 - b. could potentially submit a bid in response to this call for bids, based on their qualifications, abilities or experience;
6. the Bidder discloses that (check one of the following, as applicable):
 - a. the Bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with, any competitor;
 - b. the Bidder has entered into consultations, communications, agreements or arrangements with one or more competitors regarding this call for bids, and the Bidder discloses, in the attached document(s), complete details thereof, including the names of the competitors and the nature of, and reasons for, such consultations, communications, agreements or arrangements;
7. in particular, without limiting the generality of paragraphs (6)(a) or (6)(b) above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:
 - a. prices;

- b. methods, factors or formulas used to calculate prices;
 - c. the intention or decision to submit, or not to submit, a bid; or
 - d. the submission of a bid which does not meet the specifications of the call for bids; except as specifically disclosed pursuant to paragraph (6)(b) above;
8. in addition, there has been no consultation, communication, agreement or arrangement with any competitor regarding the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates, except as specifically authorized by the Tendering Authority or as specifically disclosed pursuant to paragraph (6)(b) above;
9. the terms of the accompanying bid have not been, and will not be, knowingly disclosed by the Bidder, directly or indirectly, to any competitor, prior to the date and time of the official bid opening, or of the awarding of the contract, whichever comes first, unless otherwise required by law or as specifically disclosed pursuant to paragraph (6)(b) above.

(Printed Name and Signature of Authorized Agent of Bidder)

(Position Title) (Date)

Certificate of Independent Price Determination (April 1985)
(United States)

1. The offeror certifies that—
 - (1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to—
 - (i) Those prices;
 - (ii) The intention to submit an offer; or
 - (iii) The methods or factors used to calculate the prices offered.
 - (2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and
 - (3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

2. Each signature on the offer is considered to be a certification by the signatory that the signatory—
 - (1) Is the person in the offeror's organization responsible for determining the prices being offered in this bid or proposal, and that the signatory has not participated and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; or

- (2) (i) Has been authorized, in writing, to act as agent for the following principals in certifying that those principals have not participated, and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this provision _____ [insert full name of person(s) in the offeror's organization responsible for determining the prices offered in this bid or proposal, and the title of his or her position in the offeror's organization];
- (ii) As an authorized agent, does certify that the principals named in subdivision (b)(2)(i) of this provision have not participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; and
- (iii) As an agent, has not personally participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision.
3. If the offeror deletes or modifies paragraph (a)(2) of this provision, the offeror must furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure.

**ANNEX 2:
LIST OF AREAS FOR IMPROVEMENT IN THE
PROCUREMENT LAWS AND REGULATIONS**

Procurement procedures
<p>1. Current procurement rules on bidders' participation can be discriminatory towards foreign bidders and limit their possibility of selling goods and services in Mexico. IMSS and other public agencies would therefore likely benefit if current restrictions to participation were abolished and all qualified bidders, irrespective of their nationality, could participate.</p>
<p>2. An excessive use by public agencies of the “de minimis” exception under article 42 of the Procurement Act may result in competition being unnecessarily restricted and “value for money” not achieved for these purchases. A review of the use by public agencies of this exception would be useful.</p>
<p>3. The use of remote procurement procedures could be further promoted.</p>
Public notice and publicity requirements
<p>4. The mandatory requirement to hold a clarification meeting for each call for tender may represent for bidders an opportunity to exchange sensitive information or reach a collusive agreement.</p>
<p>5. Current disclosure requirements (e.g. relating to the identities of bidders and the value of the bids they submit) can facilitate bid rigging and could be accordingly eliminated or substantially circumscribed.</p>

Joint bids and compliance with competition law
6. In the current practice, the fact that joint bidders are not required to specify the purpose and merits of submitting a joint bid may facilitate the implementation of a collusive agreement.
7. Collusion would be made more difficult if IMSS and other public buyers could require bidders to submit a “Certificate of Independent Bid Determination” in addition to the “Integrity Statement” required by article 29 subpart IX of the Procurement Act.
8. Disclosure requirements imposed on bidders would make it more difficult to use sub-contracting as a mechanism to implement collusion.
Market studies
9. In order to reduce differences in the quality of market studies within the Mexican public administration, best practices should be actively disseminated.
Prices and margins of preference
10. At present Mexican bidders are granted preferential treatment in the evaluation of bids. This limits the possibility for IMSS and other public buyers in Mexico to obtain the best prices.
Criteria to award a contract
11. The requirement that IMSS and other public buyers in Mexico cannot accept bids below the minimum threshold represented by the convenient price may limit their ability to obtain the best value from their purchases.
12. The possibility of splitting a contract among multiple suppliers may facilitate collusion.
Penalties, guarantees and rescission of contracts
13. The current procurement laws and regulations provide a weak framework for penalties related to fulfilment of a contract. In particular, with the current provisions providers’ strategic choice of partial fulfilment of a contract is relatively cheap.

**ANNEX 3:
LIST OF AREAS OF IMPROVEMENT IN IMSS' PROCUREMENT
PRACTICES**

Further consolidation of purchases
<p>1. IMSS should explore additional opportunities to make the best use of its significant buyer power by:</p> <ul style="list-style-type: none"> a. Further consolidating purchases among its local centres; b. Using multi-year tenders where appropriate (e.g. for generic medicines which have already lost patent protection since several years – i.e. for which the number of eligible suppliers is now fairly stable); c. Procuring goods and services jointly with other government agencies; and, d. Attracting the interest and sponsoring the entry of new suppliers.
Coordination with SFP, the CFC and adoption of best practices
<p>2. IMSS should coordinate its procurement procedures with SFP not only at the stage of requesting social witnesses, but also earlier in the procurement cycle by requesting advice on how to best design the procurement and structure the tender.</p>
<p>3. IMSS should make more efforts to promote among its staff the adoption of best practices in procurement and the use of standardised tender documents and procedures as described in SFP's procurement manual.</p>
<p>4. IMSS should adopt remote and electronic tender procedures for all its purchases and at all stages of the procurement process.</p>
<p>5. IMSS should seek to expand its cooperation with the CFC and possibly make it more formal, e.g. by signing a protocol.</p>

Fighting practices which may facilitate collusion
<p>6. IMSS' calls for tender should make it clear that joint bids are allowed only when there are pro-competitive justifications, e.g.:</p> <ul style="list-style-type: none"> a. Two or more suppliers active in different markets providing a single integrated service which none of them could supply independently; b. Two or more providers active in different geographic areas submitting a single bid for the whole of Mexico; or c. Two or more providers combining their capacity to fulfil a contract which is too large for each of them individually.
<p>7. IMSS should split a single contract among multiple suppliers only in exceptional circumstances, e.g. to allow new entrants to gain a presence in the market. In cases where security of supply is a concern, IMSS should consider either repackaging the contract into smaller lots and assigning each of them to a single provider (which can be feasible for smaller players) or consolidating purchases (in order to attract additional large bidders), rather than simply awarding the same contract to multiple suppliers.</p>
<p>8. In order to deter the use of sub-contracting as a mechanism to implement collusion, IMSS should require bidders to: i) disclose up-front (i.e. in the bidding documentation submitted to IMSS) the intention to use sub-contractors; ii) clearly identify these subcontractors; and, iii) explain why sub-contracting is necessary for the proper performance of the contract.</p>
<p>9. Within the limits imposed by the law, IMSS should assess whether the amount of information which is published in its annual procurement plan, and its level of detail, may facilitate collusion.</p>
Increased use of competitive mechanisms
<p>10. IMSS should limit the use of exceptions to public tenders (c.f. Articles 41 and 42 of the Procurement Act).</p>

<p>11. In general, IMSS should always opt for opening up participation in a procurement procedure as fully as possible. Related to this, whenever a national tender is declared void, IMSS should open the tender to non-Mexican suppliers rather than using an exception to public tender.</p>
<p>12. IMSS should change tender mechanisms, timing of tenders and extent of consolidation in a way which makes collusion more difficult to emerge or to continue existing.</p>
<p>13. IMSS should consider requiring a Certificate of Independent Bid Determination (CIBD) to accompany all tenders.</p>
<p>Overhaul of market studies</p>
<p>14. IMSS should consider changes to its planning procedures so that enough time is available to carry out informative market studies.</p>
<p>15. IMSS should consider making changes to the way market studies are currently conducted so that a sufficient amount of information is collected from good-quality sources (possibly including international comparators) to inform the choice of the tender procedure to use as well as the level of reference prices.</p>
<p>16. Information contained in the market studies should not be disclosed to bidders before the tender.</p>
<p>Monitoring and information-sharing activities</p>
<p>17. IMSS should regularly and proactively monitor the number of bidders for each macro-category of expenditure and check that such number does not fall below acceptable levels.</p>
<p>18. Related to this, IMSS should proactively investigate why bidders decide not to bid any longer and take appropriate actions to remove obstacles to participation.</p>
<p>19. IMSS should maintain a comprehensive dataset for all its tenders and make it available to CFC in a format which allows data to be easily analysed, so that any suspicious bidding pattern may be promptly investigated.</p>

20. IMSS should proactively engage in a systematic dialogue with other public agencies (e.g. through a consultation mechanism), in order to share best practices, views about suspicious bidding behaviour and market intelligence (e.g. price information, identity and provenience of suppliers).

21. IMSS should set up clear procedures and reporting lines for its procurement staff to report any suspicious instance of collusion during tenders. Reporting procedures should take into consideration the need, in certain circumstances, to keep confidential the identity of the procurement official.

Training activities

22. IMSS should implement a training program for its procurement staff focusing on bid rigging and ways to fight it.