A Competition Agenda towards Integrity in Public Procurement

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Federal Economic Competition Commission

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Introduction

The goal of public procurement, from large infrastructure projects to small purchases, is to provide the State with the best inputs to carry out its constitutional and legal functions. In this sense, it is a powerful tool for the fulfillment of public objectives, insofar as public resources are maximized, and the provision of public goods and services of the highest possible quality are ensured.

Thus, regulation of public procurement must lay the foundations to achieve the best conditions for the public acquisition of goods and services, as well as in contracting for public works. Competition is an ally in achieving the best possible conditions for procurement processes.

The design of procedures should be targeted at: i) *achieving the highest possible number of bidders*, that is, avoiding artificial limits on the number of tenderers, as well as other limits, such as unnecessary technical requirements, the use of methods other than open public tenders, or limiting participation to certain firms, among others; ii) *fostering intense competition among market participants*, i.e., promoting the presentation of aggressive price positions and avoiding rules that favor some participants over others; and iii) *reducing spaces for the creation and maintenance of collusive agreements*. Likewise, administrative efficiency should be privileged in the implementation and monitoring of procurement procedures.

Mexico's public procurement reality is complex. In 2017, more than 228 thousand public contracts were awarded, with a value exceeding 585 billion pesos. 78% of the contracts were awarded directly, 10% through an invitation to at least three bidders, and only 12% through a public tender.[1]

A more detailed analysis of this data shows that, in practice, seeking greater market access and competition is not the rule. As the value of a contract increases, the importance of awarding it through a public tender procedure also increases (as this method maximizes competition and free market access). However, of the 35, 739 contracts valued over one million pesos (with a total value of 553 billion pesos), 11, 882 (33%) were awarded directly (for a total amount of 179.4 billion pesos), and 10, 292 contracts (29%) were awarded through an invitation to at least three bidders (for a total of 53.3 billion pesos). This implies that 232 billion pesos were awarded in contracts valued above one million pesos and through contracting mechanisms other than public tenders.

1. As for the values of the contracts, 29% correspond to direct awards, 10% to an invitation to at least three bidders and 60% to public tenders.

Table 1. Percentage of Contracts per Type of Procedure.

Type of procedure	All contracts	Contractsvalued at more than one million pesos
Directly Awarded	**78%**	**33%**
Invitation to at least three bidders	**10%**	**29%**
Open public tender	**12%**	**38%**

Source: compiled by COFECE using CompraNet data.

Conversely, in purchases of lower monetary value, the administrative cost of carrying out public tenders becomes relevant, since it could represent a high percentage of the resources that will be disbursed with the purchase. Therefore, regulation considers direct awards for these types of contracts. Of the 228 thousand procurement procedures registered in 2017, 69%, or 157 thousand contracts, corresponded to contracts award directly for amounts less than 500 thousand pesos each, and 8%, or 20 thousand contracts, for amounts less than one hundred thousand pesos.[2] Although direct award contracts reduce administrative costs, they do not ensure that the State is purchasing under the best possible price, quality, and opportunity conditions. Therefore, it is also important to implement mechanisms based on international best practices (for example, online markets[3]) to ensure the best procurement terms of purchases of lower monetary value without compromising administrative efficiency.

Lack of competition in public procurement procedures is associated with the inefficient use of public resources. It could result in the acquisition of products or services at higher prices than those procured competitively, with superfluous or excessive technical specifications, of a lower quality than required, with hidden defects or which may even prove unusable. The inefficiencies resulting from the lack of competition in public procurement may be due to:

- The use of methods other than public tenders justified ambiguously or subjectively.
- The restriction of participation through unnecessary requirements.
- Granting advantages to certain agents with certain technical specifications or other criteria.
- The reduction of incentives to present competitive bids.
- Fostering bid rigging.

2. CompraNet (2017). *Reporte de los datos relevantes de los contratos ingresados a CompraNet que iniciaron vigencia en el año 2017*. Available in Spanish at: https://sites.google.com/site/cnetuc/contrataciones. For purchases in currency different than Mexican Pesos, different average annual exchange rates were used, accessed on June 7, 2018. Available at: bit.ly/2LbQNRP. Contracts that provide information are classified as per type of procedure. Federal Public Administration (APF as per its initials in Spanish) and state government contracts are considered.
3. Online markets are described further below in this document.

Thus, the existence of competition in a procurement procedure depends mainly on two factors: 1) the design of calls and procedures —which in turn depend on the regulatory framework— and 2) institutional incentives for the correct enforcement of regulations.

Given the diverse nature of public tenders (according to the types of goods and services acquired, the frequency with which they are carried out, the sum or quantity of the purchase, the complexity of goods, services or public works projects, the degree of certainty at the time of procurement, the characteristics of the bidders that participate in said market, among many other aspects), the legal framework for public procurement should provide the flexibility to carry out differentiated processes as well as the necessary controls to avoid private agents and public officials from hindering competition and free market access.

With this document, the Federal Economic Competition Commission (COFECE or Commission) will present recent lessons learned in the fulfillment of its functions, related to competition problems detected in public procurement processes, as well as proposals for action, both in the administrative and regulatory sphere, to effectively promote competition and free market access in said economic activity.

Box 1. A vicious cycle: corruption and lack of competition in public procurement

COFECE is not the competent authority in anti-corruption matters. However, specialized literature shows that efforts to increase competition in public procurement can —indirectly yet significantly— help fight corruption.[4] Competition problems that arise in public procurement can result from, and in turn feed, acts of corruption between individuals and public officials, and have subsequent (and permanent) effects on the competitive dynamics of markets.

When a public official favors certain participants or gives them undue advantages through the use of privileged information in exchange for bribes, she generates extra-normal profits for the economic agent who is awarded the contract at artificially high prices. This in turn facilitates the payment of further bribes in exchange for continuing to be favored in the award process, generating a vicious cycle between corruption and lack of competition, in which the public official can direct the procurement process at providing certain agents success and/or facilitate collusive agreements that violate the Federal Economic Competition Law (LFCE as per its initials in Spanish). Thus, corruption may in turn limit free market access and/or exacerbate lack of competition.

Moreover, when there are acts of corruption in a procurement process, the winner is not determined by the efficiency of the company. If the growth of a firm is contingent upon being awarded public contracts through acts of corruption and not because of its efficiency, it could jeopardize the permanence of other competing companies that, albeit more efficient, must exit the market as they do not sell enough to afford to stay in business. Thus, the firm that grew by selling dishonestly to the government obtains the power to increase its prices to its consumers, both public and private, as they no longer face competition. Therefore, corruption may generate a permanent situation of lack of competition in a market beyond public procurement alone.

Conversely, when a public tender is designed to foster competition, overpricing, favoritism, and undue influence peddling is restricted, thus preventing the formation of collusive agreements aimed at extracting illicit profits through complicity between purported competitors, or a bidder and a public official, to the detriment of the public budget and societal welfare.[5]

4. See OECD (2010). *Collusion and Corruption in Public Procurement*. Available at: bit.ly/2abxvZR.
5. COFECE (2018). *Economic Competition, A Platform for Growth, 2018-2024*. Available at: https://goo.gl/zr2xVc.

Lessons in public procurement learned by COFECE

COFECE is the body responsible for guaranteeing competition in the country's markets with the purpose of boosting economic growth and consumer welfare.[6] In the exercise of its powers, it investigates absolute monopolistic practices (collusive agreements) in public procurement, that is, agreements between competitors to: i) establish, arrange or coordinate positions in procurement procedures, as early as the market study stage; ii) segment markets by zones, public buyers or products, or alternate the awarding of contracts among certain economic agents; iii) restrict supply, for instance by refraining from participating in certain tenders in exchange for being subcontracted by the winner; among others.

During the past year, COFECE carried out the following investigations for the possible commission of absolute monopolistic practices (collusion) in public sector procurement procedures:[7]

- In the case of *media monitoring*, COFECE fined two firms and one individual more than 7 million pesos for coordinating their bids and market quotations in invitation procedures to at least three bidders and in direct awards. It was estimated that the prices paid were on average 14.5% higher, causing 3 million 144 thousand 865 pesos in damage to the treasury.
- Regarding *latex gloves*, COFECE fined five companies and eleven individuals more than 257 million pesos for segmenting the market by zones. It was estimated that the overcharges in these public tenders were on average 34%, causing 174 million 80 thousand pesos in damages.

6. COFECE is an autonomous body with its own legal personality and patrimony, its purpose is to protect and guarantee competition and free market access, as well as to prevent, investigate and combat monopolistic practices, unlawful concentrations and other restrictions to the efficient functioning of markets, except in the case of telecommunications and broadcasting (which fall under the purview of the Federal Telecommunications Institute).
7. See resolutions in Spanish on latex gloves (file DE-024-2013-I), condoms and catheters (file DE-024-2013) and media monitoring (file I0-006-2015) at: bit.ly/2Jghsef.

- Concerning *condoms and catheters*, COFECE fined five firms and seven individuals a total of 113 million pesos for simulating competition with the purpose of artificially increasing the maximum reference prices (PMR as per its initials in Spanish)[8] and segmenting the market by product. The conducts resulted in overcharging that caused the treasury damages to the tune of 177 million, 67 thousand, 392 pesos.
- COFECE initiated an investigation for possible collusion in the purchase of *polyethylene gloves*. Among others, the objective cause to initiate was the increase in prices observed in bids (37% in 2011, and 43% in 2012). During the investigation it was found that most of the shares of the two companies investigated belonged to shareholders that were directly related through family ties. Given that being directly related does not constitute one of the assumptions contemplated in public contracting regulations for conveners to refrain from receiving proposals, their separate participation was not prohibited.[9] However, due to the fact that the two companies were part of the same economic interest group (EIG), it was not possible to prove that they were competitors in the tenders investigated, which is a condition for the existence of collusion in terms of the LFCE.[10] Therefore this file was closed in 2014, without an accusation. Nevertheless, a simulation of competition could have occurred to manipulate and jointly raise the prices of the products that were acquired.[11]

Several cases related to possible collusion in public procurement in various markets such as public works services on the Cuernavaca-Acapulco highway, steel, medicines, laboratory studies and blood banks, toothbrushes, watthorimeters and debt bonds are currently under investigation. Approximately one in three cases investigated for collusion is related to public procurement.

8. The use of maximum reference prices in public tenders is stipulated in articles 29, 38 and 80 of the Buying of Goods, Leasing and Rendering of Services of the Public-Sector Law. It is a variation of traditional public tenders, in which the maximum price that the convener is willing to pay for the good or service subject to the procurement process is set by the public entity issuing the call. The maximum reference price is set based on the information obtained in the market research; from said price, bidders must offer a discount percentage as part of their proposal, which will be subject to evaluation. Available in Spanish at: bit.ly/2NJshZW.
9. Regulation only contemplates the case of refraining from accepting proposals in the same item of a good or service in a procurement process in which two or more individuals that are linked through a common partner or associate.
10. See resolution in Spanish in file DE-020-2014, available at: bit.ly/2uqSXp8.
11. A definition of Economic Interest Group is offered in a subsequent section.

In addition to corrective powers, COFECE advocates for an improved design of procurement procedures. As such, COFECE has collaborated with different public agencies to improve the design of its procurement processes, to foster competition and free market access and therefore obtain the best procurement conditions. In 2016, COFECE published *Recomendaciones para promover la competencia y libre concurrencia en la contratación pública** to aid this endeavor.[12] It also carries out efforts to identify legal precepts in the framework that regulate public procurement that could hinder competition and free market access.

The lessons learned from the work carried out by the Commission in recent years in the fight against collusion and in advocating for procompetitive principles in public procurement are summarized below.

** Translators note: in English,* Recommendations to Foster Competition and Free Market Access in Public Procurement.

12. COFECE (2015). *Recomendaciones para promover la competencia y la libre concurrencia en la contratación pública*. Available in Spanish at: bit.ly/2KPoRXK.

Collusion may occur from the onset of market research

The stages of a procurement procedure are: planning, programming and budgeting; the design of requirements and participation rules; the tender process; and the post-bidding stage, which includes the formalization of the contract, follow-up and, in some cases, modifications or extensions. In each of these stages there may be aspects and practices that foster or hinder competition.

Market research plays a crucial role in the planning process, as the convener acquires the necessary information on the market structure to make better decisions about the procedure to be chosen, requirements, technical characteristics of the goods and services to be procured, as well as the estimated price based on the information collected, among other relevant aspects.[13] Therefore, it is important to carry out market research in the most exhaustive, reliable and sound way possible.

It is important to bear in mind that certain companies may manipulate the proposals presented in the market research stage to achieve subsequent adjudications at prices higher than those that would prevail under competitive competitions. Companies might collude to fix, increase, arrange or manipulate prices proposed during the market research stage to establish an artificially high PMR. This could result in reduced participation due to the disqualification of certain participants for offering "abnormally low" prices.[14] Firms might also coordinate to avoid a large number of firms from participating by prompting the imposition of restrictions, technical or otherwise, therefore guaranteeing the award of contracts to specific agents. The former may be facilitated by acts of corruption.

The cases of media monitoring, condoms and catheters, among others sanctioned by COFECE, resulted in the identification of firm coordination of positions as of the presentation of proposals during the market research stage.

13. *Ibid.*
14. Article 36 Bis of the *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* (LAASSP as per its initials in Spanish, in English: Law of Procurement, Leasing and Services for the Public Sector; translator's note) stipulates the possibility of discarding prices below the "convenient price", in other words, the average price of the bids accepted technically in a tender, from which a percentage determined in the agency or entity's policies, basis and guidelines is subtracted.

Public tender design as the best means to promote competition and free market access

The adequate design of a procurement process is the best way to encourage the participation of as many companies as possible and foster an intensely competitive process for the award of a contract. The former results in contracting under the best quality, price, and opportunity conditions.

From a competition stance, the design of procurement procedures should —at minimum— include the following aspects: i) only the strictly necessary participation requirements, set forth in a transparent, objective and non-discriminatory manner; ii) the dissemination of information in a timely manner for participants to prepare their bids, avoiding the disclosure of information that facilitates the formation of collusive agreements; and iii) the use of objective criteria to qualify the technical and economic solvency of the quotes and the subsequent awarding of contracts. In general terms, a reduction of opportunities for discretionality and uncertainty throughout the procedure is essential, with the purpose of allowing economic agents to present bids based on the characteristics of the products/services offered and not the strategic anticipation of the behavior of the public official in charge of the tender.[15]

COFECE has the power to issue opinions on the design of procurement procedures. Certain laws or regulations require the Commission's opinion to foster competition in bidding procedures; for instance, the *Ley de Hidrocarburos* and the *Ley Reglamentaria del Servicio Ferroviario*.*[16] Likewise, the Commission issues opinions that promote competition at the behest of a party.

15. For further reference on recommendations for a pro-competitive design of the contracting procedures, see: COFECE (2015). *Recomendaciones para promover la competencia y la libre concurrencia en la contratación pública*. (In English: Recommendations to Foster Competition and Free Market Access in Public Procurement, translator's note) Available at: bit.ly/2KPoRXK.

* *In English,* Hydrocarbons Law and the Regulatory Law of the Railway Service*, translator's note.*

16. Article 9 of the *Ley Reglamentaria del Servicio Ferroviario* (Regulatory Railroad Service Law) establishes that concessions will be granted through public tender processes and that interested parties must have COFECE's opinion regarding their participation in said tender. For its part, Article 24 of the *Ley de Hidrocarburos* (Hydrocarbons Law) dictates that the bidding and awarding procedures for contracts for exploration and extraction must have COFECE's prior opinion, which will exclusively deal with the prequalification criteria and the awarding mechanism referred to in Article 23 of said ordinance. Additionally, it should be mentioned that the *Ley de la Comisión Federal de Electricidad* (in English: Federal Electricity Commission Law, translator's note) in its article 73 sets forth that the transfer of Power Plants between CFE subsidiary companies, or the merger between subsidiary companies that control *Centrales Eléctricas*, requires COFECE's authorization.

The Commission has identified several cases in which the design of the procurement procedure includes technical requirements that may reduce the number of participants and favor certain economic agents. For example, during the Mexico City Government 2017 procedure for the acquisition of garbage-disposal trucks, garages in the Metropolitan Area were required, as well as a 24-hour contact center with a Mexico City or Metropolitan Area address.[17] Similarly, participation in the procedure for the construction of the Metro-Bus Line 7 corridor, bidders were required to have an address within Mexico City or the Metropolitan Area.[18] A similar example is identified in the 2015 procedure convened by the Ministry of Public Education, for the acquisition of tablets which included, as a technical requirement, the Android 5.0 system as the only acceptable operating system.[19]

Along these lines, COFECE has identified that the design of the evaluation and adjudication mechanism of projects may also favor certain agents. For example, in 2015, COFECE issued recommendations on tender documents (guidelines, specifications, call to tender, contract, among others) for the construction of the Mexico-Queretaro high-speed train at the request of the *Secretaría de Comunicaciones y Transportes* (SCT as per its initials in Spanish, in English: Ministry of Communications and Transport, translator's note). The Commission identified that in order to evaluate solvency, the firm had to prove having built the largest length of high-speed rail tracks (corroborated, for instance, by means of the track assembly lengths, the construction of railway tunnels and overpasses, bridges, and the number of stations, among others). This could have benefited companies from countries whose size, demographics and socioeconomic characteristics favored the development of similar projects.

The Commission also identified that, in accordance with the terms of the pre-tender procedure, bidders would be awarded points for proposals that included the subtraction of a component called "Federal Government benefits", which had to be offered or supported by export promotion institutions of the country or countries from where goods for the project would be imported. This would have favored companies linked to a financing source that met the established criteria.[20]

17. The file for said procurement process is available in Spanish at: bit.ly/2KMaYcC.
18. The file for said procurement process is available in Spanish at: bit.ly/2urRzme.
19. File OG-002-2015.
20. Opinion OPN-001-2015 in Spanish is available at: bit.ly/2zuEBKk. It is noteworthy that, after the opinion was issued, the SCT confirmed 21 out of 23 of COFECE's recommendations would be taken into account. The project was later cancelled due to budgetary reasons. The press release is available at: bit.ly/2NJV8Nt.

COFECE regularly issues opinions on tender rules for the granting of concessions for Port Authorities (APIs as per its initials in Spanish),[21] maritime terminals and port facilities.[22] In recent years, COFECE has recommended: i) tender rules to specify that the rights derived from the contract will not be granted exclusively, therefore the API may enter into similar contracts with other economic agents that are not directly or indirectly related to the winner and its shareholders, for contracts with the same or similar purpose; ii) not stipulating technical, administrative and financial capacity requirements in tender terms and other documents that hinder competition; iii) avoiding the application of discretional and unfair criteria to determine the solvency of technical proposals; and iv) avoiding criteria that include more than one element, or which are based on the supply of one or more variable items over time, such as volume and/or monthly installments, or on points and percentages systems.

The Commission, through other channels of institutional collaboration, promotes the incorporation of competition principles in the design of tenders, which has generated significant savings for public institutions. Such is the case of cooperation with the *Instituto Mexicano del Seguro Social* (IMSS as per its acronym in Spanish, in English: Mexican Social Security Institute, translator's note), which, among other measures, led to consolidated purchases of medications, which resulted in savings estimated by IMSS at more than 3.175 billion pesos, in 2017-2018.[23]

This experience attests to the fact that a better design of public tenders as of the planning stage fosters competition and free market access among bidders, generating a more efficient use of resources, without compromising the achievement of sectoral objectives and commitments.[24]

21. The company holding a concession for the exploitation, use and development of public goods at ports, and maritime terminals, as well as for the construction work and the provision of port services, in accordance with the *Ley de Puertos* (in English: Port Law, translator's note).
22. The granting of concessions does not correspond to public procurement procedures regulated in the LAASSP and the *Ley de Obra Pública y Servicios Relacionados con la Misma* (LOPSRM as per its initials in Spanish, in English: Public Works and Related Services Act, translator's note), but they do involve bidding procedures. Therefore, the problems and recommendations on competition related to public procurement and concessions are complementary and enrich each other, and therefore are relevant to this document. The opinions are available in Spanish, at COFECE's Resolutions Finder at: bit.ly/2Jghsef.
23. The IMSS press release is available in Spanish at: bit.ly/2F8uF7l.
24. See in Spanish: COFECE (2016). *Recomendaciones para promover la competencia y la libre concurrencia en la contratación pública*. Available at: bit.ly/2KPoRXK.

Exemptions to competitive tendering hinder competition and are susceptible to collusion

Public tenders are generally the procurement method most favorable to competition and free market access and, therefore, the most efficient way to obtain the best possible conditions of quality, price and opportunity. Therefore, conveners should always privilege their use.

Both the *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* (LAASSP as per its acronym in Spanish, in English: Law of Procurement, Leasing and Services for the Public Sector, translator's note) and the *Ley de Obras Públicas y Servicios Relacionados con las Mismas* (LOPSRM as per its initials in Spanish, in English: Law of Public Works and Related Services, translator's note) consider methods of exemption to tenders: invitations to at least three bidders and direct awards. Said regulation stipulates that these methods may only be used in exceptional cases and when any of the cases established in said ordinances are met.[25] They also establish limits on the number of contracts that can be awarded without being subject to a public bidding procedure.[26]

The use of exemptions may be validly justified (such as for the purchase of goods with patents), or due to administrative efficiency criterion for low-cost purchases (for instance, the administrative cost of carrying out a tender exceeds possible savings). However, given the generality of the assumptions there could be an excessive use of these exemptions, and therefore should be restricted as much as possible. A clear example of the misuse of the exemption for national security issues is the purchase of boots for traffic officers' uniforms via direct award.

Therefore, it is necessary to examine the reason why said exemptions are used. That is, analyze what is purchased by institutions when they resort to these exemptions and what prevents them from convening a public tender. Additionally, the justifications used should be analyzed. This would make it possible to design specific solutions to address cases in which the use of exemptions responds to a specific problem and therefore leave

25. Article 41 and article 42 of the LAASSP and the LOPSRM, respectively.
26. Article 42 and article 43 of the LAASSP and the LOPSRM, respectively.

no other option but to convene a tender. Additionally, alternatives that reduce administrative costs of small purchases of homogeneous goods should be identified to favor the better use of public resources. Moreover, reducing administrative costs is not a justification for acquiring goods and services at higher prices or of a lower quality.

Regarding invitations for at least three to bid, in addition to restricting participation, this method may be used to disguise direct awards, through courtesy or shadow bids, which constitute a collusive agreement. That is, companies request unfeasible proposals from other competitors whom they subsequently subcontract as compensation. The former may be facilitated or instigated by public officials —even without obtaining bribes— with the purpose of expediting contracting, favoring violations of the LFCE.

In the *media monitoring* case sanctioned by COFECE, the firms involved manipulated prices in the proposals submitted in the market research stage, prior to the procurement procedures carried out through direct award or invitations to at least three bidders. The mechanism consisted in sending draft proposals or technical and economic proposals by a single company so that these documents were signed by their competitors and sent to the convening authorities.

Allowing for invitations to at least three bidders or for the direct award of contracts under broad assumptions, as is currently done, is the gateway to the abuse of these methods and facilitates collusion. Therefore, the possibility of using these exemptions must be reduced to a minimum.

Subcontracting as a mechanism for collusion

Subcontracting can be useful in the development of larger projects or to tap into the specialization of companies. However, it can also facilitate collusion, especially when it is allowed between competing companies, meaning they provide substitute products or services. This occurs because subcontracting may be used as a payment mechanism for collusive agreements.

For instance, COFECE's investigation in the case of media monitoring revealed that companies coordinated to present high proposals in order to ensure that the same company was always favored with the awarding of services. In return, the losing companies, participants of the collusive agreement, received from the winning company the benefit of being subcontracted to provide regional monitoring services.

Given that subcontracting is justified in diverse cases, its misuse must be avoided. Therefore, authorities require mechanisms that allow them to easily identify if the firm awarded the contract plans to subcontract part of the project, to whom and their reasons for doing so.

Firms belonging to the same economic interest group may simulate competition

An Economic Interest Group (EIG) is a group of individuals and/or legal entities that, despite having autonomous legal personality, have similar commercial and financial interests, and therefore coordinate their administrative, commercial, legal and corporate activities to achieve a common goal.[27]

The LAASSP and the LOPSRM establish that conveners will refrain from accepting proposals in the same budget line of a good or service in a procurement procedure from two or more individuals linked by a common partner or associate.[28] However, as long as a common partner or associate does not exist, two or more bidders belonging to the same EIG may submit bids separately in the same tender, even if they are related to each other and especially if they are jointly seeking to achieve a common goal. For instance, having the same legal representative, tax domicile, managers that are related to each other, or cases in which a "controlling company" may have multiple subsidiaries and the controlling company is not mentioned in the subsidiaries' bylaws, among other cases.

The presentation of multiple bids by a single EIG has anticompetitive effects when free access to a tender is hindered, when competitors are unduly displaced, or if it allows for the renegotiation bids to the benefit of firms belonging to the same EIG.

Firstly, when market research allows a convener to conclude that enough participants exist in a local market, regardless of the participants belonging to the same EIG, and other agents may be excluded from participating. This situation might lead to a local (in the case of some states*) or national tendering process, through which the participation

27. The *Suprema Corte de Justicia de la Nación*, (SCJN as per its initials in Spanish) Mexico's Supreme Court of Justice stipulated that an EIG is a group of individuals and/or legal entities that, despite having autonomous legal status, have similar commercial and financial interests, and therefore coordinate their administrative, commercial, legal and corporate activities to achieve a certain common objective. Source: *Grupo de interés económico. Su concepto y elementos que lo integran en materia de competencia económica*. Register: 168470. Instance: Tribunales Colegiados de Circuito. Type of thesis: Jurisprudence. Source: Semanario Judicial de la Federación y su Gaceta. Tome XXVIII, November 2008. Subject(s): Administrativa. Thesis: I.4o.A. J/66, Novena Época.
28. As per article 50 of the LAASSP and 51 of the LOPSRM, section VI, regarding the same procurement procedure, both laws deem a common partner or associate as individuals or legal entities recognized as such as per their articles of incorporation, bylaws or amendments or modifications, as they have a shareholding interest in the share capital, which gives them the right to intervene in decision making or in management of said legal entity.
** The term state with a lowercase 's' refers to the first subnational administrative unit; translator's note.*

of more firms (from other localities or foreign, as the case may arise) is avoided. Furthermore, simulated access of an artificially high number of companies could discourage other competitor's participation, as their probability of success is lower.

Secondly, an EIG may displace competitors in procurement procedures which allow simultaneous sourcing.[29] In a hypothetical scenario, if the convener decides to carry out a procedure that considers awarding 80% of the contract to the first place and 20% to the second, the EIG could coordinate proposals among affiliates and jointly obtain 100% of the tender. The former could have the purpose or effect of displacing other competitors and removing them from the market, which in the long term could reduce the number of participants in the market.

Thirdly, renegotiation in favor of firms belonging to the same EIG may occur, when tender design allows the company which was awarded the contract to strategically refuse to sign, thus allowing the contract to be awarded to the next bidder (who offered a slightly higher bid), which happens to belong to the same EIG, resulting in a less convenient outcome for the convener.[30]

In other cases, firms belonging to the same EIG could present independent bids, but still, however, be influenced by the head of the group (*holding*) or through sharing information and coordination.

In the *polyethylene gloves* case investigated by COFECE, the only two companies that directly participated in the 2012, 2013, and 2014 tenders were part of the same EIG. In this case, most of the shares were held by shareholders who were directly related. This dual relationship of kinship and shareholding implied that the investigated firms do not carry out their economic activity independently; however, taking into account the definition of EIG, they were not considered as competitors but members of the same group, therefore the case was closed.

In the *condoms and probes* case, COFECE's investigation found that two companies belonging to the same EIG shared information to separately participate in procurement procedures, albeit in a coordinated manner. This case resulted in the convener considering the existence of two national manufacturers and carried out a national tender, and therefore avoiding the participation of foreign participants.

29. Simultaneous sourcing is stipulated in articles 29, section XII, and 39 of the LAASSP, 39 section II, clause h and 59 of the RLAASSP. It implies awarding a contract to source goods or services of the same type, to two or more bidders (when this has been determined in the call to tender). Simultaneous sourcing is used when a single supplier does not have the capacity to cover 100% of the demand, thus reducing risks of non-compliance or when awarding a contract to a single supplier could affect market competition in the long term. Available at: bit.ly/2JfFZ37.
30. This type of renegotiation may be avoided by considering adequate guarantees that make this type of strategic behavior costly.

In the *media monitoring* case, COFECE's investigation revealed that two of the three companies participating in the invitation to at least three bidders, were part of the same EIG. Despite having independent addresses, they share a workforce as well as accounting and sales areas. Also, the president and administrator of one of the companies made decisions applicable to the other, and had the power to appoint the CEO, manager and other employees, as well as grant and revoke powers in said firm, even though she was not a shareholder of the latter. That is, they falsely represented themselves as companies that participated independently in the invitation to at least three bidders, even though the president exercised influence and/or control over both companies, therefore their proposals were not independent.[31]

Some anticompetitive effects that stem from the presentation of multiple proposals by the same EIG may be avoided through robust tender design which avoids limiting access to a few participants or penalizes the renegotiation of proposals through the refusal to sign contracts. In any case, scenarios in which accepting multiple proposals that favor an EIG should not be allowed.

Therefore, it is advisable to have mechanisms to identify proposals that come from firms that are members of the same EIG and have the possibility of refraining from accepting bids that are not verified as independent.[32] In the matter of ports, COFECE recommended including in the tendering procedure terms that participants must provide the API, in free format, a written declaration in which they express under oath that their bid or proposal, is the only one presented by the EIG to which they belong.

31. File IO-006-2015, p. 18. Available in Spanish at: bit.ly/2L9kMJW.
32. In 2015 a Spanish court ruled that companies that are related have the right to submit bids with "autonomy" and without violating the secrecy principle of bids, therefore the procedure to assess the alleged presentation of simultaneous proposals and their effects on competition are of the highest importance. Agreement 27/2015. Available in Spanish at: bit.ly/2zu3wO3.
Moreover, another Spanish court established that simultaneity of proposals supposes (...) the same tenderer submits several proposals to the same procurement procedure, which implies the principle of equal treatment of tenderers goes unfulfilled (...). The bases for forbidding a bidder from submitting more than one proposal is that, if the purpose of the tender is awarding a contract to the most economically advantageous bid, it is impossible to simultaneously submit two or more proposals that are at the same time the most economically advantageous bid for the simple reason that the bidder cannot bid against him or herself. *Tribunal Administrativo de Contratación Pública*. Recurso. 108/2011. Resolución 3/2012. Available in Spanish at: bit.ly/2L1f8g9.

Evaluation methodologies via points or percentages may favor proposals that do not represent the best contracting conditions

The evaluation methodology via points and percentages generally presents a problem as its purpose is to evaluate and compare dissimilar characteristics under the same criteria. Therefore, this methodology implies the discretion of whoever decides the criteria under which the projects or goods and services' different characteristics are weighed and evaluated, and generally has repercussions on the objectivity with which the contracts are awarded.

In this regard, COFECE has issued opinions on the use of the evaluation methodologies via points and percentages by conveners since it considers that such methods affect free market access and the competition process because they: i) usually determine criteria that favor bidders with greater presence or history in the market, to the detriment of new or more recent competitors; ii) create incentives to overvaluing technical aspects that may be unnecessary and could distort the economic proposal; iii) are complicated to manage; and iv) open up the possibility of undue interference by interest groups or market participants who manage to include unnecessary technical requirements to the tendering terms, which favors them. In general terms, the mechanism could favor proposals that do not represent the best economic conditions and that do not necessarily imply higher quality.[33]

Therefore, COFECE has recommended modifying the evaluation of technical proposals through methods considering point and percentages so the bidder that meets the minimum requirements in each item or sub-item of its technical proposal, obtains the total of points or percentage considered by the convener. Therefore, the economic proposals of those who comply with the technical part would be evaluated on the same basis, without granting unnecessary advantages for technical reasons to bidders, thus avoiding an effect on the economic terms of the proposal.[34]

33. OPN-003-2015, Available in Spanish at: bit.ly/2zuouwt.
34. *Ibid.*

Similarly, in the matter of ports, COFECE recommended not using the points or percentages system, but to establish clear and unambiguous criteria to determine compliance with the different elements of the technical proposals, for example, through the qualification "complies or does not comply". Thus, any bidder that meets the minimum requirements technically evaluated will have the same possibilities to compete with another that also meets them.

Contract modification fosters the distortion of the competition process

The LAASSP considers the possibility of modifying up to 20% of the contracts in terms of the amount of the good or service contracted. The LOPSRM considers the possibility of modifying contracts through agreements, as long as they do not exceed 25% of the amount or terms stipulated in the contract, and that the modification does not imply substantial variations to the original project.[35] Modifying agreements should be valuable instruments for the continuity of public services and works.

However, the modification eliminates competition for the contract's extension, which may prevent a supplier from offering its services, even when it is able to do so under conditions which are more favorable to the State. The above implies that extending the contracts may come at a higher cost than if the contracts were obtained through a new public tender. Moreover, the modification of agreements has become an instrument for the submission and acceptance of low economic bids and subsequent resource recovery through modifications. This distorts, from the onset, the competition process in the tendering processes and lends itself to the granting of undue advantages through private negotiations and interactions between private agents and public officials, which can accommodate acts of corruption.

In this sense, the cost of carrying out modification agreements must be increased to force bidders to submit serious proposals as of the tendering or procurement procedure, so that a renegotiation of the original terms of the contract or the recovery of resources derived from a low and abnormal offer is unlikely. Additionally, that the extension of a contract must have conditions equal to or better than the original conditions should be made a rule.

35. Article 47, Section II and article 59 of the LAASSP and the LOPSRM, respectively.

Modifications to concessions, permits and contracts are used to avoid competition

There are regulations that consider public tenders for granting concessions, authorizations or permits. This is the case of the *Ley Reglamentaria del Servicio Ferroviario* (in English: Railway Service Regulatory Law, translator's note), the *Ley de Aeropuertos* (in English; the Airports Law, translator's note), the *Ley de Caminos, Puentes y Autotransporte Federal* (in English: the Roads, Bridges and Motor Carrier Federal Law, translator's note), the *Ley de Puertos* (in English: the Ports Law, translator's note), the *Ley de Aguas Nacionales* (in English: the National Waters Law, translator's note), among others. Additionally, they establish exemptions to the public tender process and stipulate conditions for the granting of extensions to the concessions.

However, the granting of extensions to concessions or permits is not subject to transparency rules. This could translate into a mechanism for permitholders to extend the duration of their contracts without being subject to a competitive tendering process. Most modifications to the conditions or clauses include a renegotiation of the original terms under which the contracts were awarded and in which only the agency and the concessionaire or permit holder intervene. These modifications may be as relevant as the granting of extensions, improving economic conditions and/or financial assumptions, advantages or exclusive rights.

In 2015, COFECE issued an opinion regarding the possible anti-competitive effects the draft of the *Ley de Caminos, Puentes y Autotransporte Federal en materia de Concesiones de Caminos y Puentes de Jurisdicción Federal* (in English, draft Regulation of the Roads, Bridges and Motor Carrier Federal Law on the matter of Road and Bridge Concessions of Federal Jurisdiction, translator's note) could have had. The draft regulation contained provisions that broadened the spectrum of assumptions for exemption from tenders or public procurement process for the award of concessions, and the execution of works related to the construction, maintenance, conservation and operation of roads and bridges. This would have allowed for: i) new works not related to the original concession paid for via additional public resources, without the obligation to tender

or hold a public procurement process; and, ii) new works not related to the original concession via means of an extension, without needing to tender or conduct a public procurement process.[36]

Along these same lines, the *Reglas de Carácter General en Materia Portuaria* (in English: the General Rules on Port Matters, translator's note) stipulate that, in order to align port strategies with the energy reform, port authorities should broaden the object of contracts for the partial transfer of rights for the handling of fluids, as long as physical and security conditions allow for said activity. However, the procedure does not stipulate requesting COFECE's favorable opinion before carrying out the modifications, which could have effects on competition.[37]

Therefore, administrative procedures for the modification of concessions or permits (application, analysis and resolution) should be subject to rules of openness and transparency.

36. Opinion OMR-005-2015 is available in Spanish at: bit.ly/2N7M4B3.
37. *Reglas de Carácter General en Materia Portuaria*. Published in the Federal Official Gazette on 11/22/2016. Available in Spanish at: bit.ly/2fNV3tV.

Deterring collusion requires future disqualification as well as fines

Administrative sanctions (fines) imposed by COFECE for acts of collusion have, in principle, a deterrent effect on the commission of these behaviors. However, this must be complemented with other mechanisms, such as subsequent disqualification to participate in future public tenders. With this, there would be greater incentives for companies to act in accordance with the law.

COFECE fined the three cases mentioned above for collusion and notified the *Secretaría de la Función Pública* (SFP as per its initials in Spanish, in English: Ministry of Public Service; translator's note). COFECE is unaware if an investigation for any misconduct has been initiated, in accordance with the *Ley General de Responsabilidades Administrativas* (LGRA as per its initial in Spanish, in English: General Law of Administrative Responsibilities, translator's note). In the *polyethylene gloves* case, despite COFECE's Board of Commissioners closure of the file, notification of their resolution was sent to the Head of the IMSS' Internal Control Body with a copy of the resolution adopted; COFECE is unaware whether said body has acted accordingly.

The laws and bylaws that regulate public procurement at the state level contain diverse barriers to competition

All states, just as any public body, must strive to achieve and benefit from the best procurement conditions in terms of price, quality, financing, opportunity and other relevant circumstances as per article 134 of the *Constitución Política de los Estados Unidos Mexicanos* (CPEUM as per its initials in Spanish, in English United Mexican States Political Constitution, translator's note). Public procurement processes carried out with states' resources are regulated by each of the state laws and regulations of public works and acquisitions.

In 2016, COFECE published *Miscelánea de obstáculos regulatorios a la competencia* (in English, Miscellany of Regulatory Obstacles to Competition; translators note), in which the Commission identified anti-competitive precepts in state laws and regulations for five economic activities, including public procurement. COFECE pointed out several recurrent barriers to competition in state procurement regulations, including: i) preference margins for local suppliers for the award of contracts; ii) public tenders limited to local suppliers; iii) the lack of an obligation to perform a market analysis prior to the procurement procedure; and iv) the possibility of modifying calls to tender five business days or less before the presentation and opening of proposals.[38] COFECE has issued opinions on draft regulations for public procurement for the states of Jalisco and Quintana Roo. COFECE recommended in both cases that artificial preferences for suppliers and local contractors be avoided.

The existence of 32 differentiated regulatory frameworks, which to a great extent, contain preferences for local companies, could hinder and discourage the participation of firms from other states in the country, therefore competition barriers in state-level regulations, such as the aforementioned, should be eliminated.

38. *Miscelánea de obstáculos regulatorios a la competencia: análisis de la normativa estatal*. Available in Spanish at: bit.ly/2ueqyU1.

Agenda to improve public procurement in Mexico

The following recommendations stem from COFECE's work and lessons learned on public procurement issues. The purpose of these recommendations is to prevent the formation of collusive agreements and foster competition, free market access and integrity. They are conducive to having regulation and institutional incentives that favor the design and execution of procedures that encourage intense competition in procurement processes.

The recommendations are divided into:

a) Executive actions that do not require legislative reform.

b) Actions that require legislative reform.

A) EXECUTIVE ACTIONS THAT DO NOT REQUIRE LEGISLATIVE REFORM

1. *Require COFECE's participation in relevant procurement procedures*

Issue a presidential decree that requires convening agencies and entities to request COFECE's review of the terms of the procurement procedure, calls or general terms of a tender in cases of civil works or acquisitions of great impact.[39]

2. *Create an online market for the acquisitions of small purchases of homogeneous goods by Public Federal Administration (AFP) agencies*[40]

Public procurement online markets are electronic platforms that allow for interaction between suppliers and public officials in charge of procurement in a dynamic and competitive environment. The use of online markets fosters competition as it facilitates the participation of SME's in public purchases, among other reasons.

In online markets, public officials enter purchase requests specifying their needs, and (previously authorized) suppliers publish their products in an electronic catalog (which displays available quantity, unit price and delivery time, among other characteristics). When a good or service meets an agency's needs, the public official determines the quantity and terms of delivery. Subsequently, the supplier receives a purchase order through the online market page, in which the quantities that must be supplied are specified. If the supplier can fulfill the order, the purchase becomes official.

Online markets focus on the purchase of homogeneous goods, and of relatively low value. In practice, a maximum value is usually established above which it is not possible to use this platform (instead, traditional methods must be employed). Regarding the type of goods and services, the least complex (more standardized) ones are usually incorporated into online markets.[41] COFECE recommends that APF purchasing units be required via presidential decree to procure through online market the goods and services that appear in the catalog.[42]

39. To determine which procedures COFECE should participate in, a minimum economic threshold and/or definition of "highly complex works" could be considered, in accordance with article 2, section XXII of the LOPSRM. For instance, the involvement of the Commission in the review of contracts that exceeded one billion pesos would have meant, in 2016, the review of 37 procedures, and in contracts over two billion pesos, the review of 17 procedures. In terms of acquisitions, the so-called social witnesses will participate in the public tenders determined by the Ministry of Public Service, taking into account the impact that procurement has on the agency or entity's substantive programs. A similar criterion could be used to request COFECE's opinion.
40. Similar proposals exist. See an example in the document entitled *Anexos a la Ley Modelo de contratación públicas*, prepared by the *Instituto Mexicano para la Competitividad* (as per its initials in Spanish: IMCO, in English: Mexican Institute for Competitiveness, translator's note). Available in Spanish at: bit.ly/2zrBDWQ.
41. See the Italian online MEPA market case through which it is possible to make purchases up to 200 thousand euros. The catalog of goods and services is available at: bit.ly/2L7VhIO. The Chilean case of *microcompra* makes it is possible to purchases up to approximately 15 thousand Mexican pesos, available at: bit.ly/2vZkBK7.
42. See, for example, *Guía práctica de compras públicas*, IMCO, available in Spanish at: bit.ly/2s0ckDa.

COFECE also recommends the implementation of an electronic catalog of centrally awarded goods and services, previously competed through framework contracts that result in purchase prices and conditions valid for a defined period.[43] Said prices could indicate a reference price below which entities could freely make purchases, in any way and with any supplier. In other words. this catalogue would consist of a list of products and prices and allow for federal agencies who find a supplier offering a lower price to make the purchase without convening a tender. The catalog could include products that are recurrently purchased by institutions through methods of exemption to tenders, in small quantities or that are simple goods, such as stationery.[44]

3. *Prevent the negative effects of subcontracting and joint offers, through their correct identification*[45]

Issue a presidential decree or modify the LAASSP and LOPSRM bylaws to mandate conveners to: i) require bidders to disclose in advance who they plan to subcontract, their reasons to do so and what the subcontracted party will be responsible for; ii) prevent the subcontracting of individuals or companies that participated in the bidding process through which the contract was awarded; and iii) when allowing for the submission of joint proposals, not authorize the participation of bidders participating both individually and as part of a joint proposal in the same procurement procedure.

4. *Increase the standards for the approval of modifying agreements (term, amount, quantity)*

Institute a new APF policy for the modification of contracts through agreements, establishing special requirements for the approval and conclusion of such modifying agreements (for instance, that they be signed solely by the head of the agency or entity and are endorsed by the internal control body and/or the *Secretaría de Hacienda*, in English: Ministry of Finance, translator's note).

Additionally, COFECE recommends information on contract modifications be made public on the CompraNet system. Ideally, all modifying agreements should be saved, indicating the date and time of each update, as well as the name of the public official responsible for the information.[46,47]

43. See for example: https://www.mercadopublico.cl/
44. The online market, the market for framework agreements/contracts and the electronic catalogue of homogenous goods, might be made available through the CompraNet website.
45. Article 34 of the LAASSP and article 36 of the LOPSRM stipulate that two or more individuals may jointly present a bid without the need to establish an association or company or create a new company in the case of legal persons; for such purposes, the proposal and the contract will establish with precision each of their obligations, as well as the way in which compliance would be mandated.
46. OECD (2018). *Mexico's e-Procurement System: Redesigning CompraNet through Stakeholder Engagement*. OECD Public Governance Reviews, OECD Publishing, Paris. Available at: https://doi.org/10.1787/9789264287426-en.
47. The European Union's DIRECTIVE on public procurement may be used as reference regarding the information that should appear in the announcements of contract modifications during the contract period. Available at: bit.ly/2NKrWpV.

5. *Modifications to concessions, permits and/or contracts should be publicly disclosed and discretionality should be avoided*

Require all agencies to disclose in advance, in easily accessible formats, modifications to concessions, authorizations and/or permits previously tendered. The possibility of requiring a public consultation before carrying out such modifications, or even require COFECE's opinion prior to the modification (at least in the sectors that require the Commission's intervention during procurement processes) should be considered.[48]

Furthermore, in order to reduce discretionality in negotiations for the modification of concessions, permits or contracts, general principles to avoid the authorization of artificially high rates should be established. For instance, it might be necessary to acknowledge depreciation of previously erected infrastructure in regard to the original concession with the purpose of ensuring the approved rates are the result of a financial analysis under clear and reasonable assumptions, thus preventing them from increasing, and in turn, ensuring they decrease adequately, after the modification. Another option is limiting the extension of the term the concession is in force in cases in which investment has not been recovered for reasons not attributable to the contract holder, for the duration required to recover the projected return when the concession was initially awarded.[49,50]

To this end, COFECE recommends the Federal Executive issue a decree for agencies to disclose all ongoing modifications, as well as those that are submitted, in addition to including the most relevant background information and considerations, provided they do not include confidential data.

6. *Disqualification of economic agents sanctioned for collusion, from participating in subsequent public procurement procedures*

The LGRA stipulates disqualification from subsequent procedures on grounds of collusion with the purpose of: i) obtaining any undue benefit or advantage through public contracts, or ii) damaging the Public Finances or public agency resources.[51]

48. See subsection 4, section 3 of chapter I, from Title I of Book Two, regarding the modification Public Sector Contracts in Spain's Public-Sector Contracts Law. Available in Spanish at: bit.ly/2L5DMfu. See also a consultation for a public works project in the Murcia region, available in Spanish at: bit.ly/2um9hYs.
49. The European Union's DIRECTIVE on public procurement may be used as reference regarding the information that should appear in the announcements of contract modifications during the contract period. Available at: bit.ly/2NKrWpV.
50. To establish these criteria, refer to article 7 of the *Ley de Concesiones de Obras Públicas de Chile* (in English: Chile's Public Works Concessions Law, translator's note). It stipulates reducing the period of time the concession is in force or the extra payments to the State when the return on the equity or assets, defined in the bidding rules or by the bidder, exceeds a pre-established maximum percentage. Available in Spanish at: bit.ly/2bYCtM1.
51. Articles 70 and 81 of the LGRA.

In this regard, it is necessary to enforce the future disqualification provided in the LGRA of economic agents who have been punished for collusion by COFECE under the terms of article 53, section IV, of the LFCE, exempting those agents who have benefited from the immunity and sanction reduction program stipulated in the LFCE. In addition, exemption criteria could be considered and, where appropriate, regulated when the disqualification could generate a shortage.[52]

52. Additionally, the Organization for Economic Cooperation and Development (OECD) has proposed modifying the LAASSP and the LOPRSM to prohibit the participation, for a period of time, of economic agents sanctioned by COFECE for bid rigging. COFECE's opinion on the consequences of such a prohibition could be requested and considered. The opinion of agencies that depend on the goods and services provided by the companies and/or persons sanctioned to avoid shortages should also be sought. See OECD (2015), *Fighting Bid Rigging in Public Procurement in Mexico*, p. 70. Available at: bit.ly/2xAvtAA.
As a reference, regulation in the United States considers the violation of federal and state competition statutes regarding the submission of bids as grounds for suspension. In addition, it provides for a procedure for the public official in charge to decide on the suspension and which elements should be taken into account. *Federal Acquisition Regulation*, sections 9-406-2 and 9,406-3, respectively. Available at: bit.ly/2G2uH2f.

B) ACTIONS THAT REQUIRE LEGISLATIVE REFORM

7. *Disclose and publish Market Research*

COFECE recommends specifying in the LOPSRM that Market Research should be mandatory for agencies and entities prior to the beginning of any procedure. In addition, it recommends agencies and entities use information for market research, verifiable by any interested party, and that it be made public once the corresponding contracts are awarded, without prejudice to information classification assumptions, as per applicable laws.[53] The latter should also be included in article 26 of the LAASSP.

8. *Narrow the assumptions for procurement via procedures alternative to public tenders*

Articles 41 of the LAASSP and 42 of the LOPSRM stipulate reasons convening a public tender may be avoided. Although some are valid (as in the case of patents or copyrights, works of art, or goods related to national security), others are not sufficiently clear and open the possibility for the excessive use of these procedures.

Therefore, COFECE recommends reviewing cases of exemption to public tenders with the purpose of limiting them to strictly valid cases and, additionally, regulate their use specifically to certain sectors, activities or goods. An example of such type of rules is the European Commission's special Directive for purchases related to security.[54] This implies all contracts not expressly listed should be subject to tender.

9. *Eliminate the exemption provided for in LAASSP and the LOPSRM for contracting between agencies and entities*

Articles 1 of the LAASSP and the LOPSRM stipulate the following contracts or legal acts are not subject to said legislation: those entered between agencies and public entities, between public entities, between agencies, and those that are concluded between an APF agency or federal entity with any entity belonging to the public administration of a state.

The benefits of said regime are unclear. Conversely, several cases of misuse of this exemption have been documented.[55] Contrary to what is stipulated in the regulation, contracted public entities choose to subcontract part of the good, work or service contracted, which

53. OPN-003-2015, Available in Spanish at: bit.ly/2zuouwt.
54. The Directive on Public Procurement is applicable to the award of security and defense contracts, with exception of: a) those that fall within the scope of Directive 2009/81 / EC; b) for which Directive 2009/81 / EC is not applicable in light of articles 8, 12 and 13. Available at: https://bit.ly/2MQwUiS.
55. See: Castillo,M., et al. (2017). *La estafa maestra*. Animal Político. Available in Spanish at: bit.ly/2xMzjVB.

could result in higher end prices and lower quality. Therefore, COFECE proposes to reform articles 1 of the LAASSP and the LOPSRM to eliminate the exemption.

The cases under which this exemption is justified could be analyzed (for example, when the Secretaría de Defensa Nacional, in English Ministry of National Defense, translator's note, executes public works in strategic facilities under orders of national security authorities) and evaluate the how to include them as a limited and regulated exemption, as proposed in the previous subsection.

Additionally, COFECE recommends analyzing other exemptions contemplated in articles 1 of the LAASSP and the LOPSRM. For instance, the exemption to acquisitions, leases and services contracted by State Productive Enterprises with their subsidiary productive companies; or the exemption for Public Research Centers to procure with self-generated resources from their Scientific Research and Technological Development Funds, as per the rules for operation of said Funds. Should said exemptions be deemed as unduly limiting competition and free market access, the pertinence of their elimination should be evaluated.

10. *Allow for other interested bidders to participate in restricted procedures*

Modify articles 43 and 44 of the LAASSP and the LOPSRM, respectively, so that convening agencies and entities are required to allow third parties to participate in published calls for restricted procedures (invitations for at least three bidders).

The previous implies agencies and entities would be required to receive and consider proposals from other interested parties that could meet the requirements, regardless of the existence of an invitation, even in the case of procurement via invitation to at least three bidders. Therefore, it is necessary to establish advertising rules for these procedures to be disclosed in advance through different means such as CompraNet, conveners' websites and official media, among others, for all potential participants to have the possibility to submit proposals.

11. *Restrict the simultaneous participation of companies belonging to the same EIG to avoid simulation of competition*

Amend articles 50 and 51 of the LAASSP and the LOPSRM, respectively, to stipulate that in the event of two or more participants being members of the same EIG, convening agencies and entities are required to refrain from receiving proposals or awarding contracts. Exemption from the former is contingent upon the related bidders demonstrating the EIG does not have knowledge or has not influenced the content of the proposals of its bidding members. In other words, the burden of proof of independence and autonomy falls upon the bidders.

Therefore, COFECE recommends conveners require participants to declare under oath which EIG they belong to. In addition, the definition of an EIG should be defined in regulations, as well as the criteria, parameters and elements with which it will be possible to demonstrate that the relationship has not influenced the behavior of the firms that belong to a common EIG. This will allow participants to present said statement, and that the convener may evaluate, and where appropriate prohibit, the simultaneous participation of economic agents belonging to the same group, mainly when there is a risk that it implies a restriction on the entry of new participants, the displacement of third-party suppliers, or the possibility of favoring an EIG that has submitted multiple proposals.[56]

12. *Transform the points or percentages methodology into a two-stage evaluation*

Modify articles 38 of the LOPSRM and 36 of the LAASSP to establish an alternative methodology to that of points and percentages. A two-stage process is recommended: first, during the technical stage, the bidder must comply with minimum requirements (transparent, clear and objective) in different areas. Evaluation will be carried out using binary criterion "comply/does not comply". The totality of points possible is awarded to participants who comply. In the second stage, bidder's economic proposals that have achieved the minimum technical compliance required, are evaluated on the same basis. Therefore, granting undue advantages for technical matters is avoided in the economic portion of the bid.[57]

56. See the European Court of Justice's resolution on matter C538/07 Assitur Srl vs Camera di Commercio, Industria, Artigianato e Agricoltura di Milano. Available at: https://bit.ly/2OF9Aql. Additionally, the previously mentioned SCJN's thesis on the definition of EIG may be considered.
57. See COFECE's opinion OPN-003-2015, available in Spanish at: bit.ly/2zuouwt.

13. *Create a General Law on Public Procurement (acquisitions and public works), in line with international standards*[58]

With the purpose of harmonizing principles related to the regulation of procurement and public works applied by state governments and based on the principles of article 134 of the Constitution, COFECE recommends the issuance of a General Law on Public Procurement, in line with best practices. This would result in fundamental rules on topical issues, such as planning, execution, transparency, procurement methods and evaluation, among others.[59]

The first step to this end would be to reform article 73 of the Mexican Constitution to grant Congress powers to issue general laws on public procurement that establish the principles and basis on matters of public procurement for the Federation, states, municipalities and Mexico City's territorial jurisdictions.

58. There are similar proposals, see IMCO (2018), *Índice de riesgos de corrupción: El sistema mexicano de contrataciones públicas*. Available in Spanish at: bit.ly/2KPp8tL.
59. In this regard and as an example, it is worth highlighting the case of the *Ley de Responsabilidad Financiera* (in English: Financial Responsibility Law, translator's note) whose purpose is to establish the general criteria for fiscal and financial responsibility applicable to states and municipalities, as well as their respective Public Entities, for the sustainable management of their public finances. Likewise, provisions for the adequate management of the local treasuries; for procurement and register of public debt; and transparency and accountability are determined.

What is next?

COFECE issues this document, based on article 12, sections XXI and XXIII, of the LFCE, with the purpose of strengthening the country's public procurement system.

The Commission reiterates that corruption and the lack of competition in public procurement are part of a vicious cycle, therefore, in the fight against corruption, the promotion and defense of competition may be relevant strategies.

COFECE urges the Federal Government, the President Elect's Transition Team and the legislators and policymakers of Congress' LXIV Legislature, to assess the content of this Agenda, in order to join efforts from each area of responsibility to achieve more integrity in Mexico.

COFECE also formally requests the *Comité de Participación Ciudadana del Sistema Nacional Anticorrupción* (SNA, as per its initials in Spanish, in English: Citizen Participation Committee of the National Anti-Corruption System, translator's note) to take these recommendations under advisement, and should they consider appropriate, submit them to the Coordinating Committee, as per articles 9, section IX, 21, section XV and 31, section VII of the National Anticorruption System General Law.

The Commission will continue fostering and protecting competition, as well as make use of its powers to investigate and sanction any unlawful conduct that affects competition and free market access in public procurement procedures.

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