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Written contribution by

Mexico

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Competition and Public Procurement in Mexico

1. Article 134 of the Mexican Political Constitution (Constitution) establishes that 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, financing and quality.

2. As stated in the Secretariat's report on the Mexican Social Security Institute (IMSS for its acronym in Spanish) procurement regulations and practices (IMSS report), elaborated by the Organization for Economic Cooperation and Development (OECD),¹ the two key laws implementing Article 134 are:

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

3. The Mexican Ministry of the Public Administration (SFP for its acronym in Spanish) is responsible for the implementation of the Acts mentioned above and for issuing further provisions necessary to adequately implement those laws.

4. According to the IMSS report, in August 2010, the SFP 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 prior to that date. It provides a step-by-step guide for all stages in the procurement cycle (i.e. from planning to organizing the tender to awarding the contract) and standardizes existing procedures in the Mexican federal public administration.

¹ Available at: http://www.oecd.org/document/59/0,3746,en_2649_37463_49389179_1_1_1_37463,00.html

5. Besides, Article 28 of the Constitution prohibits monopolies and monopolistic practices under terms and conditions established in the Mexican competition law. In this sense, Section IV of Article 8 of the competition law establishes bid rigging as an anti-competitive practice in Mexico.

6. Although the Mexican procurement legal framework mandates that public procurement procedures must guarantee that the State obtains the best available terms and conditions, in practice regulations focus too much on transparency and protection of domestic suppliers and too little on assuring a competitive outcome. This situation introduces incentives to collude in markets that are highly concentrated, particularly where auctions are restricted to domestic suppliers.

7. The Mexican Federal Competition Commission (Commission or CFC for its acronym in Spanish) has had several cases that illustrate this situation, most of them in the procurement contracts of the public health sector, which is the sector that the CFC has studied the most. For example, the CFC has found collusive agreements for the supply of different types of surgical sutures, x-ray materials and chemicals to IMSS and ISSSTE.

8. The CFC's most relevant bid rigging case in the health sector derived from a study of the tenders called by IMSS during 2003-2007 for the procurement of generic pharmaceuticals. This case started 2006; in particular, the CFC focused on tenders to procure two pharmaceutical products, humane insulin and saline solutions, between 2003 and 2006.

9. The Commission's investigation revealed that several firms adopted a coordinated behavior 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.

10. As a result of this 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 \$151.7 million Mexican pesos, the maximum amount allowed by the competition law applicable at the time in Mexico.

11. As a complementary effort to fight bid rigging, through aligning Mexico's laws and regulations with best international standards, the CFC has worked together with international organizations, as well as, with several government institutions (at federal and state level).

12. In this sense, the work of the CFC has particularly involved collaboration with the OECD, IMSS, the Mexican Institute for Competitiveness (IMCO for its acronym in Spanish), SFP and local governments such as the ones from the State of Mexico (GEM for its acronym in Spanish), Zacatecas, Campeche, and Guerrero. The following sections describe the collaboration of Commission with those entities.

Collaboration of CFC with IMSS, GEM and OECD to adopt and implement the “Guidelines for fighting bid rigging in public procurement” of OECD (Guidelines).

13. In 2011, IMSS and GEM committed to adopt and implement the Guidelines with support of the OECD and the CFC. The Guidelines list the most common strategies of bid rigging (e.g. cover bid rigging, bid suppression, bid rotation and market allocation) and industry, product, and service characteristics that facilitate collusion (i.e. 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).

14. The 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.

Adoption and Implementation of the Guidelines by IMSS

15. In January 2011, IMSS committed to adopt and implement the Guidelines, through:
- i. Analyzing the extent to which the current public procurement legislation in Mexico and practices at IMSS are consistent with the Guidelines and identify areas for further improvement;
 - ii. Increasing awareness about bid rigging practices among IMSS's public procurement officers (both at the central and delegation offices);
 - iii. Developing in-house skills to identify and avoid bid rigging practices; and

- iv. Implementing the applicable recommendations derived from the process at its institutional policy level.

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

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

17. The CFC committed to support the process of adoption and implementation of the Guidelines by IMSS, through:

- i. Collaborating with its expertise in preventing, deterring, identifying and sanctioning anti-competitive practices;
- ii. Accompanying IMSS through the process;
- iii. Assigning necessary resources for the process.

18. The aforementioned OECD analytical report on the current procurement legislation, regulation and practices governing IMSS procurement was published in January 2011. The recommendations address to IMSS in this report are related on how the Institute could improve its procurement procedures in the following thematic areas:

- Further opportunities for IMSS to exercise buyer power (further consolidating purchases among its local centers; using multi-year tenders where appropriate; procuring goods and services jointly with other government agencies; and attracting the interest and sponsoring the entry of new suppliers);
- Coordination with SFP, the CFC and adoption of best practices(i.e. use of standardized tender documents and procedures as describe in SFP's procurement manual; and adopt remote and electronic tender procedures for all its purchases and at all the stages of the procurement process);
- Fighting practices which may facilitate collusion (i.e. calls for tender should make clear that joint bids are allowed only when there are pro-competitive justifications;

and split of single contract among multiple suppliers only in exceptional circumstances);

- Increased use of competitive mechanisms (i.e. limit the use of exceptions to public tenders; open tenders to non-Mexican providers; and considering requiring a Certificate of Independent Bid Determination to accompany all tenders);
- Overhaul of market studies (i.e. consider change in planning procedures so that enough time is available to carry out market studies; allow for sufficient amount of information is collected from good-quality sources; and information in these studies should not be disclosed to bidders before the tender);
- Monitoring and information-sharing activities (i.e. regularly and proactively monitor the number of bidders; investigate why bidders decide not to bid any longer; and maintain a comprehensive dataset for all its tenders and make it available to the CFC); and
- Training activities (implement training program for its procurement staff focusing on bid rigging and ways to fight it).

19. Most of these recommendations were provided in a preliminary form to IMSS in June 2011 and were incorporated in IMSS's 2012 procurement cycle since they did not require changes to the procurement laws and regulations.

20. The Adoption of the Guidelines by IMSS was a key milestone in Mexico's fight against bid rigging in public procurement. It contributed to allow for increased competition in public procurement processes of IMSS in order to promote efficiency on behalf of its beneficiaries.

Adoption and Implementation of the Guidelines by GEM

21. Following the successful experience of IMSS, GEM also committed to adopt and implement the Guidelines.

22. In October 2011, the CFC, GEM and the OECD signed an Inter-Institutional Agreement with the aim of enabling the OECD, with the support of the CFC, to develop an analytical report that analyzes the extent to which procurement legislation, regulation and practices at GEM are consistent with the Guidelines, as well as, to formulate related recommendations.

23. Once the analytical report is completed by mid- 2012, the Commission, GEM and the OECD will determine the best way to proceed with the implementation of applicable recommendations by GEM at institutional policy level.

24. In addition, this agreement enabled OECD to conduct, together with CFC, capacity building among procurement officials on the cost and risks of bid rigging and to provide them with guidance on:

- i. How to design tenders to reduce the risk of bid rigging;
- ii. How to identify possible instances of bid rigging at an early stage during the procurement process; and
- iii. What to do when bid rigging is found at this stage.

25. Motivated by IMSS and GEM's examples in the fight against bid rigging, other federal government entities like the health and social services provider to federal government employees (ISSSTE for its acronym in Spanish) and the State electricity monopoly (CFE for its acronym in Spanish) have shown interest in signing similar agreements with the CFC and the OECD. Indeed these initiatives are very important, since CFE and ISSTE concentrate 14.9% of the public federal procurement (11.3% and 3.6% respectively).

Programs to fight bid rigging in other government institutions

26. In September 2011, the Mexican Institute for Competitiveness (IMCO) presented a study called "Competition on public procurement".²

27. The objective of this study was to detect State regulations on public procurement that restrict competition among suppliers. It found that all the corresponding regulations to the 32 States of Mexico failed to include competition principles in their procurement rules.

28. In addition, the study ranked the 32 States according to their level of compliance with the Guidelines. The worst performing States of this ranking were Campeche, Guerrero and

² Available at:

[http://imco.org.mx/images/pdf/Competencia_en_las_compras_p%C3%BAblicas.12sept2011_documento_\(final\)_pdf](http://imco.org.mx/images/pdf/Competencia_en_las_compras_p%C3%BAblicas.12sept2011_documento_(final)_pdf)

Zacatecas. Therefore, in 2011, collaboration agreements between these States the CFC and IMCO were pursued and signed.

29. The objective of the agreements is to implement a comprehensive project to fight bid rigging in public procurement similar to those conducted by IMSS and GEM in each of the three States mentioned in the preceding paragraph.

30. In the first stage of the project, IMCO, with the support of the CFC, committed to develop a deeper analysis on the extent to which specific State's procurement regulation and practices are consistent with the Guidelines as well as to issue related recommendations. Once the analytical reports are completed, IMCO, the CFC and the respective States will agree on the best implementation procedure for the applicable recommendations.

31. IMCO also committed to provide capacity building for officials entitled to carry out procedures of public procurement within the States.

Training to officials of SFP on bid rigging

32. In November 2011, CFC carried out the first training on "Fighting bid rigging in public procurement" for officials from the comptroller entities of several federal public administration institutions.

33. Comptrollers were trained on the negative effects that bid rigging has over the public procurement processes. It is expected that this training will be replicated in the coming years.

Conclusions

34. Notwithstanding the important efforts conducted by the CFC to fight bid rigging in public procurement, important challenges to be overcome still remain as many other States are still needed to be brought on board in this fight; as well as the most important procurer of the federal government, the State oil company (PEMEX for its Acronym in Spanish), which concentrates 45.65% of the public federal procurement.

35. In addition, the Commission will continue to integrate and analyze databases similar to the one on generic pharmaceuticals to identify and further investigate cases where a hypothesis of illegal collusive behavior can be reasonably developed. The fight against bid rigging would be easier as the CFC identifies and sanctions more cases and cartel members have more incentives to apply to the leniency program that has been recently implemented in Mexico.